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Enemies of the State: Legal Constructions of Enmity and the Limits of Law

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INTRODUCTION

The concept of the enemy occupies a paradoxical role in legal and constitutional theory. Although modern legal systems are generally defined by the rule of law, the protection of rights, and constraints on arbitrary authority, political communities have historically and conceptually established their identities through exclusion. By designating certain individuals or groups as threats to collective security, political unity, or constitutional order, they create boundaries that define membership. Recent legal controversies—such as the United States' classification of "enemy combatants" after the attacks of 11 September 2001 and China's counterterrorism policies in Xinjiang and Hong Kong—demonstrate the ongoing significance of this dynamic in contemporary constitutional practice. Thus, the legal construction of the "enemy" exposes a fundamental tension within law: the simultaneous existence of universal norms and exceptional categories, of inclusion and exclusion, of legality and the suspension of protections. This dissertation investigates this tension through a comparative analysis of two constitutional systems often viewed as opposites: the United States and the People's Republic of China. By examining how each system defines, regulates, and legitimises the figure of the enemy, the study aims to clarify the relationship between sovereignty, constitutional structure, and the boundaries of law.

Building upon this context, determining who may be considered an enemy of the state is rooted in longstanding philosophical debates. Classical political theory consistently linked political authority to the imperative of securing collective survival against threats. Within the social-contract tradition, the establishment of political order is justified by the dangers inherent in a condition lacking common authority. Thomas Hobbes described the state of nature as marked by insecurity and conflict, where life is precarious and dominated by fear, necessitating the creation of a sovereign to guarantee peace. In this framework, identifying those who threaten the community is inseparable from maintaining political order. Subsequent theorists, such as Carl Schmitt, further emphasised the structural role of enmity in politics, arguing that the distinction between friend and enemy constitutes the defining criterion of the political and that sovereignty ultimately depends on the capacity to decide on exceptions to the normal legal order. Despite efforts by modern constitutionalism to constrain power through norms and procedures, the persistence of emergency powers, security legislation, and exceptional categories indicates that the problem of enmity has not disappeared but has instead been transformed within legal frameworks.

These philosophical insights suggest that the legal definition of enemies cannot be fully understood through doctrinal analysis alone, as the issue engages fundamental questions of sovereignty, legitimacy, and the boundaries of political community, necessitating engagement with both political and legal theory. At the same time, enmity is realised through positive law, including constitutions, statutes, judicial decisions, and administrative practices. In response, this study adopts an interdisciplinary approach, integrating philosophical analysis with comparative constitutional and legal examination. Chapter 1 establishes the conceptual foundations by tracing the evolution of the idea of the enemy in political thought and legal history, demonstrating how categories of exclusion have been linked to claims of necessity, security, and exceptional authority. The following chapters build on this by analysing how these logics operate within two contemporary legal systems. The methodological premise is that philosophical categories clarify the structural logic of enmity, while constitutional and legal analysis reveal its institutional and doctrinal manifestations.

The selection of the United States and China for comparison addresses a central methodological question: the rationale for these specific cases. The comparison is motivated not merely by their geopolitical prominence, but by the stark contrast in their constitutional forms and conceptions of sovereignty. The United States exemplifies a liberal constitutional democracy grounded in the separation of powers, judicial review, and the primacy of individual rights. In contrast, China is structured as a party-state, with the leadership of the Communist Party constitutionally entrenched and political authority organised around unity, stability, and collective objectives. These divergent constitutional arrangements generate distinct understandings of legality, legitimacy, and security. In the American tradition, the concentration of power is historically linked to tyranny, leading legal discourse to emphasise limits, checks, and procedural guarantees. Conversely, the Chinese constitutional framework treats political unity and social harmony as prerequisites for order, with law explicitly subordinated to the objectives of security and stability. As these systems represent opposing models of constitutional organisation, they offer a particularly illuminating contrast for examining whether and how the legal construction of enemies varies across regimes.

The comparative perspective adopted in this study is based on the hypothesis that both systems, despite their differences, rely on structurally similar logics of enmity, though they diverge in legal forms and targets. In liberal constitutional discourse, enemies are typically framed as external threats to the polity, such as foreign combatants, terrorists, or non-citizens perceived as endangering national security. Legal controversies in the United States following the attacks of 11 September 2001 illustrate how

categories like “enemy combatant” emerged at the intersection of war powers, immigration law, and constitutional rights. In contrast, Chinese security discourse has focused primarily on internal threats, including separatism, extremism, and political dissent. Legal developments in Xinjiang and Hong Kong demonstrate how the state constructs certain populations as dangers to unity and stability, regulating them through expansive security legislation. The juxtaposition of these cases indicates that, although the enemy's location differs, the underlying dynamic of exclusion through law persists in both systems. This dissertation contends that the legal construction of enemies reflects a shared structural logic across regimes, while diverging in constitutional articulation: the United States tends to externalise enmity and express it through a rule-of-law framework, whereas China tends to internalise enmity and articulate it through a paradigm of unity and security.

The dissertation's structure is designed to reflect this comparative logic. Building on the theoretical foundations, Chapter 2 examines the constitutional orders of the United States and China in parallel, focusing on their respective conceptions of sovereignty, legality, and security. The analysis contends that the American model tends to externalise enmity, locating threats outside the constitutional community, while the Chinese model tends to internalise enmity, identifying threats within the social body. Chapters 3 and 4 analyse specific legal regimes in each country. The American case study investigates the evolution of the enemy combatant category, the relationship between executive power and judicial review, and the extension of security rhetoric into migration and domestic governance. The Chinese case study examines how Uyghurs are legally constructed as threats through counterterrorism legislation, surveillance practices, and administrative measures, highlighting tensions between constitutional guarantees and security measures. The comparative analysis across these chapters supports the central claim that different constitutional forms shape the juridical expression of enmity without eliminating its structural function.

The focus on law necessarily imposes certain limitations. This dissertation does not provide a comprehensive account of the political or sociological dimensions of security policy in either country, nor does it evaluate the empirical effectiveness of specific measures. Instead, it concentrates on the legal articulation of enmity and its constitutional implications. The study also refrains from adopting a prescriptive normative stance regarding the legitimacy of particular policies. Its objective is analytical: to elucidate how legal systems conceptualise and institutionalise the figure of the enemy and what this reveals about their underlying constitutional logic. Nonetheless, the analysis inevitably addresses questions of rights, power, and legitimacy, as the designation of enemies often involves the restriction of

liberties and the expansion of state authority. By situating doctrinal developments within broader theoretical frameworks, the dissertation aims to clarify these tensions rather than resolve them normatively.

The contemporary relevance of this inquiry is demonstrated by ongoing developments in both jurisdictions. In the United States, political rhetoric and legal measures related to immigration and border control have increasingly framed migrants as security threats, extending the language of enmity beyond traditional wartime contexts. In China, the consolidation of a comprehensive national security paradigm under Xi Jinping's leadership has strengthened the link between internal stability and legal governance, particularly in regions associated with separatism or dissent. These parallel developments underscore the persistence of the problem of enmity in modern constitutional orders and highlight the value of comparative analysis. Ultimately, the dissertation contends that the legal construction of enemies does not disappear in systems committed to legality or rights; instead, it adapts to their constitutional structures, revealing the enduring tension between universal norms and the sovereign imperative to protect the political community.

CHAPTER 1: The Foundations of Enmity in Law and Political Thought

1.1 Defining the Enemy in Legal and Political Theory

1.1.1 Classical Philosophical Perspectives: Hobbes and Sovereignty

The modern discourse on sovereignty emerged from the fragmentation of late medieval Christendom, when the intertwined jurisdictions of empire, papacy, and local rulers produced a crisis of authority. The dispute between Pope Boniface VIII and King Philip IV of France at the turn of the fourteenth century, in which the king refused to submit to the papacy[1], represents an early expression of the question of ultimate power: who has the final right to command within a political community? From these conflicts arose the need for a unified, secular conception of authority that could secure order amid religious and political pluralism.

The conceptual crystallization of sovereignty, however, occurs most prominently in early modern theories that sought to ground political unity and law in the figure of a singular, supreme authority. This modern notion drew partly on the Roman legal maxim *princeps legibus solutus est*– the idea that the ruler, as lawgiver, is not bound by his own laws. Early modern thinkers, most notably Jean Bodin (1530–1596) and Thomas Hobbes (1588–1679), rediscovered this principle to justify the concentration of legal and political power in a single sovereign entity[2]. For Bodin, writing in the context of the civil war between Huguenots and Catholics, sovereignty was conceived as the perpetual and absolute power of a commonwealth.[3] Nevertheless, Bodin presupposed the existence of a juridical state: his analysis concerned the stability of monarchical power rather than the origins of political authority itself.

Hobbes, on the other hand, established a systematic philosophical framework for sovereignty by emphasising human nature, reason, and fear. The English Civil War and the demise of scholastic metaphysics in the seventeenth century forced Hobbes to face the issue of political unity in a society torn apart by religious and moral differences. Hobbes rejected Aristotle's notion of man as an inherently political person, arguing that individuals are motivated not by virtue or sociability, but by a fundamental

[1] S Lechner, 'Conceptual Foundations of Sovereignty and the Rise of the Modern State' in H Williams and others (eds), *The Palgrave Handbook of International Political Theory*, vol I (Springer Nature 2023) 381.
[2] ibid 382.
[3] Jean Bodin, *Six Books of the Commonwealth* (1576; trans M J Tooley, Basil Blackwell 1955) Book I, ch 8.

urge for self-preservation.[4] His *De Homine* (1658) describes the greatest good as life's preservation and the greatest evil as death, particularly violent death[5]. From this fundamental anthropology flows his political theory: humans, being equal in their vulnerability, live in a natural condition of insecurity and competition.

Like Bodin, Hobbes regards sovereignty as an attribute of the juridical state. However, while Bodin merely presupposed a theory of the juridical state, Hobbes developed it. Hobbes sets out to explain how the state would have come about if specific facts about human beings and their mutual relations were true: his explanation is hypothetical rather than historical. Such hypothetical relations characterize the state of nature, a condition of interaction that would occur in the absence of a juridical state. In a Hobbesian state of nature, individuals are assumed to be naturally free and equal. Assuming, further, that they regularly interact and that no legal rules constrain their interactions, the outcome is radical uncertainty. What arises is the famous *bellum omnium contra omnes* —the war of all against all.[6] In such a state, there is neither justice nor injustice, for these presuppose the existence of law. The laws of nature, apprehended by reason, dictate that humans should seek peace where it can be obtained, but in the absence of enforcement, reason alone cannot secure it.[7]

Thus, for Hobbes, political society originates in a rational act of covenanting. Fear of death and desire for peace compel individuals to renounce their natural right to self-defence in exchange for security under a common power.[8] This agreement, known as the social contract—although he never used such a term—institutes a sovereign—whether a monarch or an assembly—to which all submit their will. The contract is not a particular, time-and space-bound transaction between named individuals. Instead, it is a generalised transaction between all those individuals who, from a future-directed perspective, would have qualified as citizens of the state[9]. Sovereignty, in this sense, is both the product and the guarantor of civil order. It is the mechanism by which multitude becomes unity. Today, Hobbes's theory is classified as contractarian because it presents the state as an outcome of a social contract.

Hobbes grounds his argument for the sovereign state in the concept of authority, a concept unique to *Leviathan* (1651)[10]. Here, the core idiom of power is replaced by authority, which implies recognition

[4] Thomas Hobbes, *Leviathan* (1651; ed Richard Tuck, Cambridge University Press 1996) 460–461 (ch 46).
[5] S Salzborn, 'No Sovereignty without Freedom: Machiavelli, Hobbes and the Global Order in the Twenty-first Century' (2015) 62 *Theoria* 19, 29.
[6] Thomas Hobbes, *De Cive* (1642; Oxford University Press 1983) 30 (Epistle Dedicatory).
[7] Hobbes, *Leviathan* (n 4) 91–92 (ch XIV).
[8] ibid 118–120 (ch XVII).
[9] Lechner (n 1) 385.
[10] Hobbes, *Leviathan* (n 4) (ch XVI).

by those governed. A ruler is said to hold supreme political and juridical authority— or sovereignty— in virtue of prior authorization by the individuals he or she comes to govern, meaning they are holders of original authority. Hobbes defines original authority as 'the right of doing any act'.[11] By implication, 'political authority' ('juridical authority') is a right to act within the realm of politics (law). Because the would-be citizens themselves authorize the sovereign, they freely undertake an obligation to obey the positive law the sovereign makes. This change in emphasis from fear to freedom, and from power to authority, gives Hobbes the conceptual tools to articulate a robust conception of sovereignty and to link it to the state as an institutional structure[12]. The covenant that founds the commonwealth is not a continuation of any natural sociability but its radical negation. It represents, as several scholars have noted, a rupture by which individuals, motivated by fear rather than moral duty, erect an artificial concord in place of natural discord. Peace, in Hobbes's model, is therefore an artifact of law and command, not an ethical harmony.[13]

In *Leviathan*, Hobbes discusses two forms of sovereignty: 'sovereignty by institution' and 'sovereignty by acquisition'. Sovereignty by institution involves a multitude of contractors, where each promises to every other to relinquish one's right to self-government by authorizing the same person, called a state (civitas or 'commonwealth'), to govern them all with a view of protecting their common peace and security[14]. Sovereignty by acquisition covers the case when a defeated party pledges obedience to the victor in order to save one's life. Hobbes treats this pledge as a form of free contracting or promising, rather than as an instance of coerced submission[15]. Both forms are legitimate because both derive from the same rational calculation: the preservation of life through obedience to power. Nonetheless, there are two key differences between them. The first is that sovereignty by institution represents a genuine social contract in which each person contracts with every other person in a generalized, open-ended manner. In contrast, sovereignty by acquisition involves a series of individualized contracts between a particular victor and a particular captive. The second difference concerns the distribution of fear. Sovereignty by institution implies generalized uncertainty such that everybody fears everybody else; in sovereignty by acquisition, the vanquished fear one known person, the victor.

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[11] Ibid.
[12] Lechner (n 1) 386.
[13] C B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press 1962) 16–18.
[14] Hobbes, *Leviathan* (n 4) ch 18.
[15] ibid ch 20 and 'A Review and Conclusion' 391.

What is the relation between state and sovereignty? Hobbes's state[16] is a body of laws (coercive general rules) that determines offices, rights, and positions, intending to regulate: (1) relations among individual citizens and (2) relations between the citizenry as a whole and its ruler(s). Law has two primary ingredients: general rules plus coercive back-up. Whereas medieval jurisprudence viewed law as an expression of moral or divine order, in *Leviathan*, Hobbes defines it as the sovereign's command backed by coercive power. Law is valid not because it is just, but because a rightful authority issues it. The state-sovereign relation can be explicated as follows: the Hobbesian state is a system of coercive rules and laws authorised by those governed. These rules regulate relations of property and status, notions of right and wrong, standards of exchange, accumulation, and measurement, and any matter whose contestation by private parties in the state of nature might severely hinder or render impossible the peaceful coexistence of men. The Hobbesian sovereign is the ultimate office that issues such final, authoritative determinations, thereby removing uncertainty. The sovereign is capable of performing this role because it constitutes right reason. Right reason is generated by social convention—a group of people agrees to treat the reason of one person, the sovereign, as an ultimate measure of what is right. In the absence of right reason, individuals will fall back onto their private judgements, leading to disagreement and uncertainty—the predicament of the state of nature[17].

There are certain conditions that a person or body must satisfy to qualify as sovereign in Hobbes's view. One essential condition is that the sovereign's pronouncements are final, authoritative, and coercively enforceable within the realm of state law. Another one is that each state should have a single sovereign. Third, there are epistemic conditions: it should be possible to uniquely identify the sovereign as a duly authorized lawgiver and ultimate adjudicator, and the sovereign's identity must be public knowledge. Otherwise, uncertainty and disagreement will endure. Fourth, there are conditions of scope or jurisdiction. Sovereign authority applies only to relations between agents which it would be proper to regulate by law—actions (*foro externo*) rather than thoughts (*foro interno*), and, concretely, actions of one individual that might harm or infringe the rights of another individual. Finally, sovereignty entails jurisdiction restricted to the territory of a particular state. These conditions indicate that the Hobbesian state is a territorial system of law and that sovereignty is a status determined within it. Thus, the sovereign must be a legal person[18].

[16] ibid pt 2.
[17] Lechner (n 1) 388.
[18] ibid.

Unlike earlier theories that grounded political legitimacy in moral virtue or divine authority, Hobbes breaks sharply with this tradition by separating law from morality altogether. For him, good and evil are not objective truths but reflections of individual desires and aversions.[19] Moral judgment becomes a matter of personal feeling rather than universal principle. The only good that everyone can agree on is peace; the only universally recognised evil is violent death. Politics emerges as an autonomous domain guided by necessity rather than ethics. This secularisation of political authority is a significant departure from medieval philosophy and anticipated the modern positivist view of law as the command of an acknowledged authority.

Finally, the logic of representation produces an asymmetry between ruler and ruled. The citizen's duty is absolute obedience, save where self-preservation is directly threatened.[20] The sovereign's duty, though moral rather than contractual, is to offer protection, because authority without protection undermines the basis for obedience.[21] This protection-obedience relationship became, as Schmitt subsequently recognised, the fundamental principle of Hobbes' state. However, it also highlights the conflict between force and legitimacy: the same act that establishes peace also establishes despotic rule.

Hobbes's theory contains the seeds of modern constitutionalism. Although he rejects the division of powers, his insistence that political authority derives from collective authorisation implies that sovereignty is, in origin, popular. The people are not an active political agent, but rather the foundation of legitimacy: once they have authorised the sovereign, their unity is absorbed into the state. This paradox—absolute sovereignty based on public consent—is central to Hobbes' legacy. It underpins both the modern state's claim to legitimacy and its ability to wield complete power.

1.1.2. Schmitt's Friend–Enemy Distinction in Political Theory

Carl Schmitt (1888-1985) is among the most recognized legal experts and political philosophers of the 20th century. Writing in the context of the crises of the Weimar Republic (1919-1933) and drawing on his experience of the civil-war-like conditions of the Munich revolution of 1918–19, Schmitt sought to expose what he regarded as the structural weaknesses of liberal constitutionalism[22]. His central claim was that liberalism, grounded in procedural rationality, parliamentary discussion and the belief that

[19] Hobbes, *Leviathan* (n 4) 39–40 (ch VI).
[20] Ibid 162–165 (ch XXI).
[21] Ibid 164–165 (ch XXI).
[22] R Mehring, 'Carl Schmitt's Friend–Enemy Distinction Today' (2017) 28(2) *Filozofija i društvo* 304, 304.

conflict can be domesticated through norms, obscures the antagonistic foundations of political existence.[23]

Schmitt's major works, notably *Political Theology* (1922) and *The Concept of the Political* (1927; 1932; 1963), develop a conception of politics rooted not in normative ideals but in existential differentiation, insisting that politics begins wherever collectivities distinguish between friends and enemies. Against the liberal aspiration to reduce politics to ethics, economics or neutral norms, Schmitt argues that genuine political life presupposes the ever-present possibility of conflict.[24]

In *Political Theology*, Schmitt's argument that 'sovereign is he who decides on the exception'[25] expresses his idea that the essence of sovereignty rests in the ability to discern when the legal order must be suspended to preserve the political community. Liberal legalism cannot account for this moment of decision: it defines legitimacy by adherence to rules even though every legal system presupposes an authority capable of determining the boundary between normality and emergency. The sovereign decision is therefore existential rather than administrative. By declaring an emergency, the sovereign identifies a threat and thereby reasserts the friend–enemy distinction upon which political unity rests. The exception ultimately reveals that the legal order depends on an act of exclusion that it cannot itself regulate.

Schmitt's engagement with Hobbes is central to his reformulation of sovereignty and the political. He regarded *Leviathan* as the foundational text of modern state theory, accepting Hobbes's insight that political authority rests on the relationship between protection and obedience. Yet Schmitt believed that Hobbes's project had been undermined by the rise of pluralism, international law and moral universalism, developments that eroded the state's monopoly on the political.[26] Whereas Hobbes sought to overcome the state of nature by subordinating politics to peace through a rational contract, Schmitt maintained that the possibility of conflict exists within any political system. Hobbes had turned hostility into a problem to be solved, but Schmitt redefined it as an integral component of politics.[27] Accordingly, the state is not a neutral administrator of law but the entity that designates the enemy and secures the unity of the people.

In *The Concept of the Political*, Schmitt sets out the premises underlying the friend–enemy distinction. These include: (i) a negative view of human nature; (ii) the security concerns inherent in

[23] Carl Schmitt, *The Concept of the Political* (1932; George Schwab tr, University of Chicago Press 2007) 69–71.
[24] Schmitt, *The Concept of the Political* (n 23) 25–27.
[25] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1922; George Schwab tr, University of Chicago Press 2005) 5.
[26] Schmitt, *The Concept of the Political* (n 23) 65–67.
[27] Gabriella Slomp, *Carl Schmitt and the Politics of Hostility, Violence and Terror* (Palgrave Macmillan 2009) 12–15

political associations; and (iii) the protection–obedience principle, which he adopts from Hobbes[28]. Since human beings are capable of harm, protection becomes a basic political requirement, and security the primary task of the state. For Schmitt, Hobbes' account of political obligation—obedience granted in exchange for protection—encapsulates the essential logic of legitimacy and explains the crisis of the twentieth-century liberal state, which he believed could no longer provide genuine security.[29]

Schmitt supplements these premises with a second cluster of concepts: (i) the notion of political friendship; (ii) the notion of political enemy; (iii) the relationship between hostility and politics. Whereas ancient and medieval thinkers treated friendship as a political relation, modern theory relegated it to the private sphere. Schmitt sought to revive the political significance of friendship, assigning it a new function: domestically, it fosters unity and suppresses internal pluralism; internationally, in combination with enmity, it sustains a pluriverse of competing political entities and prevents the emergence of a universal, depoliticised order[30].

Schmitt's account of enmity is correspondingly precise. The political enemy is not a private adversary but a public opponent whose existence threatens a collective way of life. He further distinguishes the enemy from the economic competitor and the debating opponent: whereas the former two involve disputes about profit or reputation, the political enemy concerns existential conflict. The possibility of real violence—physical killing, material war and actual death—gives Schmitt's notion of hostility its concrete force. The political enemy endangers the continued existence of the political entity, which in turn is the precondition of individual existence[31].

Only the political agent itself, Schmitt insists, can decide whether it has an enemy and how to confront it; observers can merely register the intensity of separation between groups. When the state designates the enemy, interstate war becomes possible. When a group within the state defines the enemy—often because it no longer sees the state as protecting its way of life—civil war may follow.[32] Schmitt's account of hostility thus departs sharply from liberal and Marxist theories. Whereas Hobbes conceived politics as a means of abolishing the existential uncertainty of the state of nature, Schmitt rejects this dichotomy and emphasises the continuum between war and peace. By reclaiming what

[28] ibid 23.
[29] Schmitt, *The Concept of the Political* (n 23) 45–48.
[30] Slomp (n 27) 24.
[31] ibid 25–26.
[32] Schmitt, *The Concept of the Political* (n 23) 44–46.

Hobbes saw as the 'anticipatory' aspects of the state of nature—strategizing, preparing, calculating—Schmitt treats these as political phenomena rather than mere preludes to violence[33].

Schmitt's theory must be understood against the backdrop of the twentieth-century transformation of sovereignty. The erosion of the classical *jus publicum Europaeum* and the rise of ideological movements, revolutionary parties and transnational actors meant that the state no longer held the exclusive authority to declare the enemy. Schmitt diagnosed this as a crisis of political form: the liberal state, constrained by international norms and moralised discourses, could no longer maintain the clear distinctions—friend/enemy, inside/outside, normality/exception—upon which political order depends. This emphasis on significant disparities illustrates both the limitations of liberal universalism and the darker implications of Schmitt's worldview. His worldview, which bases politics on existential conflict, legitimises exclusion and, in extreme cases, destruction of individuals labelled as enemies. It therefore functions both as a critique of liberal depoliticization and as a latent defence of authoritarian sovereignty.

Despite these tensions, Schmitt's influence endures. His critique of liberal normativity has shaped debates in constitutional theory, international relations and security studies. Contemporary discussions of emergency powers, securitisation and the designation of non-state actors as existential threats continue to draw on his insights. In contrast to Hobbes's attempt to tame conflict through the artificial unity of the state, Schmitt reintroduces enmity as the ontological core of the political. Sovereignty is more than just the ability to command compliance; it is also the authority to determine who belongs and who must be opposed. In this sense, the Schmittian sovereign transforms Hobbes' logic of protection and obedience into one of confrontation and existential decision.

1.1.3. The Social Contract and Enmity: Locke & Rousseau

The early modern social contract tradition, developed by Hobbes, Locke, and Rousseau, represents one of the most enduring frameworks for theorising political authority. Its core premise, that legitimate government emerges from the consent of free and equal citizens[34], changed the foundations of sovereignty and modern concepts of law, liberty, and obligation. However, although they start from a shared contractual premise, each of these authors approaches the problem of hostility and the need for order differently.

[33] Slomp (n 27) 45–48.
[34] Christopher W Morris, *The Social Contract Theorists* (Rowman & Littlefield 2000) ix.

Hobbes conceived the social contract as a rational act of self-preservation, which individuals, driven by the fear of violent death, transfer their rights to an absolute sovereign who then secures peace. John Locke (1632-1704) and Jean-Jacques Rousseau (1712-1778) attempted to show how political power can be compatible with individual freedom without falling into the Hobbesian absolutism. In doing so, they reinterpreted the contract as a moral and collective act of association, grounded not in fear but in reason, trust, and the general will.

Locke's political thought, articulated most fully in *Two Treatises of Government* (1690), emerged against the backdrop of the English Revolution and the Glorious Revolution of 1688. His goal was to explain how resistance to arbitrary rule can be justified without sliding into anarchy. Locke, unlike Hobbes, viewed government as a fiduciary institution rather than an artificial person. According to him, the government derives its authority from a trust that has been entrusted with particular powers to protect natural rights that existed before.[35]

In Locke's state of nature, human beings are free and equal, bound by the law of nature, which commands that no one ought to harm another in his life, health, liberty, or possessions.[36] This natural law, discoverable by reason, endows each individual with inalienable rights—most notably to life, liberty, and property. The state of nature is not, as in Hobbes, a war of all against all. It is a state of liberty, not of licence, and though peaceful in principle, it remains insecure because individuals act as their own judges in their own causes.[37] The inconveniences of such a condition—partiality, conflict, and the lack of an impartial arbiter—lead rational people to form a political society.[38]

The Lockean contract proceeds in two stages. First, individuals agree to form a single community; second, this political society, usually by majority vote, decides what form of government it will have. Authority is thus delegated and conditional. The people retain the right to dissolve the government if it violates the trust placed in it. The social contract, therefore, does not entail unconditional obedience but establishes a continuing moral relationship between rulers and ruled. Locke's distinction between society and government has far-reaching implications for sovereignty: sovereignty lies with the people as a collective body, while government is merely a tool, set up to secure the common good by protecting

[35] John Locke, *Two Treatises of Government* (1690; Peter Laslett ed, Cambridge University Press 1988) 368 (Second Treatise, §149).
[36] Locke (n 35) 271 (Second Treatise, §6).
[37] ibid 269–270 (Second Treatise, §6).
[38] ibid 280–281 (Second Treatise, §§13–14).

natural rights. When a government acts arbitrarily or tyrannically, the trust is broken, and opposition becomes a right[39].

Thus, Locke's vision of the political community shifts animosity from the state of nature to the moral arena. The enemy is no longer the fellow human who risks survival, as Hobbes believed, but the ruler who violates social trust. Tyranny replaces civil war as the central political threat. Conflict does not disappear, but its meaning shifts. Rebellion is treated less as an existential struggle and more as a kind of juridical remedy: an attempt to repair a broken relationship. Violence, while rare, remains justifiable when used against arbitrary power. By establishing political obligations based on rights and agreement rather than fear, Locke transforms enmity into a moment of moral rupture inside a law-governed system.

This vision relies heavily on Locke's idea of property. Property, widely defined as life, liberty, and estate, is both the foundation and goal of political society.[40] Labour is what justifies private appropriation, and the resulting accumulation of property produces inequalities that require regulation. At the same time, Locke is clear that government is not the master of property but its guardian. Its job is to act as a neutral umpire among owners, not to redistribute their holdings. His framing narrows the scope of political hostility. Conflicts between citizens are reinterpreted as economic competition rather than as existential confrontation. This strategy anticipates the liberal goal of replacing hostility with peaceful commerce, even if it does not eliminate coercion from the system's edges.

Though couched in universal terms, Locke’s theory of natural rights in practice presupposed a much narrower class of rights-bearing subjects. The rights-bearing subject is implicitly male, propertied, and rational. Those outside this moral community—female, indigenous peoples, enslaved people, the propertyless—are frequently situated in a residual state of nature where coercion and domination remain legitimate. The frontier thus appears as both a physical and moral boundary: the point where the protection of law ends and the logic of conquest begins. Even within a theory of trust and consent, the problem of the enemy persists at the margins of humanity.

Jean-Jacques Rousseau’s *Du Contrat Social* (1762) reimagines the social contract as the foundation of collective autonomy rather than individual security. Writing in a context of growing inequality and the corruption of civic virtue, Rousseau sought to recover the possibility of genuine

[39] Lechner (n 1) 389.
[40] Locke (n 35) 287 (Second Treatise, §87).

freedom through political association. His central question—how to reconcile the individual's liberty with the authority of the community—defines his entire project.[41]

For Rousseau, the state of nature is not a scene of war but of simplicity and innocence[42]. Humans are naturally compassionate and self-sufficient, guided by *amour de soi* (self-love moderated by pity). It is social development—especially the introduction of private property and dependence on others—that generates *amour-propre*, a competitive desire for recognition, and with it, envy, rivalry, and domination.[43] Political institutions, therefore, must not merely restrain conflict but transform it, turning self-interest into civic virtue.

The social contract achieves this transformation by creating a moral and collective person, the body politic. Each individual alienates his natural freedom and rights to the community as a whole, receiving in return civil liberty and legal equality.[44] Sovereignty, in Rousseau's sense, does not belong to a monarch or a parliament but to the people considered as a whole. It is inalienable and indivisible, and it finds expression in the general will, understood as the common interest rather than the mere sum of private preferences[45]. In Rousseau's words, 'the legislative power belongs to the people, and can belong to it alone'[46].

On this basis, Rousseau redefines political obligation. When citizens obey the law, they are, in theory, obeying a will in which they themselves participate. Freedom, paradoxically, lies in submission to the law one has prescribed for oneself as a member of the collective. This is the meaning of Rousseau's celebrated but troubling assertion that a recalcitrant citizen may be 'forced to be free'[47]. The phrase encapsulates the dual nature of his theory: the emancipatory promise and its potential harshness. Governments, in this framework, are mere agents of the sovereign people; when they pursue particular interests or exceed their powers, they lose legitimacy. The people retain the right to assemble, deliberate, and reclaim their sovereignty. In contrast to Locke's contractual dualism between society and government, Rousseau's political order is monistic: the sovereign and the citizens are one.[48]

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[41] Jean-Jacques Rousseau, *Of the Social Contract* (1762; Victor Gourevitch tr, Cambridge University Press 1997) 49 (bk I, ch 6).
[42] Morris (n 34) 97.
[43] Frederick Neuhouser, *Rousseau's Theodicy of Self-Love: Evil, Rationality, and the Drive for Recognition* (Oxford University Press 2008) 37–43.
[44] Rousseau (n 41) 50–51 (bk I, chs 6–7).
[45] Lechner (n 1) 391.
[46] Rousseau (n 41) 121 (bk III, ch 1).
[47] ibid 53 (bk I, ch 7).
[48] Morris (n 34) 95–97.

Rousseau's conception of sovereignty transforms the logic of enmity. Whereas Hobbes defined the enemy as the natural other and Schmitt as the existential adversary, Rousseau internalises conflict within the collective. The true enemy is not external but internal—the citizen whose private will refuses to align with the general will. Disobedience becomes a form of political betrayal—a refusal to participate in the collective moral project. Hence Rousseau's acceptance of the possibility that dissenters may be compelled to conform: continued nonconformity undermines the unity of the *corps politique*.[49] In this model, the political community defines itself less in terms of foreign enemies than through its capacity to legislate for itself and maintain internal cohesion.

However, the moral unity of Rousseau's polity also contains the potential for exclusion. The general will, while abstractly universal, can be invoked to suppress particular identities or dissenting voices. Although Rousseau himself never used this label, the logic of the general will later enabled revolutionaries to portray defiant dissenters as 'enemies of the people.' In extreme cases—most visibly in revolutionary settings—invocations of the general will have been linked to the branding of 'traitors' and 'counter-revolutionaries' as enemies of the people. Rousseau's aspiration to purify politics of self-interest thus risks reproducing the very forms of coercion it seeks to transcend.

Both Locke and Rousseau redefine the relationship between law, morality, and political authority. For Locke, natural law precedes the state and limits its power; for Rousseau, law becomes the expression of collective autonomy. In each case, sovereignty is subject to a higher standard, yet the source of that standard differs: Locke grounds it in individual rights, while Rousseau grounds it in the moral will of the people. This divergence mirrors their different understandings of the person. Locke's individual is a proprietor of rights; Rousseau's is a participant in a moral community. The former prioritises security and the protection of private interests; the latter emphasises virtue and civic equality. The Lockean enemy is the tyrant who violates rights; the Rousseauian enemy is the dissenter who undermines unity.[50]

The transformation of sovereignty from Hobbes to Rousseau thus traces a movement from external to internal enmity—from the chaos of the natural state to the potential tyranny of moral unanimity. Where Hobbes resolves conflict through submission, Locke resolves it through limitation, and Rousseau through participation. Each solution carries its own tension—absolute authority, conditional trust, and the risk of moral coercion. Taken together, these theories furnish much of the conceptual architecture of the modern constitutional state: locating legitimacy in consent, constraining

[49] Jean Starobinski, *Jean-Jacques Rousseau: Transparency and Obstruction* (University of Chicago Press 1988) 48–55.
[50] Morris (n 34) 201–205.

power by law, and identifying the people as the ultimate source of authority. However, it also embeds a persistent tension between liberty and unity, individuality and sovereignty. The attempt to ground politics in reason and agreement does not remove enmity from the picture; it merely changes the forms in which enmity appears.

1.2 The Legal Construction of Enmity Across History

1.2.1. Public Enemy Designations in Roman and Medieval Law

The notion of the public enemy (*hostis publicus*) occupies a foundational place in the genealogy of Western legal thought. Long before the emergence of the modern state, Roman and medieval jurists elaborated complex distinctions between internal wrongdoers and external adversaries, between private crimes and public enmity. These distinctions did more than classify types of misconduct; they helped mark out the very edge of the legal community itself. Beyond that boundary, a person could lose the status of a legal subject and be treated instead as an enemy. In tracing the evolution of *hostis publicus* from the Roman Republic through the Middle Ages, one observes the gradual transformation of enmity from a relational status under *jus gentium* to a political category tied to sovereign power and legitimacy.

In Roman law, the *hostis publicus* denoted an enemy of the *res publica*, that is, a foreign adversary recognised as such by the Roman people. The term *hostis*, derived from the same root as *hospes* (guest), initially referred to a foreigner in general, one who was outside the civic community but not necessarily an adversary. Over time, however, the term acquired a distinctly martial and legal meaning: the *hostis* was Rome's lawful enemy in war.[51] The relationship between Rome and its *hostes* was not one of crime but of recognised hostility regulated by the *jus fetiale*, the law governing declarations of war and peace.

The distinction between the *hostis* and the *latro*—the bandit or brigand—was fundamental. The *latro* acted for private gain and without public authority, whereas the *hostis* fought on behalf of another political community. As Cicero observed, 'between nations there can be neither friendship nor

[51] A Berger, *Encyclopedic Dictionary of Roman Law* (American Philosophical Society 1953) 489.

trust where there is not the common bond of law.'[52]Thus, enmity was a status within a legal order that encompassed war as a legitimate relation between political entities.

Within the Roman Republic, however, this external conception of enmity gradually blurred as the city faced internal threats to its unity. The legal category of *perduellio*—an ancient form of high treason—bridged the gap between external and internal enemies. The *perduellis* was one who 'bore arms against the fatherland,' a citizen who had made war upon the *res publica* itself.[53] Such an act transformed the offender from *civis* to *hostis*, stripping him of the legal protections of citizenship. The *Lex Julia maiestatis*, later codified under the Empire, expanded this notion to include conspiracies, betrayals, and acts deemed injurious to imperial majesty.[54]

This transformation illustrates the political elasticity of enmity in Roman jurisprudence. What began as an inter-political relation—regulated and reciprocal—became an intra-political instrument of repression. The designation *hostis publicus* allowed the Senate to declare certain citizens 'enemies of the state,' as in the famous *senatus consultum ultimum* passed against Catiline and his followers in 63 BCE.[55] Once so declared, a citizen was no longer entitled to trial or appeal; he could be killed with impunity, and his property confiscated. The act of proscription formalised this exclusion, rendering the *hostis* simultaneously *extra ordinem* (outside the regular legal process) and *extra civitatem* (outside the civic body).

Under the early Empire, the category of *hostis publicus* retained its utility as a tool of political control. Emperors such as Augustus and later Tiberius used treason trials (*crimina maiestatis*) to eliminate rivals and suppress dissent. What had once been a public and collective decision of the Senate became a prerogative of the sovereign. The *hostis* was now whoever the emperor declared to be so. Thus, the legal status of public enmity became increasingly tied to the concentration of authority in a single person, foreshadowing the modern concept of sovereignty.

Roman jurists conceived the enemy not as an outlaw but as a lawful adversary. The *jus belli* (law of war) distinguished legitimate warfare, declared by the fetial priests, from mere robbery or violence. This presupposed parity: states recognised one another as legal actors even while authorising violence

[52] Cicero, *De Officiis* I.36.
[53] Cicero, *Pro Rabirio Perduellionis Reo* 7–9.
[54] Tacitus, *Annals* 1.72; see also Justinian, *Digest* 48.4.
[55] Cicero, *In Catilinam* I.4–5.

against each other. As Ulpian later summarised, 'the law of nations permits us to take the property of enemies and to make them slaves.'[56]

This classical conception of enmity placed moral and procedural constraints on violence. Even the enemy was subject to law, albeit a different law. The Roman *jus fetiale* codified rituals of declaration and reparation, ensuring that war was undertaken only after formal demands for redress were refused. These rituals reflected a conception of justice as reciprocity and order, even amidst conflict.

Nevertheless, as the *res publica* gave way to the imperial state, the moral symmetry of enmity eroded. The enemy became less an equal adversary and more the negation of lawful order. Political violence was redefined as the prerogative of legitimate authority. By the time of Justinian's *Corpus Juris Civilis* (sixth century CE), the distinction between lawful and unlawful enemies had become central to imperial sovereignty. The emperor alone determined who qualified as *hostis* and who was merely a criminal (*latro*); the former could be fought under the *jus gentium*, the latter exterminated as a criminal.[57]

This fusion of law and political judgement would prove decisive for medieval thought. It established a conceptual split that endured for centuries: the external enemy, who could be fought in lawful war, and the internal enemy, the traitor or rebel, who could be punished without restraint. Roman categories thus set the stage for later doctrines concerning heresy, rebellion, and infidelity—forms of being 'outside the peace.'[58]

With the collapse of the Western Empire and the rise of Christendom, the idea of the public enemy acquired new theological layers. Where Roman law understood enmity in secular, juridical terms, medieval Europe increasingly framed it through Christian doctrine. The Augustinian conception of *bellum justum* (the just war) provided the moral framework for legitimising violence. War was no longer a contest between equals, but a punitive act authorised by divine justice. The 'enemy' was not merely Rome's adversary but God's.

Canon law absorbed and reworked Roman legal categories. The *hostis publicus* became the *inimicus Dei*, the enemy of God and the Church: heretics, infidels, and excommunicates were placed beyond the *pax ecclesiae* and denied legal protection. The papal bull *Ad abolendam* (1184) commanded

[56] Digest 49.15.24 (Ulpian).
[57] Digest 50.16.118; Digest 48.19; Digest 48.4.
[58] R I Moore, *The Formation of a Persecuting Society* (Blackwell 1987) 50–54.

secular rulers to punish heresy as a public crime.[59] Similarly, the decrees of the Fourth Lateran Council (1215) declared that those who opposed the faith were to be treated as enemies to be destroyed.[60]

In the feudal order, the Roman practice of *proscriptio* found its analogue in the institution of outlawry. To be declared an outlaw was to stand *extra legem*—outside the law's protection. The outlaw was 'the king's enemy,' killable by anyone. The *Leges Henrici Primi* described the outlaw as someone who 'ought to be slain like a wolf.'[61] Germanic law had similar practices: the *Acht* and *Oberacht* rendered a person *vogelfrei*, meaning 'free as a bird,' and exposed them to violence without legal consequences.[62]

This medieval concept of legal banishment illustrates the persistence of the Roman logic of enmity. The community defined itself by casting out those who violated its peace. The outlaw, like the *hostis publicus*, was simultaneously included and excluded: recognised as a person only through his negation. Giorgio Agamben later identified in this figure the archetype of 'bare life'—the individual abandoned by law yet still subject to its force.[63]

In the medieval world, law, theology, and politics were inseparable. The Pope and the Emperor each claimed authority to define enemies of the faith or of the realm. The Crusades exemplified this fusion. The enemies of Christendom—Muslims, heretics, pagans—were designated not merely as military opponents but as ontological adversaries of divine order. Papal bulls and crusading theology sanctified violence against them. The concept of *bellum justum* merged with *bellum sacrum*, erasing the distinction between public and spiritual enmity.

At the same time, within Christendom, political rulers adopted similar mechanisms of exclusion. The *rex iustus*—the just king—was defined by his duty to preserve peace and punish enemies of the realm. Treason, rebellion, and heresy became parallel categories.[64] The *Decretum Gratiani* and the *Decretales Gregorii IX* codified procedures for excommunication and the forfeiture of rights.[65] The secularisation of these mechanisms in royal law foreshadowed the modern state's monopoly on legitimate violence.

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[59] *Ad abolendam haereses* (Pope Lucius III, 1184), in J D Mansi (ed), *Sacrorum Conciliorum Nova Collectio*, vol 22 (Paris 1902) 982.
[60] Fourth Lateran Council, canon 3 (1215), in Norman Tanner (ed), *Decrees of the Ecumenical Councils*, vol 1 (Georgetown UP 1990) 230.
[61] *Leges Henrici Primi* (c 1115) c 53 (L J Downer ed, 1972) 110.
[62] F Pollock and F W Maitland, *The History of English Law*, vol 2 (2nd edn, CUP 1898) 449.
[63] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998) 63–65.
[64] Ernst H Kantorowicz, *The King's Two Bodies* (Princeton University Press 1957) 148–150.
[65] Gratian, *Decretum* (c 1140) D 11 c 3; Gregory IX, *Decretales* (1234) X 5.39.28.

By the late Middle Ages, the convergence of canon and secular traditions produced a dual system of public enmity. On the one hand, the enemy of God justified wars of religion and persecution; on the other, the enemy of the king legitimised repression of rebellion and dissent. Both depended on a sovereign power capable of designating exceptions to the rule of law. This ideological structure reasserted the ancient Roman principle of the sovereign standing above the law.

Roman and medieval ideas of public enmity laid the groundwork for later practices of exclusion. Once a person was placed outside the law, violence could be exercised against them without formal restraint. Figures such as the outlaw, the heretic, and the traitor embodied the paradox of being both subjected to law and abandoned by it—a paradox that would reappear in modern doctrines of the 'state of exception.'[66]

Moreover, the Roman distinction between *hostis* and *latro* anticipated modern debates about the legality of warfare and terrorism. Designating one's opponent as a *latro* rather than a *hostis* denied him the rights of lawful combat. Medieval canonists extended this logic to heretics and infidels, who could be exterminated without violating the peace, since they were never properly within it. This framework survived into the early modern period, informing colonial justifications for conquest and the treatment of pirates and rebels as *hostes humani generis*—enemies of all humanity.

1.2.2. From Rebels to Terrorists: Modern Legal Frameworks of Enmity

The modern age witnessed a profound transformation in the legal and political treatment of enemies. From the sixteenth century onward, the consolidation of state sovereignty altered not only the structure of authority but also the grammar of enmity. The emergence of the territorial state meant that the power to define the 'public enemy'—once dispersed among church, empire, and local communities—became the prerogative of the sovereign. With this came a new capacity to distinguish between legitimate political opposition and rebellion, between lawful warfare and sedition, and, in the modern era, between insurgency and terrorism.

In the aftermath of the religious wars and civil conflicts that tore through Europe between the sixteenth and seventeenth centuries, political theorists such as Jean Bodin, Thomas Hobbes, and later Emer de Vattel formulated a conception of sovereignty grounded in indivisible authority. The sovereign's primary duty was to ensure peace and order within the realm, and the corollary of this duty was the

[66] Giorgio Agamben, *State of Exception* (University of Chicago Press 2005) 28–31.

absolute illegitimacy of rebellion. As Bodin asserted in *Les Six Livres de la République* (1576), sovereignty entails the exclusive power to make and unmake law; resistance to this power was therefore not merely unlawful but sacrilegious.[67]

This theoretical development found immediate expression in law. The English Treason Act of 1351—originally a medieval statute—was revitalised in the seventeenth century to prosecute those who levied war against the king or 'adhered to his enemies.'[68] The legal language of treason marked a decisive break with earlier, more plural conceptions of loyalty. Whereas medieval subjects might owe allegiance to multiple overlords or spiritual authorities, the modern citizen owed allegiance to one state and one sovereign. To rebel was to deny the unity of the political body itself.

The execution of Charles I in 1649, followed by the Restoration and the Glorious Revolution, demonstrated the ambivalence of this new legal order. Both royalists and republicans claimed to act in defence of the law and the people, accusing each other of rebellion. The oscillation between these claims revealed a deeper problem: the law could not adjudicate ultimate questions of sovereignty, because sovereignty itself determined what counted as lawful. The sovereign retained the prerogative to declare the state's enemies and, by extension, to decide who fell within or outside the protection of law.

By the eighteenth century, rebellion had become a paradigmatic crime against the state. In France, the *Ordonnance Criminelle* of 1670 codified the offence of *lèse-majesté* as a direct assault on royal person and order.[69] During the English Jacobite uprisings, rebels captured on the battlefield were executed as traitors rather than treated as prisoners of war. The shift was both semantic and structural: enemies within were no longer recognised as lawful belligerents. This reclassification marked the end of the medieval idea of civil war as a conflict between quasi-legitimate parties. The rebel was not an opponent in a contest of right but a criminal whose very existence threatened the legal order.[70]

The revolutionary era of the late eighteenth century reconfigured this paradigm once again. The American and French revolutions both invoked the rhetoric of sovereignty, but they relocated it from monarch to people. In doing so, they inverted the logic of treason: it was now the tyrant, not the rebel, who was the true enemy of the state. Yet even as sovereignty was democratised, the mechanism of

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[67] Jean Bodin, *Les Six Livres de la République* (1576) bk I ch 8 (M J Tooley tr, *Six Books of the Commonwealth*, Blackwell 1955) 25–27.
[68] Treason Act 1351 (25 Edw III St 5 c 2) (England).
[69] Ordonnance criminelle (France 1670), tit II, art 1.
[70] John Prebble, *Culloden* (Penguin 1961) 236–40.

exclusion persisted. The revolutionary state, like its monarchical predecessor, retained the power to define internal enemies.

In France, the National Convention's *Loi des Suspects* (1793) authorised the arrest of all citizens 'who, by their conduct, relations, or language, have shown themselves partisans of tyranny.' The enemy was no longer defined by allegiance to a foreign power but by a failure to embody the new civic virtue.[71] The guillotine, the emblem of revolutionary justice, embodied the fusion of law and violence in the service of the general will.

This politicisation of enmity culminated in the emergence of what Hannah Arendt called 'the totalitarian logic of suspicion.' The revolutionary ideal of popular sovereignty, by identifying the people with virtue itself, rendered dissent synonymous with treason. The 'enemy of the people' replaced the 'enemy of the king,' yet the underlying structure of exclusion remained unchanged: both depended on a sovereign entity capable of deciding exception.[72]

Parallel to these political upheavals, a quieter transformation was taking place in the sphere of governance. The doctrine of *raison d'État*, formulated by thinkers such as Giovanni Botero and later developed by Richelieu's France, redefined the enemy in terms of security rather than morality. Whereas medieval law had tied enmity to sin and early modern law to loyalty, the modern bureaucratic state grounded it in the calculus of survival.[73]

This secularisation of enmity coincided with the rise of administrative and police powers. By the eighteenth century, states began to monitor and manage their populations through surveillance, registration, and classification. The concept of the 'enemy within' shifted from the overt rebel to the potential subversive. The state's task was not only to punish rebellion after it occurred but to prevent it through control of information and movement.

The nineteenth century extended these practices through colonial administration and emergency powers. In the British Empire, for example, colonial subjects who resisted rule were often treated under martial law rather than civil law, placing them outside ordinary legal protections. Rebellion became a matter of 'security,' not justice. Similarly, the 1798 Irish Rebellion and later uprisings in India were suppressed under proclamations authorising the summary execution of insurgents as traitors. The

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[71] *Décret du 17 septembre 1793 (Law of Suspects), arts 1–2(1), in Jean-Baptiste Duvergier, Collection complète des lois…, vol 6 (Paris 1834) 172.*

[72] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1951) 460–463.

[73] Giovanni Botero, *Della Ragion di Stato* (1589), tr P J Waley, *The Reason of State* (Routledge 1956) 3–5.

distinction between citizen and enemy, once grounded in allegiance, now rested on the sovereign's assessment of danger.

The world wars and the ideological conflicts of the twentieth century brought the logic of enmity to its most extreme articulation. Total war blurred the line between combatant and civilian, transforming entire populations into potential enemies. States expanded their power to intern, deport, and kill those deemed threats to national security. The categories of 'spy', 'saboteur,' and 'enemy alien' revived ancient mechanisms of exclusion under modern conditions.

During the First World War, the British Defence of the Realm Acts (DORA) granted the government sweeping powers of censorship, detention, and confiscation of property belonging to 'enemy aliens.'[74] Similar measures were enacted across Europe and the United States. The Second World War further normalised these exceptional powers. The internment of Japanese Americans under Executive Order 9066 (1942) exemplified how racialised categories could intersect with the logic of enmity.[75]

After 1945, the Cold War institutionalised a permanent state of vigilance. The ideological divide between democracy and communism reinstated a global friend–enemy dichotomy. Loyalty oaths, blacklists, and national security legislation reproduced, in peacetime, the juridical structures of war. In the United States, the Smith Act (1940)[76] criminalised advocacy of the government's overthrow, and the Internal Security Act (1950)[77] authorised the detention of 'subversive' persons during emergencies. In Britain, the Official Secrets Acts and Defence Regulations preserved similar prerogatives.[78] The figure of the 'enemy of the state' thus persisted in liberal democracies, albeit under the language of national security.

The attacks of 11 September 2001 marked another decisive moment in the evolution of legal enmity. The subsequent 'war on terror' blurred the already fragile boundaries between crime, war, and politics. Unlike conventional wars, this conflict was fought against non-state actors without defined territory or uniform. The enemy was no longer a foreign sovereign, but an amorphous network of individuals labelled 'terrorists.'

In the United States, the 2001 Authorisation for Use of Military Force (AUMF) granted the President power to use 'all necessary and appropriate force' against those responsible for the attacks and

[74] Defence of the Realm Act 1914 (UK) 4 & 5 Geo V c 29.
[75] Executive Order 9066 (US, 19 Feb 1942).
[76] Smith Act 1940, 54 Stat 670 (US).
[77] Internal Security Act 1950, 64 Stat 987 (US) (the McCarran Act) §§ 103–110.
[78] Official Secrets Act 1911 (UK); Emergency Powers (Defence) Regulations 1939 (UK).

their affiliates.[79] The ensuing detention regime at Guantánamo Bay initially placed detainees beyond the reach of both domestic courts and the Geneva Conventions by designating them 'unlawful combatants'; subsequent U.S. Supreme Court rulings later intervened to extend minimal legal safeguards to those held. The Supreme Court's decisions in *Rasul v Bush* (2004),[80] *Hamdi v Rumsfeld* (2004),[81] and *Boumediene v Bush* (2008)[82] attempted to restore minimal procedural guarantees, yet the underlying logic of exception persisted. The state claimed authority to detain individuals indefinitely, without trial, on the basis of their status as enemies rather than their acts.

This re-emergence of status-based enmity echoes the Roman and medieval traditions of outlawry. The 'terrorist' functions as a contemporary *hostis publicus*, stripped of citizenship rights and placed under a permanent suspicion of violence. Legal scholars such as David Dyzenhaus and Oren Gross have argued that this represents a return to a 'jurisprudence of emergency,' in which necessity overrides legality.[83] The executive's discretion to declare and manage enemies becomes the defining feature of sovereignty, precisely as Schmitt theorised in *Political Theology*: 'Sovereign is he who decides on the exception.'[84]

European states have followed similar trajectories. The United Kingdom's Anti-Terrorism, Crime and Security Act 2001[85] authorised the indefinite detention of foreign nationals suspected of terrorism without trial, until the House of Lords in *A v Secretary of State for the Home Department* (2004)[86] ruled the measure incompatible with the European Convention on Human Rights. European states followed similar trajectories. France declared repeated states of emergency (2015–17) that expanded police powers and curtailed liberties, while Germany, though not invoking a formal state of emergency, likewise tightened its counter-terrorism laws and surveillance measures. The line between public order and warfare dissolved further with the proliferation of targeted killings and drone strikes, justified as defensive measures against stateless enemies.

Across these transformations—from rebels to terrorists—the same structural logic persists. The state asserts its identity by identifying and excluding those deemed to threaten its existence. Whether

[79] Authorization for Use of Military Force, Pub L 107–40, § 2(a), 115 Stat 224 (18 Sept 2001).
[80] *Rasul v Bush*, 542 US 466 (2004).
[81] *Hamdi v Rumsfeld*, 542 US 507 (2004).
[82] *Boumediene v Bush*, 553 US 723 (2008).
[83] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006) 1–5, 41–44; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006) 59–64.
[84] Schmitt, *Political Theology* (n 25) 5.
[85] Anti-Terrorism, Crime and Security Act 2001 (UK) pt 4.
[86] *A v Secretary of State for the Home Dept* [2004] UKHL 56, [2005] 2 AC 68.

couched in theological, moral, or security terms, the designation of enemies serves to reaffirm the unity of the political order.

Three continuities are particularly notable. First, the fusion of legal and political judgement: the decision about who counts as an enemy is never purely juridical but always an act of sovereignty. Second, the creation of liminal legal statuses: from the outlaw and the traitor to the unlawful combatant, each represents a person neither fully inside nor outside the law. Third, the temporalisation of exception: what was once an emergency measure has become a permanent feature of governance.

The shift from *hostis publicus* to the modern figure of the 'terrorist' reflects not a narrative of progress but a striking continuity. The modern state's monopoly on violence depends on its power to define the enemy; yet every exercise of that power reaffirms the tension between legality and necessity. The rebel of the seventeenth century and the terrorist of the twenty-first occupy the same juridical space—outside the ordinary law yet constitutive of it.

1.2.3. Public vs. Private Enemies: Legal and Constitutional Implications

The divide between public and private enemies has long shaped Western legal and constitutional thinking. It marks the line between law and politics, between crime and war, and between an ordinary wrongdoer and someone seen as a threat to the community as a whole. First defined in Roman jurisprudence and later reworked in medieval, early modern, and modern contexts, this distinction still helps explain how states justify suspending or expanding legal protections in moments of perceived danger.

As noted earlier, Roman law drew a clear boundary between the *inimicus privatus*—a personal adversary dealt with through private remedies—and the *hostis publicus*, an enemy of the state whose acts went beyond individual harm. Medieval canon and feudal law inherited this distinction. Private vengeance and small-scale warfare were gradually prohibited, while the authority to wage public war became concentrated in the hands of rulers.

The rise of the modern state coincided with the transformation of enmity into a matter of public order. Max Weber famously defined the state as 'the human community that successfully claims the monopoly of the legitimate use of physical force within a given territory.'[87] That monopoly includes not

[87] Max Weber, 'Politics as a Vocation' (1919) in H H Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Oxford 1946) 77.

only control over coercive force but also the power to decide which uses of force count as legitimate. The ability to name 'public enemies' therefore becomes one of the clearest expressions of sovereignty.

Thomas Hobbes formulated this theory. In *Leviathan*, individuals escape the state of nature by surrendering their private right to violence to a common authority. From that moment on, only the sovereign may determine who is friend or foe, and only the sovereign's wars are public wars. The individual who takes up arms without authorisation becomes a criminal, not a combatant.[88] The distinction between *hostis* and *inimicus* thus maps directly onto the division between public and private uses of force.

This monopoly, however, creates a structural paradox. If only the sovereign can declare public enemies, then any challenge to that monopoly—whether rebellion, revolution, or terrorism—appears as criminal by definition. Yet modern constitutionalism, born from revolutions, presupposes the legitimacy of resistance to tyranny. The question arises: under what conditions can a private actor become a public adversary, or vice versa?

In constitutional democracies, the category of the 'public enemy' generates acute tensions between legality and security. The constitution guarantees rights to all citizens, yet it also empowers the state to defend itself against threats. The problem is that the act of defence often involves suspending those very rights. This paradox—how to remain lawful while excluding law's adversaries—lies at the heart of the modern state of exception.

The English tradition of habeas corpus and later the U.S. Constitution's Suspension Clause illustrate this tension. Both permit temporary suspension of rights 'in cases of rebellion or invasion,' but they require parliamentary or congressional authorisation. The aim is to regulate exception through legality, converting what would otherwise be an arbitrary act of power into a procedurally bound one.[89] Nevertheless, history reveals how fragile this boundary remains.

During both World Wars, governments in Britain and the United States detained 'enemy aliens' and dissidents without trial under emergency statutes.[90] The justification was collective danger, not individual wrongdoing. The internment of Japanese Americans during the Second World War pushed this logic further, treating an entire community as a potential threat and exposing the uneasy relationship between universal citizenship and public danger.

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[88] Hobbes, *Leviathan* (n 4) ch 28.
[89] Habeas Corpus Act 1679 (Eng); US Constitution art I § 9 cl 2 (Suspension Clause).
[90] A W Brian Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Clarendon Press 1992); Alien Enemy Act 1798, 50 USC §§ 21–24.

The post-9/11 era revived these dilemmas. The American category of 'unlawful enemy combatant' and the British regime of indefinite detention for foreign suspects under the Anti-Terrorism, Crime and Security Act 2001[91] demonstrate how constitutional states reproduce pre-modern patterns of outlawry under the banner of national security. In *A v Secretary of State for the Home Department (2004)*,[92] the House of Lords held that indefinite detention violated the European Convention on Human Rights, emphasising that even in an emergency, legal equality must be preserved. Yet the decision also confirmed that constitutional order continues to rely on the possibility of naming exceptional enemies.

While the 'public enemy' occupies the outer margins of legality, the 'private adversary' remains firmly within the ordinary jurisdiction of law. Modern legal systems rest on the assumption that conflicts between individuals are to be adjudicated by courts rather than settled through personal retaliation. In this respect, the rule of law functions as a civilising—or domestifying—force that transforms enmity into legally manageable dispute.

Yet contemporary forms of political violence increasingly blur this boundary. Acts of terrorism, insurrection, and cyberwarfare often straddle the line between private criminality and public hostility. As a result, states oscillate between framing such conduct as ordinary crime, subject to judicial process, and interpreting it as warfare, which invites military or quasi-military responses.

The classification determines not only the procedure but also the moral and political meaning: whether perpetrators are seen as offenders with rights or as enemies to be destroyed.

Liberal legalism tends to assimilate all violence into crime, reducing political motives to personal culpability. However, this method might hide the structural conditions that contribute to political violence and depoliticise actions of resistance. Conversely, an overly broad definition of the 'public enemy' threatens to undermine the rule of law by recasting dissenters as existential rivals. The constitutional task, therefore, is to maintain a meaningful separation between political opposition—properly positioned within the realm of rights—and enmity, which belongs in the area of security.

The modern constitutional state claims legitimacy by subjecting power to law. Yet the prerogative to define enemies introduces an element of arbitrariness at the system's core. Every declaration of emergency, every identification of a public enemy, suspends equality before the law. The danger is that this suspension, initially conceived as temporary, becomes permanent.

[91] Anti-Terrorism, Crime and Security Act 2001 (n 85) pt 4.
[92] *A v Secretary of State for the Home Department* (n 86).

Constitutional design seeks to mitigate this risk through the separation of powers and judicial review. Courts act as guardians of legality, ensuring that the designation of public enemies remains subject to reasoned justification. The European human rights law's proportionality doctrine embodies this ambition. By demanding that emergency measures be 'necessary and proportionate,' courts try to convert extraordinary decisions into legal reasoning. Yet this remains a fragile compromise between the logic of security and the logic of rights.

The distinction between public and private enemies continues to shape both domestic and international law. In criminal law, it separates ordinary offenders from those accused of treason, espionage, or terrorism—offences defined by their political dimension. International law likewise distinguishes lawful combatants from unlawful ones. The Geneva Conventions grant prisoner-of-war status only to those fighting on behalf of recognised states or movements. Non-state fighters who do not qualify for prisoner-of-war status are often labelled 'unlawful combatants'—a designation not formally recognized by the Geneva Conventions, which nonetheless mandate basic humanitarian protections even for such detainees.[93]

At the conceptual level, this distinction marks the outer boundaries of the political community itself. The private adversary remains situated within the framework of law, while the public enemy stands at—and effectively constitutes—the law's outer frontier.

1.3 Ethical and Legal Dilemmas in Defining Enemies

1.3.1. Exceptionalism and the Rule of Law: Justifying Extraordinary Measures

The tension between emergency measures and the rule of law is nearly as old as the very notion of sovereignty. From Hobbes's insistence that absolute authority is the necessary condition for civil peace to contemporary constitutional debates over the scope of emergency powers, a single question persists: how can a legal order preserve itself while engaging in actions that appear to undermine its own normative foundations? The history of Western political thought reveals a sustained imbalance between the imperative of security and the commitment to legality. The 'exception'—the decision to suspend ordinary legal norms in the face of existential threat—has never functioned merely as a departure from

[93] Geneva Convention (III) relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, art 4A.

the rule of law. Rather, it is often the point at which the underlying character of that legal order is most starkly exposed.

In its earliest formulations, the doctrine of necessity was a pragmatic principle. Roman law acknowledged the *maxim necessitas non habet legem* — necessity has no law [94]— recognising that in extreme circumstances, certain acts, otherwise unlawful, might be justified to preserve the community. Medieval jurists absorbed this *maxim* into canon and public law, granting rulers discretion to act extra legem in emergencies threatening the *salus populi*, the safety of the people.[95]

With the emergence of the modern state, this practical doctrine became the cornerstone of political theory. For Hobbes, the basic human instinct toward self-preservation applied not only to individuals but to the commonwealth itself. Because the sovereign existed to secure peace, any legal limitation that threatened that mission undercut the very purpose of political order. In Hobbes's terms, the law derives from the sovereign's will and therefore cannot constrain the very authority that constitutes it. The logic of necessity thus became internal to the rule of law itself.

However, even within Hobbes's framework, the appeal to necessity was not without limits. Extraordinary measures were justified only to the extent that they safeguarded life and preserved public order—what later jurists would describe as *raison d'État*. Hobbes's real innovation was to recast what had been a moral and theological principle into a structural element of political authority. Sovereignty, in this account, was not simply the power to govern through law, but the authority to determine when law itself must be suspended to secure the survival of the polity.

It was Carl Schmitt who, three centuries later, gave the concept of exception its most systematic articulation. In *Political Theology*, Schmitt defined the sovereign as 'he who decides on the exception.'[96] For Schmitt, the exception exposes the foundations of legal order: it shows that law ultimately rests on an authority capable of suspending it. No matter how rational or procedural a legal system may appear, it depends on a decision that lies outside the norms it enforces.

Schmitt's argument emerged from the political paralysis of the Weimar Republic, a constitutional democracy that often seemed trapped by its own legal constraints. He claimed that liberal systems, in their devotion to rules and procedures, ignored the fact that every political community must reckon with the possibility of crisis. In moments of real danger, the abstractions of law are not enough; decisive action

[94] Gratian, *Decretum* (c 1140) D 1 c 7.
[95] Cicero, *De Legibus* III.3.8.
[96] Schmitt, *Political Theology* (n 25) 5.

is required. For Schmitt, the exception is not a failure of legality but the condition that makes legal order possible in the first place.

For Schmitt, the distinction between normality and exception mirrored his earlier friend–enemy dichotomy. In ordinary times, law operates impersonally; in exceptional times, the political dimension reasserts itself. The judgment about what constitutes an emergency—and who constitutes the enemy—cannot be deduced from legal rules, but only from sovereign decision. This logic allows Schmitt to portray dictatorship, even temporary dictatorship, as an extension of constitutional order rather than its destruction.

However, the implications of this theory are deeply ambivalent. On one hand, Schmitt highlighted the limits of legal formalism and the unavoidable role of political judgment. On the other hand, his framework provides a language through which extraordinary powers can be normalised. If law depends on decision rather than norm, the state of exception can easily harden into permanent rule. Weimar's Article 48, which allowed emergency decrees 'to restore public security and order,'[97] showed how a supposedly temporary safeguard could become the legal doorway to dictatorship.

The liberal tradition responded by trying to reconcile necessity with legality through constitutional design. Unlike Schmitt, liberal theorists refused to place the exception outside the law. Instead, they tried to contain it procedurally. The English constitutional experience, with its gradual limitation of royal prerogative and the development of parliamentary supremacy, established a model in which emergency powers were subject to legislative oversight. The writ of habeas corpus could be suspended only by Parliament, as during the Jacobite rebellions or the Napoleonic wars.

Similarly, modern constitutions codified mechanisms for temporarily suspending rights. The U.S. Constitution's Suspension Clause allows the suspension of habeas corpus 'when in cases of rebellion or invasion the public safety may require it,'[98] while many continental charters, such as France's 1958 Constitution, empower the executive to declare a 'state of siege.'[99] The underlying logic is the same: to preserve legality by providing it with a controlled outlet for exception.

Modern legal systems continue to rely on doctrines that justify extraordinary measures under the rule of law. The doctrine of necessity in international law, codified in Article 25 of the International Law Commission's Articles on State Responsibility,[100] permits states to breach their obligations in order to

[97] Constitution of the German Reich 1919 (Weimar Constitution) art 48.
[98] US Constitution (n 89).
[99] Constitution of the French Republic 1958 art 36.
[100] Responsibility of States for Internationally Wrongful Acts 2001, art 25.

safeguard an essential interest against grave peril. Domestically, courts have long recognised necessity as a defence for officials who act unlawfully to avert disaster. However, in practice, such doctrines often blur into the assertion of prerogative power.

The post-9/11 'war on terror' illustrates this dynamic vividly. In the United States, the executive branch justified indefinite detention, targeted killings, and enhanced interrogation techniques by appealing to necessity and national self-defence. The resulting legal category of the 'unlawful combatant' suspended the ordinary protections of both criminal and international humanitarian law. Even when courts, such as in *Hamdi v Rumsfeld* (2004)[101] and *Boumediene v Bush* (2008)[102], affirmed limited procedural rights, they accepted the existence of a legal vacuum — a sphere of exception legitimised by the threat of terrorism.

In the United Kingdom, similar reasoning underpinned the Anti-Terrorism, Crime and Security Act 2001,[103] which authorised the indefinite detention of foreign nationals suspected of terrorism. The House of Lords *in A v Secretary of State for the Home Department* (2004)[104] found the provision disproportionate yet acknowledged that the government retained broad discretion to respond to emergencies. The result, as Oren Gross and Fionnuala Ní Aoláin observe, is a 'paradox of legality': the more law seeks to regulate exceptional measures, the more it expands the boundaries of the permissible.[105]

Behind doctrines of necessity stands a larger moral argument: that exceptional measures are justified when they serve the greater good. The utilitarian logic of 'lesser evil' runs through modern security discourse. Surveillance, coercion, and even torture are defended as regrettable but essential tools for averting catastrophe. This reasoning transforms moral dilemmas into administrative calculations. The state's ability to legitimate extraordinary actions, therefore, depends on a moral economy in which survival competes directly with legality.

This moralisation of necessity obscures its political nature. Nevertheless, once necessity is moralised, its political character can disappear from view. Decisions about what counts as a threat, which measures are warranted, and what trade-offs are acceptable are ultimately political choices. Treating them as technical matters of risk management obscures the exercise of sovereign power. The appeal to

[101] *Hamdi v Rumsfeld* (n 81).
[102] *Boumediene v Bush* (n 82).
[103] Anti-Terrorism, Crime and Security Act 2001 (n 85) pt 4.
[104] *A v Secretary of State for the Home Department* (n 86).
[105] Gross and Ní Aoláin (n 83) 59.

necessity becomes self-confirming: because the state claims to act for its own protection, its actions appear justified simply by virtue of that claim.

1.3.2. Human Rights and the Boundaries of State Action

The emergence of modern human rights norms after the Second World War represents one of the most significant attempts to curtail the logic of exceptional sovereignty described in the previous subsection. Suppose the state of exception reveals the tendency of sovereign power to expand in conditions framed as dangerous. In that case, the human rights movement seeks to institutionalise external and universal limits to state action—limits that do not depend on the sovereign's own self-restraint but instead attempt to bind political authorities through law that claims precedence over political contingency. Whereas exceptionalism is structured by the defence of the political community against perceived threats, human rights introduce a competing vocabulary in which the individual, rather than the community, becomes the primary bearer of legally protected interests. This shift produces a deep tension: the creation of universal safeguards against arbitrary state power simultaneously challenges the state's prerogative to define, manage, or eliminate its 'enemies'.

Human rights norms were conceived as an explicit response to the atrocities committed by states acting under claims of emergency, necessity and internal enemies. The Holocaust, fascist repression, and the total mobilisation of populations through emergency powers all demonstrated the catastrophic consequences of allowing sovereignty to operate without external constraints. Post-war constitutionalism, therefore, sought to impose normative limits that could operate even when the state invokes existential danger. Instruments such as the Universal Declaration of Human Rights (UDHR)[106], the European Convention on Human Rights (ECHR)[107], and later the International Covenant on Civil and Political Rights (ICCPR)[108] attempted to establish rights that apply irrespective of citizenship, allegiance, or perceived loyalty to the state.

These frameworks significantly weaken the classical model inherited from Hobbes and Schmitt, which presumes that the sovereign defines both the subject of protection and the subject of threat. Human rights law, by contrast, de-territorialises protection: it posits that certain rights belong to individuals simply by virtue of being human, not by virtue of membership in a political community. The ultimate

[106] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).
[107] European Convention on Human Rights (1950) ETS No 5.
[108] International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

purpose is to prevent states from reclassifying individuals as "enemies" in order to remove them from legal protection. In this sense, human rights norms are designed to intersect with and contest the logic of enmity.

The effect is a radical transformation of the legal imagination. Under human rights constitutionalism, the state is no longer the sole arbiter of legitimate violence. Domestic courts, international tribunals, treaty bodies and supranational institutions can review and constrain state actions, including in situations the state frames as emergencies. This undermines the sovereign prerogative to decide unilaterally when ordinary legal guarantees must be suspended.

Despite their universalist ambition, human rights frameworks concede that emergencies may legitimately require restrictions on certain rights. Instruments like Article 15 of the ECHR[109] and Article 4 of the ICCPR[110] explicitly permit derogations in times of public emergency. These clauses acknowledge a reality that Hobbes and Schmitt made central: states must at times act decisively and with exceptional measures to ensure survival. Yet human rights law simultaneously places substantive and procedural boundaries on such derogations.

Most significantly, treaties identify a category of non-derogable rights—including the prohibitions on torture, slavery, retroactive criminal punishment, and (in many instruments) arbitrary deprivation of life.[111] These rights represent an attempt to stabilise a legal core that the sovereign cannot suspend, even in the face of an existential threat. The creation of such non-derogable norms is deeply tied to the recognition that the language of 'enmity' can be used to justify abuses precisely when legal protections are most needed.

These provisions aim to bind the sovereign at the point of maximum temptation to overreach by rendering specific prohibitions absolute. Human rights law establishes limits that cannot be eliminated by political rhetoric, the intensification of fear, or the designation of a population as hostile. Nevertheless, the very existence of derogation clauses demonstrates that human rights law accepts a reconfigured form of exceptionalism. The central question becomes not whether exceptional measures are permissible, but who decides their limits. This relocation of evaluative authority—to courts, committees, or supranational bodies—constitutes the most significant challenge to the sovereign claim to define threats and enemies.

[109] European Convention on Human Rights 1950, art 15.
[110] International Covenant on Civil and Political Rights 1966, art 4.
[111] ECHR 1950, art 15(2); ICCPR 1966, art 4(2).

A defining feature of the human rights framework is its insistence that individuals retain legal rights even when the state perceives them as dangerous. In traditional frameworks of sovereignty, the classification of an individual or group as an enemy result in the suspension of ordinary legal protections; in human rights law, by contrast, the state must justify any interference with rights through principles of legality, necessity, proportionality, and non-discrimination. These principles transform the individual from a passive object of sovereign decision into an active subject whose rights cannot be erased by political categorisation.

The principle of proportionality is fundamental. It requires states to show that measures restricting rights are suitable, necessary, and balanced in relation to their aim. This doctrine directly confronts the logic of enmity: if the state describes a group as an existential threat, proportionality demands evidence and rational justification, not merely political assertion. Judicial review becomes a mechanism for challenging the construction of 'enemy' categories.

Similarly, the principle of non-discrimination imposes limits on the sovereign's attempt to target particular groups based on ethnicity, religion, nationality or other classifications. Historically, many of the most extreme abuses of exceptional power—including internment, deportation, and deprivation of legal status—were justified on the basis that specific populations constituted inherent threats. Human rights norms place these practices under strict scrutiny.

Human rights law also transcends the boundaries of the state. International courts and supervisory bodies increasingly intervene in matters previously left to sovereign discretion. The European Court of Human Rights, the Inter-American Court, and periodic reviews under the UN system evaluate whether states have complied with their obligations to respect and protect rights. This transnational oversight challenges Schmitt's claim that political authority is necessarily indivisible and internally determined.

The evolution of jus cogens norms further strengthens this process—peremptory norms of international law from which no derogation is permitted.[112] Prohibitions on torture, genocide and crimes against humanity establish absolute limits to the treatment of individuals, regardless of their political status or the existence of emergencies. These norms represent the point at which human rights law most clearly denies the state the power to produce 'rightless' enemies.

In addition, the Responsibility to Protect (R2P) doctrine,[113] though controversial, reflects an emerging expectation that the international community may intervene when a state turns against

[112] Vienna Convention on the Law of Treaties 1969, art 53.
[113] 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) paras 138–140.

populations under its control. While not a fully established legal obligation, the doctrine signals a weakening of the idea that sovereignty entails exclusive authority over internal enemies.

Despite these developments, human rights law has not eliminated the sovereign tendency to construct and manage enemies. States continue to invoke security as a justification for extraordinary measures, and courts often defer to governments in contexts framed as involving terrorism or national survival. The jurisprudence of the ECHR and ICCPR indicates that states frequently succeed in narrowing rights through broad interpretations of 'necessity' and 'proportionality', particularly when dealing with individuals labelled as threats.

Moreover, human rights law is structurally reactive. It can review state action, but it cannot entirely prevent the initial construction of an enemy category. States still decide whom they regard as suspicious, dangerous or disloyal, and human rights institutions typically intervene only after harm has occurred. The boundary between legitimate security concerns and the political manufacture of enmity, therefore, remains contested and unstable.

Finally, the universality of human rights is under strain. Rising authoritarianism, technological surveillance, and the normalisation of emergency measures—particularly after 9/11—have created environments in which states can reintroduce exceptional logics under legalistic forms. The language of human rights may be invoked by states even as they erode its substance. This phenomenon illustrates that the central tension identified by Hobbes and Schmitt—the conflict between security and liberty—has not been resolved, but rather displaced into complex legal frameworks.

1.3.3. Balancing National Security and Individual Liberties

The tension between national security and individual liberty constitutes one of the defining problems of modern constitutionalism. If the previous sections examined the justificatory logic of exceptionalism and outlined the normative and institutional constraints imposed by human rights law, this final subsection turns to the problem of balance, understood not as a stable midpoint but as a dynamic—often unstable—equilibrium shaped by legal doctrine, political necessity, and the evolving nature of security threats.

Historically, the balance between national security and liberty has been structured by a set of recurring dilemmas. Liberal constitutional orders seek simultaneously to preserve public order and to

protect the autonomy and dignity of individuals.[114] Yet the more the state assumes responsibility for safeguarding collective security, the more it risks intruding on personal freedoms. This dilemma intensifies in moments of crisis—war, terrorism, insurgency—when future-oriented risks blur the line between prevention and punishment, and when states increasingly rely on pre-emptive measures.[115] In such contexts, the legal system must determine how much uncertainty justifies limiting fundamental rights, and whether such limits respect the proportionality, legality, and necessity requirements that underpin the rule of law.

Modern constitutional jurisprudence often frames this relationship in terms of proportionality, which has become the central doctrinal tool for mediating conflicts between liberty and security.[116] Under proportionality analysis, interferences with rights must be oriented toward legitimate aims, be suitable to achieve those aims, be necessary in the sense of involving the least restrictive means, and maintain a fair balance between the interests of the community and the rights of the individual. While the proportionality test provides structure to judicial reasoning, its inherent flexibility means that much depends on the court's willingness to interrogate the government's security claims. In times of perceived emergency, courts have tended to defer to the executive,[117] allowing broad discretion in assessing threats and crafting responses. The central risk of this deference is that the boundary between temporary crisis measures, and long-term structural shifts becomes porous.

Importantly, the notion of balance is not merely a judicial technique; it also expresses a constitutional theory of the state. Liberal democracies are premised on the idea that rights are not absolute yet remain foundational. Security, in this context, is not an aim external to constitutional order but one of the reasons that rights are recognised in the first place. The challenge lies in ensuring that the pursuit of security does not erode the very conditions that make rights meaningful. Excessive securitisation risks producing what scholars describe as a 'permanent state of exception',[118] in which the temporary logic of emergency becomes normalised, and where exceptional powers are no longer confined to extraordinary circumstances.

The post-9/11 era has provided a clear illustration of these dynamics. The shift from traditional, state-centric warfare to asymmetrical and transnational threats has encouraged states to expand

[114] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 3–6.
[115] Gross and Ní Aoláin (n 83) 9–14.
[116] Barak (n 114) ch 1.
[117] *A v Secretary of State for the Home Department* (n 86).
[118] Agamben, *State of Exception* (n 66) 2–7.

surveillance, preventive detention, and administrative control regimes.[119] These measures increasingly operate in legal grey zones where judicial oversight is limited, evidence is classified, and individuals are targeted based on risk profiles rather than proven wrongdoing. The challenge for constitutional democracies is that the more regulatory and preventive the security apparatus becomes, the more difficult it is to maintain meaningful safeguards against arbitrariness. Balancing liberty with security therefore requires not only doctrinal constraints but also institutional ones, including independent courts, parliamentary scrutiny, and effective public accountability.[120]

At a deeper conceptual level, the problem of balance brings into question the traditional dichotomy between the individual and the state. Human rights frameworks tend to understand liberty as a constraint on public power, whereas national security discourse often depicts the state as a necessary guardian against external and internal threats. Yet these perspectives are not mutually exclusive. A functioning security system is required for rights to be exercised, and a robust rights framework is required to ensure that security policies remain legitimate, proportional, and oriented toward public rather than partisan interests. The constitutional challenge is therefore not to choose between these values but to create a structure within which each can reinforce the other.[121]

Ultimately, achieving a sustainable balance between national security and individual liberty depends on recognising both the inevitability of state power and the necessity of constraining it. Constitutional democracies must resist the temptation to treat liberty as expendable and security as absolute. Instead, the aim is to cultivate a legal and political culture in which security measures are framed as exceptional rather than routine, where rights are presumptively protected even in times of crisis, and where the justification for any interference is subject to rigorous public and judicial scrutiny. Only within such a framework can the pursuit of security coexist with the preservation of a free and democratic society.

[119] David Dyzenhaus (n 83) 41–44.
[120] Gross and Ní Aoláin (n 83) 59–64.
[121] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 190–192.

CHAPTER 2: The Enemy and the State: Divergent Conceptions of Sovereignty in the United States and China

2.1 Sovereignty and the Location of the Enemy

2.1.1. Shared Logics of Enmity Across Legal Orders

Both liberal and authoritarian modern states exhibit a fundamental logic in constructing the figure of the 'enemy' through law. As discussed in Chapter 1, the classic Schmittian insight holds that the enemy is not merely a lawbreaker or immoral actor, but rather an existential threat to the unity and survival of the political community. According to Schmitt, the friend–enemy distinction defines the outer boundary of normal politics, identifying those who do not belong to the community and who may therefore be subject to exceptional treatment.[122] Although liberal constitutionalists often reject Schmitt's authoritarian implications, they also employ a variant of this friend–enemy logic at the periphery of their legal systems. Thus, every legal-political order, whether explicitly or implicitly, defines an enemy to demarcate the point at which ordinary law gives way to exceptional rule.[123] This subsection examines three common features of enmity construction across different regime types: (i) the use of 'the enemy' to delineate the boundaries of the legal community, (ii) the justification of extraordinary measures in response to perceived threats, and (iii) the maintenance of sovereign authority through the power to identify and confront enemies.

In all states, the concept of the enemy functions to demarcate the protected interior from the threatening exterior of the legal order. Both liberal democracies and authoritarian regimes begin by defining those entitled to legal protections—such as citizens, law-abiding subjects, or friends—and those at the margins, including traitors, terrorists, or subversives, who are constructed as enemies. In this context, the enemy is a figure against whom the community's identity is clarified, and for whom legal norms are often suspended or reinterpreted.[124] Crucially, liberal systems primarily externalise enmity, focusing on foreign adversaries, terrorists, or other external groups as existential threats to justify mobilisation and relaxation of normal rules, whereas authoritarian systems tend to internalise enmity by designating domestic groups or dissenting individuals within the state as threats—such as 'enemies of the

[122] Schmitt, *The Concept of the Political* (n 23) 26–37.
[123] Dyzenhaus (n 83) 1–12; Gross and Ní Aoláin (n 83) 1–5.
[124] Agamben, *State of Exception* (n 66) 1–4; Mark Neocleous, *Critique of Security* (Edinburgh University Press 2008) 23–28.

people,' 'counter-revolutionaries,' or 'separatists'—as threats to be neutralised for social unity. While liberals draw the boundary at the state's edge, authoritarians mark enemies within. Despite these differing emphases, the underlying logic remains consistent as legal orders use the figure of the enemy to identify those excluded from ordinary rights and obligations. This act of designation establishes zones where full legal protections do not apply. Whether by labelling a foreign militant an 'unlawful enemy combatant' or a domestic dissident a 'criminal element,' the legal system carves out exceptions for enemies, and this classification is profoundly political, as it excludes certain actors from the community that the law protects.[125]

A second shared feature is that both liberal and authoritarian regimes invoke enemies to justify suspending or extending normal legal constraints. The perceived threat—whether from terrorist networks, dangerous ideologies, or impending civil disorder—justifies authorities' claim that ordinary legal rules are inadequate to address extraordinary dangers.[126] A key distinction is that liberal democracies usually stress that emergency powers are temporary and constrained, with exceptional measures authorised by special legislation, such as broad anti-terrorism statutes or wartime decrees. These are accompanied by legal rationales and often judicial review, so departures from individual rights are formally limited and portrayed as temporary.[127] In authoritarian regimes, the transition to exceptional powers is more direct: states of emergency may be invoked without procedural obstacles, and broad definitions of subversion enable routine designation of enemies from groups within. There may be little to no judicial review or legislative limitation, making the exceptional powers potentially permanent.[128] Despite procedural differences, both systems recalibrate the rule of law when addressing enemies, embedding exceptions in law through mechanisms tailored to their respective regimes. In both cases, the survival of the community is asserted as justification, but liberal regimes emphasise temporary and overseen measures, while authoritarian regimes treat them as lasting governance instruments.

A third underlying feature is that the processes of defining and confronting enemies are fundamentally exercises of sovereign authority. Regardless of constitutional structure, the power to

[125] David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New Press 2003) 3–15; Jens David Ohlin, 'The Combatant's Privilege in Asymmetric and Covert Conflicts' (2015) 40 *Yale Journal of International Law* 337, 340–45.
[126] Gross and Ní Aoláin (n 83) 11–18.
[127] Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press 2006) 13–24; Dyzenhaus (n 83) 42–50.
[128] Agamben, *State of Exception* (n 66) 2–4; Carl J Friedrich, *Constitutional Government and Democracy* (Little, Brown 1950) 558–62.

declare 'this is the enemy' constitutes a core sovereign function that affirms the supremacy of the state.[129] In liberal constitutional democracies, this authority is typically dispersed and formalised through legal mechanisms. Laws define treason or terrorism, and procedures involving courts or legislatures govern emergency declarations, accompanied by rhetoric that frames the fight against enemies as a defence of the rule of law. Formally, systems of checks and balances and multiple branches of government are intended to mediate the identification of enemies and the permissible responses to them. In practice, however, liberal systems often concentrate decisive power in the executive during security crises. For instance, following 9/11, the U.S. President's commander-in-chief authority was interpreted expansively to identify Al-Qaeda and others as enemies and to authorise unilateral action. Although courts and legislatures may exercise some oversight, they frequently defer to executive security claims, implicitly recognising the necessity of a final decision-maker in emergencies.[130]

In more centralised or authoritarian systems, sovereign authority over the designation of enemies is intentionally less constrained. The ruling party or leader can identify opposition groups, ethnic minorities, or political critics as enemies of the state with little institutional resistance. The separation between political decision-making and legal implementation is minimal; the regime's identification of an enemy is rapidly codified in broad statutes, such as anti-subversion acts or national security laws, and enforced without independent oversight.[131] Despite these institutional differences from liberal systems, both regime types are united by the fundamental logic of reasserting sovereign supremacy through enemy designation.

Importantly, these differences in institutional form do not undermine the fundamental similarity between regimes. In both cases, the act of naming the enemy reaffirms the paramount authority of the sovereign—whether embodied by elected officials, the Party, or a singular Leader. By identifying an existential adversary, the state assumes the role of protector and legitimises actions that might otherwise be considered illicit. The designation of the enemy thus preserves the integrity of the political community and clarifies the *locus* of ultimate power. It serves both as a unifying mechanism, mobilising the populace against a perceived threat, and as a legitimating device, reinforcing the state's right to act decisively.[132]

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[129] Schmitt, *The* Concept of the Political (n 23) 5–7; Martin Loughlin, Foundations of Public Law (Oxford University Press 2010) 347–52.
[130] Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (W W Norton 2007) 58–71; Aziz Z Huq, 'The President and the Detainees' (2008) 165 *University of Pennsylvania Law Review* 499, 503–10.
[131] Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 559, 565–70.
[132] Schmitt, *Political Theology* (n 25) 5–7; Loughlin (n 129) 352–60.

Even in liberal *polities* that prioritise individual rights, moments of crisis reveal the resurgence of sovereignty in its most unmediated form: a decision is made to override normal law, at least for those excluded from its full protection. In authoritarian systems, there is no pretence that law fully constrains sovereignty in matters of security. In both contexts, the legal category of 'enemy' functions as a mechanism through which sovereign power delineates its own boundaries and reasserts its primacy.[133]

Despite clear ideological differences between open societies and one-party states, their approaches to enmity reveal a significant continuity. Both liberal and authoritarian orders rely on defining an enemy at the margins of the law to protect the polity from perceived existential threats. The primary differences concern who is designated as the enemy and the mechanisms by which this designation is implemented—differences that reflect distinct conceptions of sovereignty and legality. However, the act of designation itself is a constant. Recognising this shared logic of enmity, as it is mediated across different contexts, is essential for the comparative analysis that follows. This observation suggests that the tension between security and law is a structural feature of modern statehood, not unique to any particular system. The subsequent sections will examine how this dynamic manifests in the United States and China. Each state addresses the question of the enemy differently—one historically externalising threats and seeking to reconcile emergency powers with constitutionalism, the other often internalising threats and responding with centralised authority—yet both exemplify the same underlying pattern. Through these case studies, Chapter 2 will demonstrate how the legal construction of 'the enemy' defines the boundaries of law and the character of sovereignty in both liberal and authoritarian contexts.

2.1.2. Divergent Sovereign Strategies: Externalisation vs Internalisation

Building on the shared political logic of enmity outlined above, this subsection examines how different constitutional orders locate the figure of the 'enemy' in divergent ways. In broad terms, liberal-democratic states like the United States tend to externalise enmity—projecting existential threats outward and treating the 'enemy' as fundamentally outside the political community.[134] Yet, authoritarian systems such as China take the opposite approach: enmity is internalised, with sources of subversion and deviance identified within the population and internal dissidence treated as the primary threat to sovereign unity.[135]

[133] Agamben, *State of Exception* (n 66) 23–31; Dyzenhaus (n 83) 196–202.
[134] Cole, *Enemy Aliens* (n 125) 3–20; Ackerman (n 127) 13–24.
[135] Carl Minzner, *End of an Era: How China's Authoritarian Revival Is Undermining Its Rise* (Oxford University Press 2018) 41–64; Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge University Press 2002) 280–309.

These opposing orientations are more than mere policy choices; they are structural tendencies, each rooted in a particular system's conception of sovereignty. The liberal vision of the state, with its emphasis on constrained power and individual rights, pushes enmity to the periphery—beyond borders or outside normal civic life. In contrast, the authoritarian vision, grounded in ideals of unity and centralised authority, draws enmity to the core of domestic governance and posits that the gravest dangers arise from within the polity. All states must confront security threats, yet each positions 'the enemy' in a unique relation to the body politic. This divergence reflects distinct foundations of political legitimacy and constitutional design.

Liberal democracies typically conceptualise the enemy as an external adversary, a perspective shaped by historical and constitutional experiences. In the United States, for instance, the founding generation's fear of tyranny resulted in a constitutional structure wary of concentrated power. Internal political conflict—such as dissent, opposition, or protest—has generally been legitimised as part of normal politics rather than as an existential threat to the state. Consequently, existential danger is located beyond the community's borders. In this context, the 'enemy' is often defined as someone outside the circle of presumed loyalty, such as a foreign aggressor, a terrorist, or any actor beyond the civic social contract. This logic leads liberal states to respond to threats by establishing legal and physical boundaries that separate perceived dangers from the general population.[136] Mechanisms such as border controls, immigration law, distinctions between citizens and aliens, and the use of extraterritorial or exceptional sites serve to externalise enmity. A notable example is the U.S. decision to detain post–9/11 terrorism suspects at Guantánamo Bay, an offshore military base under U.S. control but technically outside U.S. sovereign territory. This arrangement placed detainees beyond the reach of normal constitutional constraints, symbolising an 'outside' space for managing those deemed enemies without integrating them into the domestic legal order.[137] Similarly, legal doctrines such as the classification of 'enemy combatants,' primarily applied to non-citizens captured abroad, illustrate how liberal regimes use status-based exclusions to keep the enemy concept at the margins of the polity.[138] Ultimately, liberal-democratic sovereignty seeks to maintain internal civic unity and rule-of-law normalcy by relegating true enmity to external spaces such as foreign battlefields, border zones, or exceptional detention camps.

[136] Cole, *Enemy Aliens* (n 125) 21–35.
[137] Kal Raustiala, 'The Geography of Justice' (2005) 73(2) *Fordham Law Review* 2501, 2504–12.
[138] Ohlin (n 125) 340–45.

Even when liberal states do confront internal threats, they tend to frame such episodes as both exceptional and temporary. Periodic crackdowns on internal 'enemies'—such as the persecution of communists during the Red Scare or post-9/11 surveillance targeting Muslim communities—have occurred in the United States and other democracies.[139] However, these measures are typically justified as extraordinary responses to abnormal circumstances, distinct from the normal functioning of politics. Liberal constitutionalism, at least in principle, holds that ordinary domestic dissent should not be equated with treason.[140] When segments of the population are cast as potential enemies—as in the case of Japanese-Americans during World War II or suspected extremists after 2001—the state frequently links the threat to external conspiracies or wartime exigencies to justify its actions. Such policies are often, over time, subject to judicial or public repudiation as deviations from liberal norms. Ambivalence characterises this pattern: liberal states may implement exceptional security measures under duress, but do so with underlying normative discomfort. Declaring internal enmity is seen as an anomalous state of exception—always intended to be temporary and reversible. In essence, this approach reflects a deeper liberal commitment: sovereignty is ultimately constrained by law and popular consent. The government may combat enemies, but it must maintain that it is not permanently redefining the boundaries of 'the people.' Ideally, enemies are outsiders, not members of the constitutional community. When the state targets its own citizens, such actions are presented as regrettable but necessary exceptions, not as a new norm.

In authoritarian and one-party states, the logic of enmity is fundamentally different. Rather than distinguishing sharply between a loyal populace and external adversaries, these regimes identify danger within society itself. In China, this inward orientation of threat perception is deeply rooted in both political tradition and ideology. From imperial times through the People's Republic, Chinese rulers have prioritised social harmony, ideological conformity, and unitary authority as foundations of stability. Threats are perceived as arising from internal disunity, including factionalism, deviant beliefs, ethnic separatism, or disloyal elements among the population.[141] The Communist revolutionary experience reinforced this perspective, with Maoist doctrine explicitly identifying 'internal enemies'—such as counter-revolutionaries, class enemies, and traitors—who were deemed essential to the revolution's

[139] Geoffrey R Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (W W Norton 2004) 285–300, 503–12.
[140] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 17–25.
[141] Michael Dillon, *China: A Modern History* (I B Tauris 2010) 23–28; Peerenboom (n 135) 23–35.

survival.[142] In contemporary China, the language of state security continues to focus on internal enemies: authorities frequently warn against 'splittists' and 'subversives,' terms applied to Tibetans or Uyghurs with separatist aspirations, political dissidents, religious movements, or anyone considered a threat to Party leadership and social unity. Thus, the prevailing assumption in the authoritarian paradigm is that the most serious threats to the state originate within its own borders, embedded in the minds and networks of its subjects, rather than from foreign adversaries.[143]

The internalisation of enmity in authoritarian systems results in security being integrated into everyday governance, in contrast to the liberal model. While liberal states view emergency powers as rare exceptions, authoritarian states treat the maintenance of security and orthodoxy as a continuous and routine function of government. For the Chinese Communist Party (CCP), political security, defined as the security of the regime's hold on power, is of utmost importance. Law and policy are employed to identify, pre-empt, and neutralise internal threats on an ongoing basis, rather than only during declared emergencies. Consequently, the distinction between 'ordinary' law and 'exceptional' security measures becomes blurred, and preventive repression is institutionalised. Broad legal definitions of subversion, terrorism, or sedition enable the state to categorise dissidents or minority groups as enemies under legal frameworks.[144] For instance, China's recent Counterterrorism Law[145] and national security statutes encompass a wide range of activities deemed threatening to national unity or socialist principles, providing a constant legal basis for surveillance, censorship, re-education campaigns, and mass detention. The Chinese legal order thus demonstrates how law can serve as an instrument of sovereignty rather than a constraint upon it. In this context, law emanates from the political will of the sovereign—the Party-state—and is designed to enforce loyalty and eliminate deviance. The result is a 'securitisation of everything,' where virtually any aspect of life—from religious practice to online speech to ethnic culture—can be framed as part of the struggle against internal enemies and subjected to state control. Enmity is regarded not as an external anomaly but as a domestic pathology to be continually purged to safeguard the integrity of the state.[146]

These divergent strategies of externalising vs. internalising enmity flow from fundamental differences in constitutional structure, political-historical experience, and notions of legitimacy. In liberal

[142] Maurice Meisner, *Mao's China and After: A History of the People's Republic* (3rd edn, Free Press 1999) 68–85.
[143] Minzner (n 135) 41–64.
[144] Eva Pils, 'China's Counterterrorism Law: A New Legal Foundation for Repression?' (2016) 15(2) *China Perspectives* 3, 7–8; Peerenboom (n 135) 280–309.
[145] Counterterrorism Law of the People's Republic of China 2015.
[146]Minzner (n 135) 121–29.

democracies, sovereignty is constitutionally fragmented and balanced. The separation of powers, federalism, and judicial review create multiple veto points that complicate the state's ability to declare and act against internal enemies. The underlying social contract in a liberal system assumes a pluralistic citizenry – different beliefs and oppositional politics are part of the accepted landscape, so long as they operate within legal bounds. Legitimacy here rests on protecting citizens' rights and choices; therefore, a government that openly brands segments of its own people as enemies risks its normative justification for power.[147] American political culture, for instance, venerates the idea of loyal opposition and the right to dissent. This does not mean internal conflicts never occur, but the bar for treating domestic groups as existential threats is extremely high. Even when executives push that boundary, as in interning Japanese-Americans in the 1940s or surveilling civil rights activists in the 1960s, the constitutional structure provides avenues for challenge and, eventually, for reconciliation with the liberal ideal—court rulings, apologies, or legislative corrections.[148] Thus, the externalisation of enmity is reinforced by a constitutional design that favours law functioning as a check on power. Sovereignty, in a liberal-democratic sense, is ultimately seen as residing in the people as a whole, but delegated in limited ways to the state; the state must therefore continually justify its security measures in legal terms and cannot permanently redefine who 'the people' are without losing legitimacy.[149] In short, the liberal model's externalised enemy corresponds to a vision of unity based on voluntary allegiance and legal equality: the enemy is he who stands outside that voluntary community, not one who merely dissents within it.

Authoritarian regimes reverse many of the premises found in liberal democracies. In these systems, sovereignty is typically unitary and undivided, often embodied in a single party, leader, or ideological vanguard. Rather than fragmentation, there is a fusion of power: the Party's political will becomes law, and courts, if they exist independently, are not expected to impede security policies.[150] China's constitutional order, in both its imperial and communist forms, prioritises unity over plurality. Dissent is not regarded as a healthy sign of freedom but as a threat to the body politic. Chinese political tradition values order, harmony, and the Mandate of Heaven, the belief that legitimate rule is contingent upon maintaining social harmony.[151] This tradition, reinforced by the trauma of internal upheavals such as the Cultural Revolution and the Tiananmen unrest, has entrenched the view that internal instability

[147] Dworkin (n 140) 24–30.
[148] Stone (n 139) 423–32.
[149] Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991) 7–15; Loughlin (n 129) 352–60.
[150] Mark Tushnet, *Authoritarian Constitutionalism* (Cambridge University Press 2015) 17–24.
[151] Dillon (n 141) 12–18.

poses the greatest danger to the nation.[152] Consequently, unity is conceived not as a negotiated consensus among diverse groups, but as a singular people guided, and if necessary, shaped by sovereign authority. Legitimacy in the Chinese context is achieved by delivering stability, development, and national strength, and by preventing internal division or subversion. The Party's claim to rule is based on its role as guardian of the people's welfare and arbiter of the correct political line; those who challenge or deviate from this line are, by definition, excluded from the people. In this framework, internal enemies are a persistent reality, and neutralising them is equated with defending national unity and regime legitimacy. Law in this context does not primarily function as a neutral adjudicator among social interests or as a shield for individual liberties. Instead, it serves as an extension of sovereign will, a tool for organising and disciplining society in accordance with state objectives.[153] While a liberal system may question whether a security measure exceeds legal limits, an authoritarian system presumes that security goals define the scope of the law. Can this contrast be summarised as follows: Is law a boundary for sovereignty, or an expression of it? Liberal states aspire to the former, insisting that even the pursuit of enemies must conform to legal norms, whereas authoritarian states tend toward the latter, adapting legal norms to meet the demands of combating enemies.

It is essential to recognise that these are ideal-typical models. In practice, no state fully externalises or internalises all threats; liberal democracies have confronted insider threats with illiberal measures, and even the most authoritarian regimes acknowledge certain external dangers. Nevertheless, the structural tendencies are evident: systems characterised by dispersed power and individual rights are more likely to presume that the enemy originates from outside, while systems based on concentrated power and enforced orthodoxy are more inclined to identify the enemy within. This theoretical divergence provides the foundation for the detailed case studies that follow. The following section will analyse the American paradigm, demonstrating how U.S. legal and constitutional practices reflect an externalisation of enmity moderated by liberal norms. Further, Section 2.3 will examine the Chinese paradigm, investigating how China's conception of sovereignty and security has institutionalised the internalisation of enmity. By transitioning from theory to specific contexts, the subsequent sections will illustrate how each state's laws and institutions operationalise these logics, highlighting both the promises and the pathologies of these divergent strategies in practice.

[152] Minzner (n 135) 83–102.
[153] Peerenboom (n 135) 280–309; Tushnet (n 150) 21–28.

2.2 The American Paradigm: Liberty, Sovereignty, and the External Threat

2.2.1. Foundational Tensions: Fear of Tyranny and the Birth of Constitutional Limits

The American conception of sovereignty is defined by a fundamental ambivalence toward concentrated power. Originating in a revolutionary struggle against imperial authority, the United States developed a pervasive fear that unchecked power, whether monarchical or popular, would inevitably lead to tyranny.[154] This historical context profoundly influenced the constitutional structure of the American state and continues to inform its approach to security, emergency powers, and the identification of enemies.

A central paradox defines the American constitutional project: the state must provide security while also being constrained from threatening individual liberty. This distrust of sovereign power was institutionalised through mechanisms intended to fragment, rather than consolidate, authority. Separation of powers, federalism, and checks and balances function not only as technical arrangements, but as normative commitments rooted in the belief that liberty is maintained through institutional rivalry. Within this framework, sovereignty is intentionally dispersed, making the exercise of coercive power both procedurally complex and subject to normative suspicion.[155]

This constitutional suspicion of power directly shapes the conceptualisation of enmity. Since internal political dissent was integral to the revolutionary experience, it could not be readily cast as an existential threat to the polity. Instead, opposition, disagreement, and contestation became normalised features of republican self-government.[156] The First Amendment's protections of speech, religion, and assembly[157] exemplify this orientation: internal conflict is managed through legal means rather than eliminated. Consequently, the American constitutional tradition tends to identify the enemy as external to the political community.

This externalisation of enmity is closely associated with liberal social contract theory, especially in its Lockean form. As outlined in Chapter 1, Locke's model conceptualises government as a fiduciary institution with limited powers to safeguard pre-existing rights. In this framework, the primary danger is

[154] Gordon S Wood, *The Creation of the American Republic, 1776–1787* (University of North Carolina Press 1969) 403–10.
[155] The Federalist No 51 (James Madison); Loughlin (n 129) 323–31.
[156] Gordon S Wood, *The Radicalism of the American Revolution* (Vintage 1991) 95–104.
[157] US Constitution, amend I; Thomas I Emerson, *The System of Freedom of Expression* (Random House 1970) 3–15.

not civil disorder but the potential for abuse by rulers. Tyranny, rather than rebellion, is regarded as the central threat.[158] This perspective decisively shapes American constitutional logic: security measures are primarily justified in response to external threats, while internal opposition is presumed legitimate.

However, this presumption is not absolute. The American constitutional system includes mechanisms for suspending or adjusting normal protections during perceived crises. Provisions such as the Suspension Clause,[159] the Commander-in-Chief power, and the war powers framework recognise that extraordinary threats may necessitate extraordinary responses. Nevertheless, these powers are situated within a legal structure that emphasises, at least rhetorically, their exceptional and temporary nature. Emergency authority is therefore presented as a deviation from, rather than a replacement for, constitutional normalcy.[160]

The ongoing tension between liberty and security has produced a distinctive pattern in American legal history. Periods of war, insurrection, or perceived subversion have repeatedly tested the boundaries of constitutional restraint, as seen in the Alien and Sedition Acts[161] and Cold War loyalty programs. Although the state has at times identified specific groups as existential threats, these episodes are generally regarded as aberrations and are often later repudiated through political, judicial, or historical processes.[162] Even when exceptional measures are implemented, they are accompanied by a persistent sense of constitutional unease.

This dynamic produces a security logic marked by ambivalence rather than certainty. The American state asserts the necessity of decisive action in response to threats, yet remains normatively committed to the principle that unchecked power constitutes a danger. As a result, enmity is managed through legal categories such as alienage, territoriality, and wartime status, which maintain the internal coherence of constitutionalism without fundamentally redefining political membership. This foundational tension accounts for the United States' historical reluctance to conceptualise internal populations as enemies of the state, even during periods of acute insecurity. When enmity does arise within the constitutional order, it is typically mediated by distinctions that situate the threat at the periphery of political belonging.[163] The following sections analyse how this logic is implemented through

[158] Locke (n 35) 412–28.
[159] US Constitution, art I, §9, cl 2.
[160] Gross and Ní Aoláin (n 83) 57–69.
[161] Alien and Sedition Acts 1798, ch 58, 1 Stat 570.
[162] Stone (n 139) 285–300, 503–12; Cole, *Enemy Aliens* (n 125) 21–35.
[163] Cole, *Enemy Aliens* (n 125) 41–60.

the legal tradition of alien enemies and how, during crises, constitutional limits are tested but not formally abandoned.

2.2.2. The Alien Enemies Tradition: External Threats and the Legalisation of Suspicion

While American constitutionalism is rooted in a profound scepticism toward sovereign authority, it has simultaneously sustained a tradition of managing perceived external threats through status-based legal classifications. This approach represents a persistent attempt to balance security imperatives with constitutional limitations by externalising enmity and associating suspicion with legal identity instead of internal political dissent. The concept of the 'alien enemy' is central to this legal framework, serving as a juridical tool that enables the state to act decisively without overtly compromising its commitment to internal liberty.[164]

Since its inception, the United States has maintained a clear distinction between citizens and non-citizens in security matters. The Alien and Sedition Acts of 1798[165] illustrate this principle. Although the Sedition Act's[166] effort to criminalise domestic dissent was controversial and short-lived, the Alien Acts[167] established a more enduring system by granting the executive broad powers over foreign nationals considered threats to public safety. The Alien Enemies Act, 47[168] specifically, permitted the detention or removal of nationals from hostile states during declared wars without individualised evidence of wrongdoing. In this framework, enmity was inferred from nationality and geopolitical association rather than from criminal acts.

The early use of alienage as a proxy for threat demonstrates a distinctive legal strategy. Instead of framing internal opposition as an existential risk, the American state created mechanisms to address insecurity by designating the enemy as an external presence within its borders. Foreign nationals became subjects of suspicion because they existed outside the fundamental constitutional relationship between government and citizen. The legal classification of the alien enemy enabled the state to exercise

[164] ibid 7–15.
[165] Alien and Sedition Acts 1798 (n 161).
[166] Sedition Act 1798, ch 74, 1 Stat 596; Stone (n 139) 25–60.
[167] Alien Friends Act 1798, ch 58, 1 Stat 570.
[168] Alien Enemies Act 1798, ch 66, 1 Stat 577 (codified at 50 USC §§21–24).

exceptional powers while formally maintaining the normative integrity of constitutional protections for citizens.[169]

Although this logic has evolved, it has remained persistent. During major conflicts such as the World Wars and the Cold War, the state consistently employed legal distinctions based on nationality, loyalty, and affiliation. In these contexts, suspicion was generalised, targeting entire groups rather than specific actions. The legal approach to non-citizens was preventive, aiming to neutralise potential threats before they emerged rather than punishing past misconduct. These measures were typically justified as wartime necessities, reinforcing the notion that such departures from standard legal norms were exceptional responses to external threats.[170]

The alien enemy's tradition demonstrates how legal frameworks can normalise suspicion without explicitly violating constitutional principles. By presenting security measures as matters of immigration control, wartime authority, or national defence, the state circumvented direct challenges to the liberal assumption that citizens possess rights to due process and political participation. Consequently, exposure to coercive power was shifted onto individuals whose legal status already identified them as outsiders. Suspicion was thus institutionalised, embedded in ostensibly neutral legal categories that nonetheless had significant implications for liberty and inclusion.[171]

This framework highlights a significant asymmetry in the American understanding of enmity. Internal dissent is constitutionally safeguarded as an element of a democratic society, whereas external threats are addressed through mechanisms that conflate presence with danger.[172] The alien enemy need not be an active adversary; alienage alone justifies precautionary intervention. This logic foreshadows later developments in security law, where affiliation, association, or proximity to perceived threats can prompt coercive actions even without concrete evidence of individual wrongdoing.

Simultaneously, the alien enemy's tradition is characterised by ongoing tension and debate. Actions against foreign nationals have frequently provoked political opposition, judicial review, and retrospective critique. However, such challenges seldom dismantle the foundational framework. Rather, they establish a pattern in which exceptional practices are criticised in theory but maintained in law, remaining available for future crises. The persistence of this tradition highlights its functional

[169] Cole, *Enemy Aliens* (n 125) 21–35.
[170] Stone (n 139) 285–300.
[171] Cole, *Enemy Aliens* (n 125) 41–60.
[172] Gerald L Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton University Press 1996) 62–70.

significance within American constitutionalism, as it reconciles security and liberty by upholding the internal-external distinction central to the constitutional order.

This tradition becomes especially prominent when threats cannot be easily limited to state-based adversaries or territorial boundaries. The emergence of non-state actors, transnational networks, and asymmetric warfare complicates the distinction between internal and external threats, placing the alien enemy's framework under pressure.[173] The response, as subsequent chapters will demonstrate, is adaptation rather than abandonment. Legal categories are expanded to address new types of threats, extending suspicion beyond traditional wartime enemies while maintaining the core logic that links enmity to externality rather than internal dissent.

An examination of the alien enemy's tradition reveals that American legal constructions of the enemy have consistently relied on status-based suspicion rather than explicit declarations of enmity. This approach maintains the appearance of constitutional normalcy while facilitating preventive security measures against individuals situated at the periphery of political membership.

2.2.3. The Liberal Paradox: Exceptional Measures under a Rule-of-Law State

The American approach to security demonstrates a persistent liberal paradox: exceptional measures are authorised and maintained through legal mechanisms, even as the legal system continues to assert its commitment to normality, temporality, and individual rights. Instead of suspending the rule of law, the United States typically integrates emergency powers into its legal framework, resulting in a security regime that is formally legal but substantively exceptional. This paradox is central to the American model of sovereignty and informs its unique construction of enmity.[174]

Liberal constitutionalism, at the normative level, assumes that law constrains political power. Emergency authority is viewed as a temporary deviation, justified solely by extraordinary circumstances and intended for eventual reversal.[175] However, historical evidence indicates that American security practices often diverge from this ideal. Exceptional measures are not only tolerated during crises; they

[173] Samuel Issacharoff and Richard H Pildes, 'Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime' (2004) 5 *Theoretical Inquiries in Law* 1, 6–14; Cole, *Enemy Aliens* (n 125) 225–40.
[174] Dyzenhaus (n 83) 1–7; Gross and Ní Aoláin (n 83) 3–10.
[175] Gross and Ní Aoláin (n 83) 17–26; Ackerman (n 127) 1–9.

are legalised, institutionalised, and sometimes normalised. The tension between fidelity to the rule of law and the security-driven exception defines the American paradox.[176]

This dynamic is evident in how legal frameworks address uncertainty and threats. Instead of suspending legality, the American state generally expands statutory and executive authority while preserving the formal rhetoric of constitutional continuity. Emergency measures are justified through broad authorisations, deferential judicial standards, and flexible interpretations of existing powers. Consequently, the exception is embedded within the legal order rather than existing outside it. Law thus serves as the vehicle for exercising extraordinary authority, rather than acting as a barrier to it.[177]

The management of enmity within this framework exhibits similar ambivalence. The enemy is seldom defined in absolute or permanent terms. Instead, legal categories are constructed to accommodate ambiguity, framing threats as contingent, evolving, and context-dependent. This approach enables the state to act preventively without making explicit claims that would challenge constitutional self-conceptions. As a result, the enemy is both exceptional and legally recognisable, positioned within a system that maintains the appearance of due process and legality, even as substantive protections are diminished.[178]

Judicial oversight is central to maintaining this paradox. Courts frequently serve as protectors of constitutional principles, emphasising rights, procedural safeguards, and the separation of powers. Simultaneously, they often defer to executive decisions in national security matters, especially when arguments of expertise, urgency, or institutional competence are presented. This stance results in conditional restraint: the judiciary regulates the boundaries of exceptional power without challenging its fundamental logic. The outcome is not a restoration of normality, but a managed accommodation between legal norms and perceived necessity.[179]

This accommodation is further strengthened by the presentation of exceptional measures as responses to external threats. By situating danger outside the political community, the American state maintains a conceptual separation between security and internal political life. Exceptional powers are thus justified as protective, directed outward rather than inward. However, this distinction becomes increasingly challenging to uphold as threats blur the lines between foreign and domestic, civilian and

[176] Dyzenhaus (n 83) 50–66; Stone (n 139) 533–45.
[177] Eric A Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press 2007) 3–12.
[178] Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (2nd edn, Hart 2015) 190–200; Cole, *Enemy Aliens* (n 125) 219–30.
[179]Posner and Vermeule (n 177) 23–40.

combatant, and peace and war. In these circumstances, the liberal paradox intensifies: the legal system must adapt its categories to address new forms of enmity without explicitly abandoning its foundational principles.[180]

The persistence of this paradox indicates that it is not a temporary shortcoming of liberal constitutionalism, but rather a structural characteristic. The rule-of-law state relies on the ability to respond decisively to perceived existential threats, yet it lacks the conceptual framework to fully recognise the enduring nature of such responses.[181] As a result, exceptional measures are presented as provisional even when they become permanent, and legality serves to manage rather than resolve the tension between liberty and security.

This paradox forms the essential context for understanding the post-9/11 legal order discussed in Chapter 3. The development of new enemy categories, the expansion of executive authority, and the transformation of judicial oversight do not signify a break with American constitutionalism, but rather an intensification of its internal contradictions. By legalising exceptions rather than openly declaring them, the American state maintains its self-conception as a rule-of-law system while exercising powers that conflict with that identity. The subsequent analysis examines how this paradox manifests in specific legal practices, highlighting both the resilience and the vulnerability of liberal constitutional limits during prolonged insecurity.

2.3 The Chinese Paradigm: Unity, Sovereignty, and the Internal Threat

2.3.1. Imperial Foundations: Harmony, Hierarchy, and the Mandate of Heaven

The Chinese conception of sovereignty is rooted in a political tradition that contrasts sharply with liberal constitutionalism. Instead of arising from a revolutionary scepticism of authority, imperial Chinese governance was structured around normative ideals of unity, hierarchy, and moral order. Authority derived its legitimacy not from popular consent or institutional checks, but from a cosmological and ethical framework that equated political stability with harmony.[182] This tradition continues to shape the Chinese state's approach to security, dissent, and internal threats.

[180] Mary L Dudziak, *War Time: An Idea, Its History, Its Consequences* (Oxford University Press 2012) 95–112; Cole, *Enemy Aliens* (n 125) 231–40.
[181] Dyzenhaus (n 83) 82–95; Gross and Ní Aoláin (n 83) 230–40.
[182] Benjamin A Elman, *Civil Examinations and Meritocracy in Late Imperial China* (Harvard University Press 2013) 1–8.

The concept of the Mandate of Heaven was central to imperial political thought. Sovereign authority depended not on legal accountability to subjects, but on the ruler's ability to maintain order, prosperity, and cosmic balance. Political legitimacy was thus determined by outcomes: rebellion was not inherently illegitimate, but was viewed retrospectively as evidence that the mandate had been lost.[183] In contrast to Western social contract theories, which interpret resistance as a legal response to violated obligations, the Chinese tradition regarded disorder as a moral and administrative failure. Stability, rather than liberty, served as the principal criterion for good governance.

The prioritisation of harmony significantly influenced the relationship between authority and dissent. Political unity was regarded as a moral imperative, whereas fragmentation and pluralism were perceived as threats to stability. Dissent was not institutionalised as a routine aspect of political life, but was instead interpreted as an indication of imbalance necessitating correction. In this context, law functioned not as a limitation on sovereign power, but as a tool for enforcing hierarchical order and moral discipline. Authority was expected to be comprehensive and instructive, directing subjects toward conformity rather than mediating between competing claims of rights-bearing individuals.[184]

Hierarchy also shaped the imperial conception of political belonging. Society was organised through differentiated roles and obligations, with loyalty directed upward and protection extended downward. Political identity was relational and hierarchical, defined by proximity to the centre of authority rather than by equality or reciprocity. Groups considered culturally, geographically, or morally distant from the centre—especially those on the frontiers—were often subject to heightened supervision.[185] As a result, governance and security were closely linked, with social difference frequently construed as a potential source of disorder.

In this framework of sovereignty, the distinction between internal and external threats was relatively indistinct. Disorder within the polity—such as social unrest, heterodox beliefs, or regional resistance—was perceived as a threat to both political and cosmic order. The enemy was not exclusively external, but could arise internally in the form of rebels, heterodox sects, or inadequately assimilated populations. Sovereign authority was measured by its ability to identify and neutralise such threats before

[183] Mark Edward Lewis, *The Early Chinese Empires: Qin and Han* (Belknap Press of Harvard University Press 2007) 13–20.
[184] Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases* (Harvard University Press 1967) 3–15.
[185] James A Millward, *Eurasian Crossroads: A History of Xinjiang* (Hurst 2007) 45–58.

they escalated into open rebellion. Preventive intervention was not considered extraordinary, but was an essential aspect of maintaining order.[186]

The imperial legacy also influenced the function of law in addressing disorder. Law operated in conjunction with ritual, moral education, and administrative discipline to foster conformity and stability, with punishment aimed more at restoring social harmony than at assigning individual blame. Although modern China has formally moved beyond imperial rule, these foundational assumptions continue to shape its conceptions of sovereignty and security. The emphasis on unity over pluralism and stability over contestation fosters a political environment in which internal differences are readily problematised and managed as risks.[187]

This imperial conception of sovereignty forms the historical foundation for contemporary Chinese security practices. It elucidates why internal threats remain central in state discourse and why legality is frequently employed to facilitate comprehensive control rather than to limit sovereign authority. The subsequent section examines how these imperial logics were reinterpreted through revolutionary ideology, establishing the basis for the modern legal construction of internal enemies.

2.3.2. Revolutionary Continuities: From Counter-Revolutionaries to 'Separatists'

The founding of the People's Republic of China in 1949 did not eliminate the foundational logic of internal enmity that had long characterised earlier political traditions. Instead, revolutionary ideology redefined and intensified this logic. Although the Communist revolution rejected imperial cosmology and Confucian hierarchy, it preserved and radicalised the notion that political unity depends on the ongoing identification and neutralisation of internal threats. The basis of legitimacy shifted from moral harmony to ideological correctness, yet the central role of the internal enemy persisted.[188]

Maoist political thought defined sovereignty in terms of class struggle. The political community was understood not as a pluralistic association of rights-bearing individuals, but as a revolutionary collective engaged in ongoing existential conflict. Internal enmity was deliberately constructed: counter-revolutionaries, landlords, rightists, and other so-called 'bad elements' were designated as enemies of the

[186] Yuri Pines, *The Everlasting Empire: The Political Culture of Ancient China and Its Imperial Legacy* (Princeton University Press 2012) 97–112.
[187] Peerenboom (n 135) 27–36.
[188] Meisner (n 142) 41–58.

people based on their beliefs, social origins, or affiliations, which rendered them inherently suspect. These individuals were not regarded as conventional criminals, but as political adversaries whose continued existence threatened the revolutionary project. The identification of enemies was thus ideological and anticipatory, relying more on presumed dispositions than on concrete actions.[189]

This conception transformed law into an overtly political instrument. Legal norms functioned not as neutral constraints on state power, but as mechanisms for enforcing ideological conformity. Campaigns against internal enemies relied extensively on administrative measures, mass mobilisation, and re-education practices, which blurred the distinction between political judgment and legal sanction. Punishment was directed toward transformation rather than adjudication, reflecting the belief that ideological deviation could be corrected through coercive intervention.[190]

Revolutionary enmity was conceived as a permanent, rather than episodic, condition. Maoist governance regarded struggle as an enduring aspect of political life, not merely a temporary emergency. The continual identification of new enemies was understood not as evidence of instability, but as a defining feature of sovereign authority. Persistent vigilance against internal threats became a central responsibility of the state, reinforcing a model of order based on suppression rather than accommodation of dissent.[191]

The post-Mao reforms of the late 1970s and 1980s aimed to restore legal order and administrative regularity, yet they did not abandon the underlying paradigm. While the rhetoric of class struggle diminished, the structural logic of internal suspicion endured. Ideological deviation was increasingly reframed as a threat to social stability, national unity, and political security. Legal reforms prioritised governability and discipline, thereby enhancing the state's capacity to manage perceived risks within the population.[192]

Within this revised framework, new categories of internal enemies emerged. Terms such as 'separatists,' 'splittists,' and 'hostile forces' supplanted counter-revolutionaries as the principal figures of threat.[193] Although the terminology changed, the underlying logic remained unchanged: political dissent, cultural difference, or demands for autonomy were viewed not as legitimate expressions of pluralism but as challenges to sovereign unity. These categories facilitated the translation of ideological

[189] Frank Dikötter, *The Tragedy of Liberation: A History of the Chinese Revolution 1945–1957* (Bloomsbury 2013) 89–112.
[190] Jerome A Cohen, *The Criminal Process in the People's Republic of China 1949–1963: An Introduction* (Harvard University Press 1968) 9–25.
[191] Meisner (n 142) 307–315.
[192] Peerenboom (n 135) 48–65; Minzner (n 135) 17–35.
[193] James Leibold, 'Ethnic Policy in China: Is Reform Inevitable?' (2013) 4(1) *China Brief.*

nonconformity into a security issue, thereby justifying preventive intervention and administrative control.

Consistent with earlier revolutionary campaigns, suspicion was directed less toward specific acts of violence and more toward identity, affiliation, and belief. Ethnic minorities, religious groups, and peripheral populations were especially susceptible to such classification, particularly where cultural distinctiveness overlapped with concerns about territorial integrity. The transition from 'counter-revolutionary' to 'separatist' represents a semantic shift rather than a substantive transformation.[194] Enmity remained internal, population-based, and preventive.

This continuity is crucial for understanding contemporary Chinese security law. The legalisation of counterterrorism and stability maintenance did not introduce a new logic of threat, but instead provided juridical tools for an established mode of governance. Revolutionary categories of internal enemy were recast in the language of security, risk, and extremism, enabling their persistence within a formal legal framework. The next section analyses how this logic is consolidated in the contemporary Chinese state, where legality functions as a comprehensive instrument of control and internal threat is regarded as a permanent condition of governance.

2.3.3. Legality and Control in the Modern Chinese State

Within the contemporary Chinese state, legality operates not as a constraint on sovereign power but as a mechanism for organising, extending, and normalising political authority. In contrast to liberal constitutional systems, where law is positioned as a normative check on governmental discretion, Chinese legality is integrated into a governance model that emphasises unity, stability, and anticipatory control. Rather than mediating between the state and autonomous rights-bearing individuals, law structures the management of populations identified as politically sensitive or potentially destabilising.

This conception of legality is shaped by the combined legacies of imperial governance and revolutionary practice. The imperial focus on harmony and hierarchy, together with the Maoist emphasis on ideological unity, has led the Chinese state to regard internal disorder as a threat to sovereign integrity rather than as a legitimate form of political expression. In the modern era, this logic has been juridified rather than replaced. Legal reforms since the late twentieth century have broadened and refined

[194] Joanne Smith Finley, 'Securitization, Insecurity and Conflict in Contemporary Xinjiang' (2019) 38(1) *Central Asian Survey* 1, 3–10; Sean R Roberts, *The War on the Uyghurs: China's Internal Campaign against a Muslim Minority*(Princeton University Press 2020) 40–58.

governance mechanisms without fundamentally altering the relationship between law and political power.[195]

A central feature of this model is the integration of security into routine administration. The Chinese state does not treat emergencies as exceptional; instead, it conceptualises security as an ongoing, proactive responsibility. Legal norms related to public order, counterterrorism, and social management are crafted to permit intervention before concrete threats emerge. The use of broad statutory language, significant administrative discretion, and complex regulatory frameworks allows state actors to respond to perceived risks, suspicions, and predictive assessments. As a result, the boundary between prevention and punishment is intentionally blurred, enabling the exercise of control without the procedural safeguards typical of criminal adjudication.[196]

Judicial institutions occupy a constrained position within this framework. Courts are not independent arbiters capable of limiting executive or party authority in matters of security. Instead, legality is enforced through administrative bodies under Party leadership, with judicial review subordinated to prevailing political objectives. This institutional arrangement reinforces the alignment of political decision-making and legal implementation. Once a threat category is identified by political authorities, law enforcement operationalises that designation rather than challenging it.[197] Consequently, the legal system serves to stabilise sovereign judgment rather than subject it to adversarial scrutiny.

A defining aspect of this model is its focus on populations rather than individuals. Threats are conceptualised not in terms of individual culpability but in terms of patterns of identity, belief, behaviour, and association. Legal categories are constructed to encompass broad, indeterminate risks, allowing governance to target groups rather than isolated offenders.[198] Practices such as surveillance, ideological regulation, and administrative detention are justified as routine measures essential for maintaining social order, rather than as exceptional responses to specific acts. In this context, legality imparts an appearance of regularity to practices that might otherwise be perceived as extraordinary.

This orientation further erases the boundaries between political opposition, cultural difference, and security threat. While liberal systems attempt, albeit imperfectly, to distinguish between dissent and danger, the Chinese legal framework conflates these categories. Expressions of identity, religion, or

[195] Peerenboom (n 135) 63–80; Minzner (n 135) 41–64.
[196] Pils (n 144) 5–9.
[197] Donald C Clarke, 'China's Legal System and the Fourth Plenum' (2015) 43(2) *Hong Kong Law Journal* 387, 392–400.
[198] James Leibold, 'Surveillance in China's Xinjiang Region: Ethnic Sorting, Coercion, and Inducement' (2020) 34(1) *Journal of Contemporary China* 46, 48–55.

regional autonomy may be construed as signs of latent disloyalty, especially when they align with historical narratives of separatism or foreign influence.[199] In this way, law becomes an instrument for governing identity, converting difference into risk and risk into grounds for intervention.

The enduring nature of this security logic sets the Chinese model apart from the liberal paradox previously discussed. While American exceptionalism is rhetorically presented as temporary and contingent, Chinese legality does not depend on the discourse of emergency. Preventive control is institutionalised as a standard aspect of governance rather than as an exception. Sovereignty is maintained through ongoing regulatory oversight rather than through sporadic declarations of exception. Consequently, the enemy is not viewed as an anomaly but as a persistent possibility inherent within the population.

Interpreting legality as an instrument of control rather than as a limitation on power is crucial for analysing contemporary Chinese security practices. This perspective clarifies how extensive systems of surveillance, detention, and ideological regulation function within a formally legal framework, and why these practices are portrayed as consistent with constitutional order rather than as deviations from it. The legal construction of internal enemies thus signifies not a failure of legality, but its realisation within a specific conception of sovereignty.[200]

This framework establishes the conceptual basis for the analysis presented in Chapter 4. The legal treatment of Uyghurs in Xinjiang should be understood not as an isolated or exceptional occurrence, but as a paradigmatic manifestation of a broader governance logic in which law is employed to manage internal enmity as a persistent condition.[201] By situating contemporary security practices within this historical and structural context, the dissertation advances beyond descriptive accounts toward a more nuanced understanding of the intersections among sovereignty, law, and enmity in the modern Chinese state.

From a comparative perspective, the Chinese model demonstrates that the legal construction of the enemy is not merely a response to crisis, but a structural element of modern sovereignty.[202] Although liberal and authoritarian systems differ significantly in constitutional design and political ideology, both depend on identifying enemies to define the boundaries of law and legitimise exceptional exercises of

[199] Finley (n 194) 3–11.
[200] Peerenboom (n 135) 280–309.
[201] Minzner (n 135) 121–40.
[202] Dyzenhaus (n 83) 1–15; Schmitt, *Political Theology* (n 25) 5–15.

power. The critical distinction lies not in the existence of enmity, but in its location and juridical management.

In the United States, sovereignty is fragmented and constrained by a normative fear of tyranny, resulting in a security logic marked by ambivalence, juridification, and a rhetorical emphasis on temporality. Exceptional measures are legally authorised, yet remain conceptually inconsistent with liberal constitutional ideals.[203] In contrast, Chinese sovereignty is unitary and oriented toward stability, rooted in traditions that prioritise unity over pluralism and regard internal disorder as an existential threat. In this context, legality does not mediate between power and rights, but instead organises preventive control, normalising suspicion and establishing internal enmity as a permanent feature of governance.

By embedding these contrasting sovereign strategies within legal frameworks, this chapter provides the analytical foundation for the empirical case studies that follow. Chapters 3 and 4 do not simply illustrate abstract distinctions, but examine how these logics of enmity are operationalised within specific legal regimes. The post-9/11 United States and contemporary China thus appear not as departures from their respective traditions, but as intensified manifestations, highlighting the central role of law in sustaining sovereign power amid insecurity.

[203] Cole, *Enemy Aliens* (n 125) 3–18.

CHAPTER 3: Enemy Combatants in the U.S. Legal System after 9/11

3.1 Legal and Constitutional Tensions in Defining Enemy Combatants

3.1.1 The Authorization for Use of Military Force (AUMF) and the Executive's War Powers

On 14 September 2001, three days after the terrorist attacks carried out by al-Qaeda operatives, the United States Congress passed the Authorization for Use of Military Force (AUMF),[204] signed into law by President George W. Bush on 18 September. Enacted with overwhelming bipartisan support, the resolution authorized the President to use 'all necessary and appropriate force' against those he determined to have 'planned, authorized, committed, or aided' the 9/11 attacks, including those who harboured them.[205]

Unlike prior war authorizations, the 2001 AUMF[206] did not name a specific country, location, or time frame. Its broad wording showed the urgency and uncertainty after the attacks. While it was first meant to target groups like al-Qaeda and the Taliban in Afghanistan, it has also been used to justify military operations in Yemen, Somalia, and other locations,[207] as well as the detention of individuals held at Guantánamo Bay.

Over time, the executive branch expanded its interpretation of the AUMF.[208] During the Obama administration, officials introduced the idea of 'associated forces.' Even though this term is not in the original text of the AUMF,[209] it was used to include armed groups that did not exist in 2001, such as ISIS. This change allowed the law to support counterterrorism operations well beyond its original purpose.[210] It also meant the AUMF[211] could be applied to new groups with different ideologies.

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[204] Authorization for Use of Military Force 2001 (n 79).
[205] ibid s 2(a).
[206] ibid.
[207] Jennifer Daskal, 'The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone' (2013) 161 University of Pennsylvania Law Review 1165, 1171–1178.
[208] Authorization for Use of Military Force 2001 (n 79).
[209] ibid.
[210] Harold Hongju Koh, 'The War Powers and Humanitarian Intervention' (2010) 53 *Harvard International Law Journal* 971, 975–977.
[211] Authorization for Use of Military Force 2001 (n 79).

Structurally, the AUMF[212] delegates broad discretionary authority to the President. Its operative clause relies on presidential judgment to identify eligible targets, effectively empowering the executive to define the enemy and shape the scope of hostilities. In effect, this dynamic alters the constitutional balance of war powers by vesting interpretive and operational control in the executive without requiring ongoing congressional involvement. While Article I of the U.S. Constitution[213] vests in Congress the power to declare war, and Article II[214] designates the President as Commander-in-Chief, the AUMF[215] blurs this division by granting interpretive and operational control to the executive without requiring renewed legislative input.

This sweeping delegation has raised constitutional concerns, particularly regarding the non-delegation doctrine, which limits Congress's ability to transfer legislative power without clear standards.[216] The statute also lacks an explicit requirement that the President comply with the international law of armed conflict, further raising doubts about legal safeguards. Together, these features create a framework in which the executive can initiate and sustain military action with minimal legislative oversight and only marginal judicial review.

Critics contend that the AUMF[217] has institutionalized an open-ended emergency framework.[218] Rather than initiating a limited or time-bound conflict, it provides a durable legal foundation for geographically diffuse uses of force. This effect is compounded by Congress's reluctance to revisit or constrain the statute, which has remained virtually unchanged since 2001. The result, critics suggest, is a significant weakening of the War Powers Resolution framework,[219] which was originally designed to ensure continued legislative control over extended hostilities.[220]

From a theoretical perspective, the AUMF[221] implicates foundational questions about sovereignty and emergency authority. Carl Schmitt famously argued that 'Sovereign is he who decides on the exception,' locating true sovereignty in the power to suspend the legal order in crisis.[222] In delegating

[212] ibid.
[213] US Constitution art I § 8 cls 11–16.
[214] US Constitution art II § 2 cl 1.
[215] Authorization for Use of Military Force 2001 (n 79).
[216] *J W Hampton Jr & Co v United States* 276 US 394 (1928); see also *Whitman v American Trucking Associations* 531 US 457 (2001).
[217] Authorization for Use of Military Force 2001 (n 79).
[218] Cole, *Enemy Aliens* (n 125) 19–23.
[219] War Powers Resolution 1973, Pub L No 93–148, 87 Stat 555.
[220] Michael J Glennon, *Constitutional Diplomacy* (Princeton University Press 1990) 81–85.
[221] Authorization for Use of Military Force 2001 (n 79).
[222] Schmitt, *Political Theology* (n 25) 5.

both interpretive and operational authority to the executive, the AUMF[223] arguably codifies Schmitt's logic of exception within the legal order itself. By allowing the executive to determine who constitutes the enemy and how hostilities are to be conducted, the statute embeds emergency discretion at the heart of the legal system.

While the AUMF[224] does not explicitly create new legal categories, it laid the groundwork for subsequent doctrinal innovation. The shift from state-based warfare to asymmetric conflict with non-state actors necessitated new legal designations. Within this context, the term 'enemy combatant' emerged—an adaptable category reflecting the evolving contours of conflict authorized under the AUMF.[225]

3.1.2 The Emergence of the 'Enemy Combatant' and Its Legal Ambiguities

Following the 9/11 attacks, U.S. authorities introduced the designation 'enemy combatant' to classify individuals engaged in hostilities against the United States outside the framework of regular state militaries. This status-based classification was not grounded in statutory law or treaty obligations, but rather constructed by the executive to describe actors in what it framed as a global armed conflict against terrorism. Crucially, the designation does not constitute a criminal charge and does not require proof of individual conduct in a court of law. Instead, it assigns individuals to a hostile category based on alleged affiliations or support.

In legal terms, the enemy combatant designation situates individuals in a liminal space—neither conventional criminal defendants nor lawful combatants under the Geneva Conventions.[226] Those designated are neither indicted nor tried under the domestic criminal justice system, nor are they granted the protections afforded to prisoners of war under the Geneva Conventions.[227] As a result, the government has used this status to justify military detention without charge or trial, and without the procedural safeguards typical of either the criminal justice system or the law of armed conflict. Under this framework, detention rests not on adjudicated guilt, but on unilateral executive determination—often without judicial oversight.[228]

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[223] Authorization for Use of Military Force 2001 (n 79).
[224] ibid.
[225] ibid.
[226] Geneva Convention (III) (n 93) arts 4–5.
[227] Geneva Convention (III) (n 93).
[228] David Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot' (2004) 113 *Yale Law Journal* 1753, 1761–1764.

The conceptual logic underlying this category echoes older legal traditions of exclusion rooted in enmity. In Roman law, the term *hostis* denoted a public enemy of the state, whose designation entailed loss of legal protection, even for Roman citizens.[229] In medieval English law, the outlaw or *caput lupinum* (wolfshead) could be attacked with impunity, having forfeited the protection of the king's peace.[230] In both traditions, legal status—rather than judicial finding—served as the trigger for a form of civil death: the loss of legal protection and standing. The modern enemy combatant designation revives this logic: legal exclusion based not on culpability, but on attributed alignment with a hostile group.

Carl Schmitt's conception of the enemy as an existential threat defined by the sovereign offers a useful conceptual lens. For Schmitt, the political enemy is not to be prosecuted but opposed, even eliminated, because they represent a threat to the political order itself.[231] The legal system, on this view, is suspended in favour of direct confrontation. The enemy combatant category reflects this logic, insofar as it places certain individuals outside the protections of ordinary law—not as offenders to be prosecuted, but as threats to be neutralized.[232]

Constitutionally, the enemy combatant designation raises serious concerns. It permits the executive to authorize prolonged detention—including of U.S. citizens—based solely on an internally defined status. Given the undefined and potentially perpetual nature of the 'War on Terror,' such detention may be indefinite. This raises serious concerns about due process, particularly the right to be charged, to confront evidence, to have legal representation, and to access the courts. By substituting status-based classification for evidence-based adjudication, the framework erodes the procedural safeguards that anchor both criminal justice and the law of armed conflict.[233]

The enemy combatant framework also disrupts the separation of powers. By unilaterally identifying individuals and ordering their detention, the executive effectively assumes the dual roles of judge and jailer. Although judicial review was later affirmed in cases such as *Hamdi v. Rumsfeld (2004)*[234] and *Boumediene v Bush* (2008),[235] the executive initially asserted that enemy combatants—particularly non-citizens at Guantánamo—could be detained beyond the reach of habeas corpus.[236]

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[229] Berger (n 51) 489.
[230] *Leges Henrici Primi (n 61) c 53.*
[231] Schmitt, *The Concept of the Political* (n 23) 26–27.
[232] Agamben, *Homo Sacer* (n 63) 166–70.
[233] Jules Lobel, 'Preventive Detention and Preventive War' (2003) 5 *Journal of International Criminal Justice* 509, 515–518.
[234] *Hamdi v Rumsfeld* (n 81) 533–534.
[235] *Boumediene v Bush* (n 82) 771–792.
[236] *Rasul v Bush* (n 80) 480–484; see also *Johnson v Eisentrager* 339 US 763 (1950).

The enemy combatant designation thus creates a legally ambiguous and institutionally unstable framework. Detainees thus occupy a legal space shaped primarily by executive discretion and national security imperatives. Even where judicial oversight has emerged, it has largely been limited to procedural review, leaving the core logic of indefinite, status-based detention intact. This construction exemplifies the post-9/11 shift toward preventive security governance, where the emphasis lies on identifying and neutralising potential threats, rather than adjudicating past wrongdoing within established legal procedures.

3.1.3 Citizenship, Territory, and the Reach of Constitutional Protection

In the post-9/11 detention regime, both citizenship and territorial location became decisive in determining the reach of constitutional protections. The U.S. government contended that while American citizens—such as Yaser Hamdi[237]—retained limited due process rights, non-citizens captured abroad were not entitled to equivalent safeguards. This bifurcated framework effectively created a dual legal order: one in which citizens retained some constitutional safeguards, while foreign nationals—particularly those held offshore—were cast outside the Constitution's protective reach.

This distinction reflects older theories of sovereign obligation. In *Leviathan,*[238] Thomas Hobbes argued that the sovereign's duty to protect applies only to those bound by the social contract; outsiders to the polity—those beyond its reciprocal obligations—have no claim to its protections. The Bush Administration adopted a similar stance: it asserted that foreign enemy combatants, especially those detained abroad, lacked enforceable constitutional rights—even when in U.S. custody and under U.S. control.[239] In contrast, the Supreme Court held in *Hamdi*[240] that U.S. citizens are entitled to core procedural rights, including notice of charges and a meaningful opportunity to contest detention before a neutral decision-maker.

Territoriality also played a central role in determining access to constitutional protections. The decision to use the U.S. naval base at Guantánamo Bay, Cuba, as a detention site was not incidental. Rather, it was a calculated legal strategy. Although the U.S. exercised exclusive jurisdiction over the base, the government argued that Guantánamo's location outside formal U.S. sovereignty placed it

[237] *Hamdi v Rumsfeld* (n 81).
[238] Hobbes, *Leviathan* (n 4) ch 21.
[239] Memorandum from Jay S Bybee, Assistant Attorney General, to Alberto R Gonzales, Counsel to the President, 'Application of Treaties and Laws to al Qaeda and Taliban Detainees' (22 January 2002).
[240] *Hamdi v Rumsfeld* (n 81) 533–534.

beyond the reach of constitutional protections and federal court review.[241] Citing *Johnson v. Eisentrager* (1950),[242] the administration argued that non-citizens detained at Guantánamo had no constitutional standing to seek habeas corpus, since the base lay outside U.S. sovereign territory.

This reasoning rendered Guantánamo a legal anomaly: a site under total U.S. control but positioned—by legal fiction—outside the scope of constitutional obligation. By invoking territorial formalism, the executive sought to create a space where neither domestic constitutional law nor full international protections would apply. In theoretical terms, Guantánamo operated as a 'space of exception,' echoing Carl Schmitt's claim that sovereignty is defined by the power to suspend the law in times of crisis.[243] By combining total control with assertions of extraterritoriality, the executive positioned detainees in a legal vacuum—exempt from the protections of both civilian courts and the laws of war.

This same strategy rested on a formalist conception of sovereignty, one increasingly at odds with the practical realities of control. Under the 1903 lease agreement,[244] Cuba retained ultimate sovereignty over Guantánamo, but the United States exercised full jurisdiction and control. Functionally, the U.S. exercised de facto sovereignty, rendering the formal distinction between territorial status increasingly untenable. In *Boumediene,*[245] the Supreme Court rejected this logic. Writing for the majority, Justice Kennedy held that the Constitution's reach is determined not by formal sovereignty, but by the extent of U.S. control. Justice Kennedy's majority opinion rejected the notion that constitutional protections cease where de jure sovereignty ends, emphasising instead the principle that effective control can trigger constitutional responsibility.[246]

Earlier decisions had already begun to undermine the legal foundation for the Guantánamo strategy. In *Rasul,*[247] the Court held that habeas jurisdiction extended to detainees at Guantánamo given the United States' complete control over the facility. The same year, *Hamdi*[248] established that citizens detained as enemy combatants retain core due process rights, even in wartime. In *Hamdan v. Rumsfeld* (2006),[249] the Court struck down the President's military commissions for lacking

[241] Brief for the Respondents, *Rasul v Bush* 542 US 466 (2004) 16–18.
[242] *Johnson v Eisentrager* 339 US 763, 777–778 (1950).
[243] Schmitt, *Political Theology* (n 25) 5.
[244] Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, (Cuba–United States) (signed 23 February 1903) 6 Bevans 1113.
[245] *Boumediene v Bush* 553 (n 82).
[246] ibid 755–766.
[247] *Rasul v Bush* (n 80) 480–85.
[248] *Hamdi v Rumsfeld* (n 81) 533.
[249] *Hamdan v Rumsfeld* 548 US 557, 613–635 (2006).

congressional authorization and violating basic procedural norms, including those under Common Article 3 of the Geneva Conventions.[250] Finally, in *Boumediene,*[251] the Court struck down the jurisdiction-stripping provisions of the Military Commissions Act,[252] holding that detainees had a constitutional right to habeas corpus because of the United States' de facto sovereignty over Guantánamo.

Collectively, these rulings marked a gradual judicial reassertion of constitutional boundaries. While initially deferential to executive claims, the courts ultimately emphasized that effective control—not geographic formalism—determines constitutional responsibility. This line of reasoning reaffirms the principle that the government may not construct zones of legal exceptionalism through spatial or status-based manipulation.[253] In reaffirming judicial oversight, the Court rejected the notion that legal obligations can be suspended by designating individuals as enemies or holding them just outside national borders. The result was a recalibration of the post-9/11 legal order, reaffirming the principle that neither status nor location can insulate executive detention from constitutional scrutiny.

3.2 Habeas Corpus and Judicial Jurisdiction

3.2.1. The Restoration of Judicial Control*: Rasul v. Bush* (2004) and *Boumediene v. Bush* (2008)

The Supreme Court's interventions in *Rasul*[254] and *Boumediene,*[255] while constituting a measured reassertion of judicial jurisdiction, ultimately preserved the foundational architecture of the post-9/11 detention regime. These decisions regulated the executive's strategy of legal exceptionalism without displacing its substantive core.

The post-9/11 detention of non-citizens at Guantánamo Bay, justified through the enemy combatant designation, was initially constructed to preclude access to civilian judicial review.[256] In *Rasul*[257] and *Boumediene,*[258] the Supreme Court intervened to restore habeas corpus, thereby reasserting

[250] Geneva Convention (III) (n 93) art 3.
[251] *Boumediene v Bush* (n 82) 771–92.
[252] Military Commissions Act 2006, Pub L No 109–366, 120 Stat 2600, s 7.
[253] Gerald L Neuman, 'Extraterritorial Rights and Constitutional Methodology after *Boumediene*' (2009) 82 *Southern California Law Review* 259, 274–278.
[254] *Rasul v Bush* (n 80) 466.
[255] *Boumediene v Bush* (n 82).
[256] Cole, *Enemy Aliens* (n 125) 57–61.
[257] *Rasul v Bush* (n 80) 466.
[258] *Boumediene v Bush* (n 82).

a minimal threshold of judicial oversight. Yet, these rulings were circumscribed in effect: while procedural access was reinstated, the underlying executive authority to detain on the basis of status remained unchallenged.

Rasul[259] marked the Court's first substantive engagement with the legal status of Guantánamo detentions. The government argued that Guantánamo lay outside U.S. sovereign territory and that *Johnson*[260] barred judicial review for non-citizens detained abroad. The Court, by a 6–3 majority, rejected this position, holding that U.S. control over Guantánamo rendered it subject to the federal habeas corpus statute, 28 U.S.C. §2241.[261] The ruling emphasized that the statute 'draws no distinction between Americans and aliens'[262] in custody, and that effective jurisdiction, not formal sovereignty, was determinative. Yet *Rasul*[263] addressed only the threshold issue of jurisdiction. The designation of 'enemy combatant' and the wartime rationale supporting the detentions remained intact.[264]

In response to *Rasul,*[265] Congress and the Executive sought to curtail judicial review. The *Detainee Treatment Act* (2005)[266] and *Military Commissions Act* (2006)[267] sought to eliminate habeas jurisdiction for Guantánamo detainees, confining them to narrow, often opaque, military or appellate procedures. It was against this legal backdrop that *Boumediene*[268] came before the Court. The petitioners—detained for years without charge—challenged the constitutionality of Congress's attempt to bar judicial review. The Court, by a 5–4 majority, held that Section 7 of the Military Commissions Act[269] was an unconstitutional suspension of the writ. It concluded that the Suspension Clause of the Constitution[270] guaranteed detainees at Guantánamo a meaningful opportunity to contest their detention in federal court, irrespective of their alienage or the formal territorial status of the base.

Boumediene[271] reaffirmed the principle that effective U.S. control—not formal sovereignty—determines the application of constitutional protections. The majority emphasized that the government could not insulate its actions from judicial review merely by choosing an offshore detention site. It also

[259] *Rasul v Bush* (n 80) 475–484.
[260] *Johnson v Eisentrager* (n 242).
[261] 28 USC § 2241(a).
[262] *Rasul v Bush* (n 80) 481.
[263] ibid.
[264] Rana, Aziz, 'Who Decides on Security?' (2012). Cornell Law Faculty Publications. Paper 1070.
[265] *Rasul v Bush* (n 80) 481.
[266] Detainee Treatment Act 2005, Pub L No 109–148, 119 Stat 2680, ss 1001–1006.
[267] Military Commissions Act 2006 (n 252).
[268] *Boumediene v Bush* (n 82).
[269] Military Commissions Act 2006 (n 252), s 7.
[270] US Constitution art I § 9 cl 2 (Suspension Clause).
[271] *Boumediene v Bush* (n 82) 755–771.

reiterated that constitutional safeguards must remain in place during times of national crisis. Yet, as in *Rasul,*[272] the Court declined to challenge the government's underlying authority to detain individuals as enemy combatants.[273] Citing *Hamdi,*[274] the *Boumediene*[275] majority affirmed that detention pursuant to the 2001 Authorization for Use of Military Force[276] was consistent with long-standing law-of-war principles.[277] Thus, the opinion limited itself to ensuring access to a judicial forum, without addressing the broader legality or duration of such detentions.

Boumediene's[278] significance was largely procedural, reopening judicial review without resolving the substantive contours of detainee rights or evidentiary standards. Subsequent litigation exposed the limitations of this framework, as the D.C. Circuit adopted a restrictive interpretation that excluded non-citizens detained extraterritorially from Fifth Amendment[279] protections. This doctrinal posture permitted the admission of hearsay and coerced evidence, and imposed only minimal evidentiary burdens on the government, thereby attenuating the practical efficacy of habeas review.

Initial successes by detainees in habeas proceedings were largely reversed on appeal, as the D.C. Circuit entrenched a posture of deference to executive detention authority. The absence of enduring doctrinal constraints permitted the continuation of indefinite detention without charge. *Boumediene*[280] thus reaffirmed the formal role of the judiciary in wartime detention, but refrained from imposing substantive limitations on the executive's preventive detention powers. The restoration of judicial review, while symbolically significant, left the architecture of legal exception fundamentally unaltered.

3.2.2 Extraterritorial Rights and the Limits of Sovereignty

The Supreme Court's decision in *Boumediene*[281] marked a significant departure from the conventional territorial conception of constitutional rights. The Court held that foreign nationals detained

[272] *Rasul v Bush* (n 80) 481.
[273] Neuman, 'The Extraterritorial Constitution after *Boumediene v Bush*' (n 253) 271–74.
[274] *Hamdi v Rumsfeld* (n 81).
[275] *Boumediene v Bush* (n 82) 771–792.
[276] Authorization for Use of Military Force 2001 (n 79).
[277] Derek Jinks, 'September 11 and the Laws of War' (2003) 28 *Yale Journal of International Law* 1, 24–27.
[278] *Boumediene v Bush* (n 82) 755–771.
[279] US Constitution, amend V.
[280] *Boumediene v Bush* (n 82) 755–771.
[281] *Boumediene v Bush* (n 82).

at Guantánamo Bay could invoke the protections of the Constitution's Suspension Clause[282] and petition for habeas corpus review, despite being held outside the formal sovereign territory of the United States. In so doing, the Court rejected the longstanding premise—most notably articulated in *Johnson*[283]—that non-citizens held abroad lack enforceable constitutional rights. Where *Johnson*[284] had denied habeas relief to German nationals imprisoned in postwar Germany, *Boumediene*[285] adopted a more functional and fact-sensitive approach, emphasizing the practical realities of U.S. control over Guantánamo rather than relying solely on formal sovereignty.[286]

This holding signalled a conceptual shift in how sovereignty is understood within constitutional law. Although Cuba retains de jure sovereignty over Guantánamo Bay under the 1903 lease agreement,[287] the Court emphasized that the United States exercises exclusive jurisdiction and effective control over the territory. In this analysis, sovereignty was not treated as a binary attribute but as a spectrum, defined by the practical distribution and exercise of authority. The Court drew on earlier precedents—especially the *Insular Cases*[288] and Justice Harlan's concurrence in *Reid v. Covert*[289]—to support the view that constitutional protections may extend extraterritorially when warranted by context and necessity. These cases had previously suggested that constitutional guarantees could apply abroad, depending on context and necessity, rather than being confined to rigid geographic boundaries.[290]

The *Boumediene*[291] majority declined to permit what it termed a 'technical sovereignty fiction' to justify the creation of a legal void. It reasoned that allowing the government to detain individuals in territories nominally outside U.S. sovereignty but under its exclusive control would enable it to evade constitutional accountability at will. The Court expressly rejected the idea that the Constitution's reach depends solely on the political branches' characterizations of territorial status. As the majority emphasized, constitutional protections cannot be 'switched on or off at will' based on the government's geographic designations and that even when operating beyond U.S. borders, the government remains

[282] US Constitution art I § 9 cl 2 (n 270).
[283] *Johnson v Eisentrager* (n 242).
[284] ibid 777–778.
[285] *Boumediene v Bush* (n 82) 755–766.
[286] Neuman, ''The Extraterritorial Constitution after *Boumediene v Bush*' (n 50) 270–74.
[287] Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations (n. 244).
[288] *Downes v Bidwell* 182 US 244 (1901); *Balzac v Porto Rico* 258 US 298 (1922).
[289] *Reid v Covert* 354 US 1, 74–75 (1957) (Harlan J, concurring).
[290] Kal Raustiala, 'Does the Constitution Follow the Flag?' (2009) 53 *Harvard Law Review* 1, 18–22.
[291] *Boumediene v Bush* (n 82) 765–771.

bound by core constitutional norms.[292] In this respect, *Boumediene*[293] redefined the limits of sovereignty as a bar to constitutional accountability, signalling that effective power—not formal ownership—must guide the application of fundamental rights.

Importantly, the Court did not establish a blanket rule extending constitutional rights to all extraterritorial settings. Instead, it adopted a balancing framework to assess the applicability of constitutional protections in extraterritorial contexts.[294] The majority outlined three guiding factors: (i) the detainee's citizenship and legal status, and the adequacy of any process already afforded; (ii) the extent of U.S. control over the detention site; and (iii) the presence of practical barriers to extending constitutional protections. This functional analysis replaced the prior bright-line rule, which had categorically excluded non-citizens held abroad from constitutional safeguards.[295]

Applying this test, the Court concluded that the Guantánamo detainees were entitled to pursue habeas corpus relief. Although the petitioners were foreign nationals lacking ties to the United States, they were detained under exclusive U.S. jurisdiction, had undergone only cursory review by Combatant Status Review Tribunals,[296] and were confined in a facility where judicial review could proceed without materially interfering with military operations. The fact that Guantánamo was not an active battlefield, but rather a long-term detention facility under full American control, significantly reduced the weight of any practical objections. Accordingly, the Court found that the combination of indefinite detention, minimal procedural safeguards, and total U.S. authority over the site warranted constitutional review under the Suspension Clause.[297]

In sum, *Boumediene*[298] redefined the constitutional interplay between territory, sovereignty, and rights. While the Court did not entirely eliminate territorial constraints, it affirmed that the scope of fundamental rights—especially the writ of habeas corpus—must be assessed through a context-specific, functional analysis. The ruling curtailed the government's ability to treat extraterritorial sites as constitutional voids, reinforcing the broader principle that where the U.S. exercises effective power, it cannot disavow the constitutional constraints that accompany sovereign control.[299]

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[292] ibid 765.
[293] ibid.
[294] Neuman, 'The Extraterritorial Constitution after *Boumediene v Bush*' (n 253) 268–73.
[295] Neuman, 'Strangers to the Constitution: Immigrants, Borders, and Fundamental Law' (n 172) 115–118.
[296] United States Department of Defense *Order Establishing Combatant Status Review Tribunals* (7 July 2004).
[297] US Constitution art I § 9 cl 2 (n 270).
[298] *Boumediene v Bush* (n 82).
[299] David Cole, 'Rights over Borders: Transnational Constitutionalism and Guantánamo Bay' (2008) 87 *Boston University Law Review* 973, 980–985.

3.2.3 The Tension Between Wartime Detention and Constitutional Normalcy

As discussed in Section 3.1, the post-9/11 legal order is defined by the institutionalization of an indefinite wartime framework. This structure has enabled detention 'until the end of hostilities' in a conflict without a clear endpoint, often referred to as a 'forever war.'[300]

This dynamic exposes a fundamental tension between the logic of wartime detention and the constitutional presumption of legal normalcy. The U.S. Constitution contemplates emergency powers as exceptional and temporary—most clearly exemplified by the Suspension Clause,[301] which permits the suspension of habeas corpus only 'in cases of rebellion or invasion.' By contrast, the post-9/11 framework reconfigures emergency as a baseline condition rather than a temporary deviation. The result is a legal structure in which prolonged detention without trial risks becoming normalized, eroding the very constitutional safeguards designed to constrain it.[302] Guantánamo made this problem administratively durable: detention could be justified as a law-of-war measure while the conflict itself remained temporally indeterminate.

The Supreme Court's jurisprudence during this period reflects a cautious effort to mediate this structural tension. For instance, in *Hamdi,*[303] the Court acknowledged that the AUMF[304] authorized the detention of enemy combatants, including U.S. citizens, for the duration of hostilities. Likewise, in *Rasul,*[305] the Court rejected the executive's attempt to place Guantánamo detainees beyond judicial oversight. In both cases, the Court asserted a supervisory role over detention procedures while accepting the executive's underlying claim that the conflict constituted an ongoing armed struggle.

The culmination of this judicial trajectory came in *Boumediene,*[306] where the Court held that the Suspension Clause of the Constitution[307] applied to Guantánamo detainees and that Congress's attempt to withdraw habeas jurisdiction through the Military Commissions Act[308] amounted to an unconstitutional suspension of the writ. The Court emphasized that constitutional protections remain

[300] Rosa Brooks, *How Everything Became War and the Military Became Everything* (Simon & Schuster 2016) 27–31.
[301] US Constitution art I § 9 cl 2 (n 270).
[302] Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1047–1050.
[303] *Hamdi v Rumsfeld* (n 81).
[304] Authorization for Use of Military Force 2001 (n 79).
[305] *Rasul v Bush* (n 80).
[306] *Boumediene v Bush* (n 82).
[307] US Constitution art I § 9 cl 2 (n 270).
[308] Military Commissions Act 2006 (n 252) s 7.

operative even in conflicts against non-state actors and that the political branches cannot insulate executive detention from judicial review by manipulating territorial formalities —without questioning the legal characterization of the conflict itself.

Yet *Boumediene,*[309] like its predecessors, ultimately left intact the core assumption of a continuing and legally valid armed conflict and did not challenge the government's authority to detain individuals designated as enemy combatants so long as some form of judicial review remained available. In this respect, the Court imposed procedural constraints without re-examining the substantive basis for indefinite detention. The result is a system in which detention is judicially regulated but substantively preserved—a legal containment rather than a constitutional repudiation.

This judicial posture exemplifies a broader normalization process. The authority to detain without trial, once confined to temporary wartime emergencies, is now embedded within constitutional governance. While this evolution may mitigate the risk of unchecked executive power, it also legitimizes the continued use of extraordinary measures.[310] As discussed in Chapter 1, this shift raises important theoretical questions about the transformation of emergency powers into permanent features of governance. The post-9/11 legal order has increasingly integrated exceptional measures into routine practice. Terms and rationales associated with emergency—such as 'battlefield,' 'enemy combatant,' and 'unlawful belligerent'—have shifted from crisis response to standard governmental operations.

Even as courts have imposed procedural constraints, they have refrained from re-examining the foundational premises of indefinite detention. The result is what scholars such as Oren Gross and Fionnuala Ní Aoláin describe as the 'legalization of the exception': the transformation of emergency powers into institutionally accepted, judicially reviewed, and bureaucratically routinized forms.[311] The jurisprudential trajectory, therefore, illustrates how theoretical accounts of emergency—articulated by Schmitt and Hobbes—have materialized in U.S. legal doctrine. This paradox reveals that efforts to regulate exceptional powers through legal mechanisms may, over time, legitimize and entrench them. Far from containing the state of exception, legal frameworks may inadvertently perpetuate it.

Viewed in this light, the post-9/11 detention regime represents not a temporary deviation from constitutional norms, but the consolidation of a structural emergency. Emergency powers—once thought to be episodic—have been institutionalized through legislation, jurisprudence, and executive practice.

[309] Neuman, 'The Extraterritorial Constitution after *Boumediene v Bush*' (n 253) 279–83.
[310] Dyzenhaus (n 83) 3–7.
[311] Gross and Ní Aoláin (n 83) 19–23.

The distinction between ordinary and extraordinary legal regimes has become increasingly blurred. Wartime detention has evolved from an ad hoc response to crisis into a routinized and constitutionally managed instrument of state power. This evolution raises fundamental questions about the resilience of constitutional normalcy and the long-term implications of embedding emergency logic within the framework of ordinary governance.

3.3 Due Process of Law and the Boundaries of Fairness

3.3.1. Minimum Procedural Guarantees: *Hamdi v. Rumsfeld* (2004) and *Hamdan v. Rumsfeld* (2006)

Collectively, the Supreme Court's post-9/11 due process jurisprudence does not reject the enemy-combatant framework, but instead imposes procedural regulation. The following analysis explores how this minimalist conception of fairness influenced evidentiary standards, permitted extended detention, and ultimately fostered judicial deference.

In *Hamdi,*[312] the Supreme Court addressed the scope of due process protections afforded to a U.S. citizen detained as an 'enemy combatant.' Writing for a plurality, Justice O'Connor affirmed that, even in the context of armed conflict, the Constitution guarantees a baseline of procedural fairness.[313] The Court held that a citizen held in military custody must receive notice of the factual basis for his classification and a meaningful opportunity to challenge it before a neutral decision-maker—though the Court did not mandate a civilian or judicial forum. While acknowledging the government's compelling interest in national security, the Court emphasized that such interest does not negate constitutional protections. Applying the *Mathews v. Eldridge (1976)*[314] balancing test, the plurality permitted procedural modifications—including hearsay evidence and presumptions favouring the government—so long as the detainee retained a meaningful opportunity to rebut the allegations.

The *Hamdi*[315] ruling deliberately framed its protections as narrow and context-specific. It declined to mandate a full criminal trial or conventional evidentiary standards. Instead, it accepted the admissibility of hearsay and permitted an evidentiary burden favouring the government, provided that

[312] *Hamdi v Rumsfeld* (n 81).
[313] ibid 533.
[314] *Mathews v Eldridge* 424 US 319, 335 (1976).
[315] *Hamdi v Rumsfeld* (n 81).

the detainee received basic notice, representation, and access to a neutral forum. At a minimum, the Court required notice, access to counsel, and the right to challenge the decision. This minimalist procedural threshold represented a compromise—one intended to preserve individual rights without unduly impairing the government's ability to manage military threats. Importantly, the Court did not assess whether Hamdi was lawfully classified as an enemy combatant; it required only that such a designation be contestable in a meaningful forum.

In *Hamdan,*[316] the Court addressed a distinct procedural question: whether the military commission convened to try a Guantánamo detainee complied with domestic and international law. The majority held that its structure and procedures violated both the Uniform Code of Military Justice[317] and Common Article 3 of the Geneva Conventions.[318] The military commissions, as constituted, failed to meet even this minimal threshold. Among other deficiencies, they permitted the accused's exclusion from his own trial, admitted undisclosed evidence, and departed from fundamental principles of adversarial justice without adequate justification.

The majority opinion, authored by Justice Stevens, rejected the argument that such deviations were necessary for national security. Instead, the Court found that the commissions violated the Uniform Code of Military Justice[319] and treaty obligations, rendering them unlawful. Like *Hamdi,*[320] *Hamdan*[321] did not question the President's authority to detain or try enemy combatants in general. Rather, it imposed procedural boundaries on how that authority could be exercised. The ruling required adherence to established legal norms and rejected the notion that the executive could unilaterally craft bespoke judicial procedures insulated from external constraint.

In both cases, the Court adopted a cautious tone, signalling deference to executive power while maintaining a thin procedural floor. In *Hamdi,*[322] the plurality acknowledged that full civilian procedural protections might be 'unworkable' in wartime, but held that 'core' due process—basic notice and an opportunity to contest detention—must remain. Similarly, in *Hamdan,*[323] the Court did not seek to overturn the broader detention regime but insisted that any deviation from ordinary procedures must be

[316] *Hamdan v Rumsfeld* (n 249).
[317] Uniform Code of Military Justice, 10 USC §§ 801–946.
[318] Geneva Convention (III) (n 93) art 3.
[319] Uniform Code of Military Justice (n 317).
[320] *Hamdi v Rumsfeld* (n 81).
[321] *Hamdan v Rumsfeld* (n 249).
[322] *Hamdi v Rumsfeld* (n 81).
[323] *Hamdan v Rumsfeld* (n 249).

grounded in functional necessity, not mere executive discretion. Both decisions exemplify a judicial posture of accommodation toward executive wartime authority, rather than robust confrontation.

Critically, however, both opinions also revealed the constraining power of the 'enemy combatant' designation itself. The Court accepted the executive's 'enemy combatant' label as a functional justification for procedural departures from civilian adjudication. The term, though ill-defined, carried with it a set of consequences: relaxed evidentiary standards, limited access to counsel, and streamlined adjudicatory processes. The Court did not interrogate the substantive validity of this status designation in detail, nor did it seek to constrain its scope. Instead, it treated 'enemy combatant' status as a premise from which procedural attenuation logically followed.

Thus, the procedural protections articulated in *Hamdi*[324] and *Hamdan*[325] remain modest. The Court refrained from reinstating the full array of constitutional guarantees and instead endorsed a minimalist conception of fairness: the opportunity to be heard, the right to basic notice, and the expectation of a neutral tribunal. Substantive protections—such as exclusion of coerced evidence or heightened burdens of proof—were notably absent or left to be shaped by future litigation. In effect, fairness was 'proceduralized' rather than fully restored. This trajectory illustrates the legal institutionalization of the exception: extraordinary measures once justified by crisis have become embedded in routine adjudication.[326]

These decisions, while symbolically significant, laid the groundwork for subsequent dilution of detainee protections. By endorsing skeletal procedural guarantees and validating flexible evidentiary standards, the Court implicitly authorized future legislative and executive actors to codify permissive regimes. In the years that followed, military commission rules and D.C. Circuit habeas jurisprudence embraced 'some evidence' thresholds and routinely admitted hearsay, further eroding traditional due process norms.[327] In this trajectory, *Hamdi*[328] and *Hamdan*[329] marked not a restoration of robust constitutional oversight, but a judicially sanctioned recalibration of due process—one defined by minimalism, compromise, and deference to the imperatives of war.

[324] *Hamdi v Rumsfeld* (n 81) 533–535.
[325] *Hamdan v Rumsfeld* (n 249) 613–615.
[326] Gross and Ní Aoláin (n 83) 72–75.
[327] *Al-Bihani v Obama* 590 F 3d 866, 872–875 (DC Cir 2010); *Latif v Obama* 666 F 3d 746 (DC Cir 2011).
[328] *Hamdi v Rumsfeld* (n 81).
[329] *Hamdan v Rumsfeld* (n 249).

3.3.2. Evidentiary Standards and the Problem of Indefinite Detention

Departing from the rigorous 'beyond a reasonable doubt' threshold governing criminal convictions,[330] the post-9/11 detention framework adopted far more permissive evidentiary standards for individuals designated as 'enemy combatants.' These relaxed rules reflected the wartime logic underpinning the enemy-combatant designation, which prioritized prevention and national security over individualized guilt assessments. Consequently, detention was justified not by proof of past criminal acts, but by perceived risk of future hostility.[331]

The procedural mechanisms established to review such detentions illustrate this evidentiary shift. Chief among them were the Combatant Status Review Tribunals (CSRTs), administrative bodies created by the Department of Defence to assess whether detainees were properly classified as enemy combatants.[332] These tribunals were not courts of law in the traditional sense. They operated without the constraints of formal evidentiary rules and accorded considerable deference to government assertions. Crucially, the CSRTs presumed the government's evidence as 'genuine and accurate,' even when detainees were denied access to the underlying classified material, thereby precluding effective rebuttal. Hearsay, intelligence summaries, and even information derived from coercive interrogations could be admitted without restriction. Detainees were typically provided only a sanitized summary of the accusations and assigned a military 'personal representative'—a government-affiliated officer with limited duties—rather than an independent legal advocate.[333]

The burden of proof in these proceedings was set at the relatively low 'preponderance of the evidence' standard.[334] In practical terms, this meant the government's evidence merely needed to be more convincing than not, far below the level required to convict in a criminal court. Once the enemy-combatant label had been applied, the evidentiary scales tilted decisively in favour of continued detention. A single intercepted communication, ambiguous association, or vague intelligence report could suffice to satisfy the preponderance standard and justify indefinite detention. The result was a regime in

[330] *In re Winship* 397 US 358, 364 (1970).
[331] Cole, *Enemy Aliens* (n 125) 65–69.
[332] Department of Defense, *Order Establishing Combatant Status Review Tribunals* (n 93).
[333] Mark Denbeaux and others, 'No-Hearing Hearings: CSRTs and the Administration of Guantánamo Detentions' (2006) *Seton Hall Public Law Research Paper No 951245* 9–15.
[334] *Al-Bihani v Obama* (n 327) 879.

which minimal evidence—rarely subjected to adversarial testing—could validate profound deprivations of liberty.

This evidentiary dilution was structurally embedded in the enemy-combatant framework. Because detention was conceptualized as a wartime measure, its goal was not to punish past wrongdoing but to neutralize perceived threats. In this context, detentions were routinely justified by forward-looking risk assessments rather than adjudicated findings of past wrongdoing. As courts themselves acknowledged, the nature of enemy-combatant detention is 'preventive rather than punitive.'[335] In *Al-Bihani v. Obama (2010),*[336] for instance, the D.C. Circuit suggested in dicta that even 'some evidence,' 'reasonable suspicion,' or mere 'probable cause' might suffice to justify continued custody. Although not formally adopted as binding doctrine, such language signalled a judicial openness to significantly attenuated standards of proof, and foreshadowed the courts' broader deference to the executive's preventive logic.[337]

This preventive rationale has displaced criminal procedural protections. The contrast is stark: while criminal trials require prosecutors to establish guilt beyond a reasonable doubt before imposing punishment, the detention regime demands only that the government demonstrate a loosely substantiated nexus to terrorist activity. In the early wave of habeas litigation following *Boumediene,*[338] district courts nominally required the government to justify detention by a preponderance of the evidence. However, in practice, this threshold was easily met through untested intelligence summaries, hearsay, and evidence concealed from the detainee. Detainees often lacked meaningful access to the information used against them, leaving detainees effectively unable to mount a meaningful rebuttal.

This evidentiary flexibility is a direct consequence of the procedural accommodations previously described, in which review mechanisms are present but function under relaxed standards tailored to wartime prevention rather than to the requirements of criminal adjudication.[339]

The outcome is a system where evidentiary standards are both weakened and restructured to favour executive discretion. Tribunals and review boards primarily serve as administrative ratifiers rather than authentic forums for adversarial testing. The lack of meaningful opportunity for detainees to challenge the government's case—especially without full legal representation and disclosure—reduces

[335] *Hamdi v Rumsfeld* (n 81) 518.
[336] *Al-Bihani v Obama* (n 327) 872–873.
[337] Stephen I Vladeck, 'The D.C. Circuit after *Boumediene*' (2011) 23 *Harvard Law & Policy Review* 75, 83–86.
[338] *Boumediene v Bush* (n 82).
[339] Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America's New Global Detention System* (NYU Press 2011) 162–167.

due process to a legitimizing formality. While procedural mechanisms are present, they are designed to validate rather than rigorously scrutinize detention decisions.[340]

In sum, the degradation of evidentiary standards is not a peripheral concern but a central feature of the post-9/11 detention regime. It flows logically from the foundational premise that 'enemy combatants' are wartime threats, not criminal defendants. Once this classification is accepted, traditional standards of proof and evidence are suspended in favour of a preventive, discretionary model. As such, the problem of indefinite detention is inseparable from the evidentiary concessions that sustain it. What is sacrificed in the name of security is not only liberty but the foundational norm that loss of freedom must rest on reliable proof, not on suspicion or prediction.

3.3.3. From Judicial Correction to Institutional Deference

Although the Supreme Court initially imposed procedural constraints, after *Boumediene,*[341] the trajectory of detention litigation shifted toward restraint and deference. Despite reaffirming the constitutional right to habeas corpus, the Supreme Court subsequently declined to articulate or enforce meaningful limits on detention authority. It denied certiorari in every subsequent Guantánamo case brought before it in the 2010s, effectively refusing to clarify the substantive scope or limits of the government's detention power.[342] As one commentator observed, the Court left detainees 'in the hands of the U.S. military,' with only limited access to civilian review mechanisms.[343] Habeas petitions were routed through procedures established by Congress and narrowly interpreted by the D.C. Circuit, with no further Supreme Court intervention. This judicial silence effectively enabled the executive branch to consolidate its approach to preventive detention without further scrutiny.

This retreat from active oversight was mirrored—and arguably intensified—by lower federal courts, particularly the D.C. Circuit. After the appellate decision in *Al-Adahi v. Obama* (2010),[344] the approach to Guantánamo habeas cases became strikingly deferential. This deference was reinforced by the D.C. Circuit, which quickly became the central venue for Guantánamo litigation following

[340] Gross and Ní Aoláin (n 83) 110–14.
[341] *Boumediene v Bush* (n 82).
[342] Stephen I Vladeck, 'The Supreme Court, the D.C. Circuit, and the Detainee Cases' (2011) 103 *Journal of Criminal Law and Criminology* 735, 750–754.
[343] Hafetz, *Habeas Corpus after 9/11* (n 339) 180–82.
[344] *Al-Adahi v Obama* 613 F 3d 1102 (DC Cir 2010).

Boumediene.[345] *Al-Adahi*[346] criticized district judges for engaging in 'plausibility' tests and instead emphasized that detention need only be supported by a preponderance of the evidence. Following this shift, detainees saw their litigation success plummet: where they had prevailed in over 50% of habeas rulings before 2010, that rate dropped dramatically thereafter. A 2012 empirical study reported that post-*Al-Adahi,*[347] 11 out of 12 habeas petitions were denied by district courts.[348] The D.C. Circuit also foreclosed legal challenges by former detainees, holding that the lingering stigma of an 'enemy combatant' designation did not constitute a cognizable legal injury. The net effect was a judicial posture that largely validated executive assertions while foreclosing substantive relief. The overall effect was a jurisprudential environment increasingly deferential to executive claims, with few remaining avenues for detainees to contest their status or conditions.[349]

While the courts retreated from active oversight, Congress and the executive codified and expanded the enemy combatant framework through legislation. The Military Commissions Act of 2006[350] codified the term 'unlawful enemy combatant' and established procedures for their detention and trial outside the Article III judiciary.[351] Most consequentially, the 2012 National Defence Authorization Act (NDAA)[352] reaffirmed the President's authority to detain 'covered persons' under the 2001 Authorization for Use of Military Force.[353] The statute's definition of covered persons included not only members of enemy forces but also individuals who 'substantially supported' al-Qaeda, the Taliban, or associated forces—thereby institutionalizing broad detention powers that extended beyond traditional battlefield combatants. The NDAA[354] explicitly endorsed indefinite detention 'without trial until the end of hostilities,' a concept rendered functionally unbounded by the open-ended nature of the post-9/11 conflict. Additional statutory measures further insulated the regime, such as appropriations provisions that prohibited funding for detainee transfers and restricted detainees' ability to communicate publicly.[355]

[345] Vladeck, 'The D.C. Circuit after *Boumediene*' (n 337) 77–79.
[346] *Al-Adahi v Obama* (n 344) 1105–1110.
[347] *Al-Adahi v Obama* (n 344).
[348] Mark Denbeaux, Jonathan Hafetz, Sara Ben-David, Nicholas Stratton & Lauren Winchester, *No Hearing Habeas: D.C. Circuit Restricts Meaningful Review* (Seton Hall Center for Policy & Research, 1 May 2012) 4–5.
[349] Aziz Rana, 'Constitutionalism and the Foundations of the Security State' (2011) 103 *California Law Review* 461,.
[350] Military Commissions Act 2006 (n 252).
[351] US Constitution art III § 1.
[352] National Defense Authorization Act for Fiscal Year 2012, Pub L No 112–81, 125 Stat 1298.
[353] Authorization for Use of Military Force 2001 (n 79).
[354] National Defense Authorization Act for Fiscal Year 2012 (n 352) s 1021.
[355] Consolidated Appropriations Act 2014, Pub L No 113–76, 128 Stat 5, div C, tit X.

Together, these developments transformed the early promise of judicial correction into a pattern of institutional acquiescence. While the Supreme Court's initial rulings imposed important procedural benchmarks—such as the right to a hearing, access to courts, and minimum trial standards—these protections were never expanded into robust judicial enforcement of substantive rights. In practice, habeas review became a formal mechanism rather than a meaningful check. Courts accepted government intelligence with little scrutiny, upheld indefinite detention under vague standards, and declined to review the legality of the ongoing wartime posture.[356]

What ultimately developed was a model of 'regulated exception,' in which judicial procedures were maintained in a minimal form while the underlying logic of indefinite wartime detention persisted. These procedures provided only the appearance of oversight, effectively endorsing executive detention practices. Early judicial interventions became routinized into deference. Scholars note that this outcome signifies a broader institutional shift, with the judiciary maintaining the appearance of legal oversight while avoiding challenges to the detention regime's foundational premises. Executive discretion, once contested, became institutionalized through procedural formalism and legislative reinforcement. The legal category of 'enemy combatant,' initially debated, was thus integrated into standard governance.[357]

In sum, the arc of post-9/11 detention law bends toward continuity rather than rupture. The judiciary's initial push to reassert constitutional boundaries gave way to a posture of restraint, while Congress and the executive enshrined the detention paradigm into statutory law. What began as judicial correction has culminated in institutional deference: a system in which expansive detention powers are constrained not by substantive judicial limitations, but by procedural mechanisms that ultimately reinforce the regime they were meant to regulate.

3.4 The Alien Enemies Tradition and Contemporary Developments

3.4.1 The Alien Enemies Act: Historical Foundations and Cold War Applications

[356] Gerald L Neuman, 'The Habeas Corpus Suspension Clause after *Boumediene*' (2009) 110 *Columbia Law Review* 537, 570–575.
[357] Gross and Ní Aoláin (n 83) 258–62.

The Alien Enemies Act (AEA)[358] of 1798 remains among the most enduring statutory embodiments of status-based national security authority in U.S. law. Enacted as part of the Alien and Sedition Acts,[359] it empowers the President, in times of declared war or invasion, to detain, restrict, or deport any non-citizen who is a national of a hostile foreign power. It does not require individualized suspicion or proof of disloyalty; nationality alone suffices as a basis for executive action. Although rarely invoked in peacetime, the Act[360] has played a foundational role in wartime immigration policy, providing legal cover for mass internment, surveillance, and removal of foreign nationals during major conflicts, including the War of 1812, World War I, and World War II.[361] Its structure anticipates later models of preventive detention, in which identity and perceived affiliation, rather than adjudicated conduct, become grounds for state action.

During World War II, the AEA[362] formed part of the legal scaffolding for the internment of tens of thousands of individuals of Japanese, German, and Italian descent. Although the most infamous detentions targeted Japanese-Americans—including U.S. citizens—the statute supported broader assumptions that national origin could serve as a proxy for disloyalty. Courts, including the Supreme Court, upheld these measures as justified by military necessity, thus institutionalizing the idea that alienage conferred presumptive threat.[363]

This principle reflects a long-standing 'enemy alien' doctrine in American legal history. From the founding era onward, foreign nationals in wartime were seen as occupying a distinct legal category, defined not by conduct but by allegiance. Courts and lawmakers have repeatedly accepted that alienage—especially when tied to a hostile state—warrants diminished rights and heightened suspicion. This logic animated not only the AEA[364] but also later exclusionary laws, such as the Chinese Exclusion Act[365] and the national-origin quotas of the early 20th century.[366] The structure is consistent: alienage, combined with national affiliation with a perceived enemy, serves as the basis for categorical restriction, often

[358] Alien Enemies Act 1798 (n 168).
[359] Alien and Sedition Acts 1798 (n 161).
[360] Alien Enemies Act 1798 (n 168).
[361] Mae M Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton University Press 2004) 38–41.
[362] Alien Enemies Act 1798 (n 168).
[363] *Ludecke v Watkins* 335 US 160, 171–173 (1948).
[364] Alien Enemies Act 1798 (n 168).
[365] Chinese Exclusion Act 1882, ch 126, 22 Stat 58; *Chae Chan Ping v United States* 130 US 581 (1889).
[366] Immigration Act 1924, ch 190, 43 Stat 153; see also *Ozawa v United States* 260 US 178 (1922).

untethered from individualized assessments of danger. This logic would later resurface in the post-9/11 era, where affiliation and identity again became stand-ins for individualized threat assessment.[367]

Although the Alien Enemies Act[368] itself fell into disuse after World War II, its underlying logic endured through subsequent national security crises. During the Cold War, legislation such as the Smith Act of 1940[369] revived the association between alienage and ideological threat, authorizing the registration, surveillance, and prosecution of immigrants suspected of Communist sympathies. Even in the absence of declared war, national security concerns once again justified measures targeting non-citizens based on perceived affiliations rather than specific conduct. The assumption that foreignness equates to latent subversion remained a foundational presumption in both law and policy.

This mindset resurfaced with renewed force in the post-9/11 era. In the wake of the 2001 attacks, the U.S. government implemented the National Security Entry-Exit Registration System (NSEERS),[370] which mandated special registration and monitoring for non-citizens from predominantly Muslim countries. Though officially framed as a counterterrorism tool, NSEERS[371] echoed the logic of the AEA[372]: that national origin, religious identity, or cultural proximity to a perceived enemy could serve as grounds for pre-emptive scrutiny and constraint. While the program was eventually suspended, it had already subjected tens of thousands of individuals to intensified state surveillance, reinforcing the continuity of suspicion-based immigration control across decades and conflicts.[373]

In a striking modern application, the Trump administration revived the Alien Enemies Act[374] to authorize the detention and removal of Venezuelan nationals accused of gang affiliation. Although no formal war existed between the U.S. and Venezuela, the administration designated these individuals as 'alien enemies' under the 1798 statute.[375] This marked a doctrinal departure from the Act[376]'s traditional wartime context—but reflected a deeper continuity: the expansion of enemy logic beyond armed conflict to cover foreignness and criminal suspicion alike.

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[367] Cole, *Enemy Aliens* (n 125) 91–95.
[368] Alien Enemies Act 1798 (n 168).
[369] Smith Act 1940, 18 USC § 2385.
[370] Department of Justice, 'National Security Entry-Exit Registration System (NSEERS)' (Final Rule, 67 Fed Reg 52584, 12 August 2002).
[371] ibid.
[372] Alien Enemies Act 1798 (n 168)
[373] American Civil Liberties Union, *The NSEERS Effect: A Decade of Racial Profiling, Fear, and Secrecy* (ACLU 2012).
[374] Alien Enemies Act 1798 (n 168)
[375] ibid.
[376] ibid.

In sum, the Alien Enemies Act[377] represents more than an antiquated wartime tool; it encapsulates a recurring pattern in U.S. legal history. The presumption that certain non-citizens, by virtue of their nationality or perceived affiliation, are inherently threatening has persisted across centuries and crises. As scholars have observed, laws enacted in times of crisis are often disavowed in peacetime yet remain dormant, ready for future activation.[378] The AEA[379]'s survival—and periodic revival—demonstrates how emergency powers become institutionalized within immigration law, blurring the line between wartime exception and peacetime governance.[380] This structural elasticity set the stage for later expansions, including their application in domestic immigration policy under the Trump administration.

3.4.2 Trump-Era Extensions: Migration, National Security, and Enemy Rhetoric

The Trump administration's immigration policies can be understood as a contemporary extension of the enemy-alien logic traced in Section 3.4.1, rather than as an isolated departure. In January 2017, President Trump issued Executive Order 13769,[381] commonly referred to as the 'travel ban,' which temporarily suspended entry into the United States for nationals of seven predominantly Muslim countries. Justified on national security grounds, the order claimed that individuals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen posed 'heightened concerns about terrorism.'[382] A revised directive—Executive Order 13780,[383] issued in March 2017—reiterated that the entry of such individuals would be 'detrimental to the interests of the United States.' Although formally framed as a precautionary counterterrorism measure, both orders relied on nationality as a proxy for threat, importing the logic of battlefield risk into the regulation of immigration in the absence of declared conflict.

These executive actions were neither isolated nor merely symbolic. On 24 September 2017, Presidential Proclamation 9645 replaced the earlier executive-order framework and imposed tailored entry restrictions on nationals of eight countries, including several Muslim-majority states as well as

[377] ibid.
[378] Kim Lane Scheppele, 'Small Emergencies' (2006) 40 *Georgia Law Review* 835, 847–850.
[379] Alien Enemies Act 1798 (n 168).
[380] Gross and Ní Aoláin (n 83) 171–74.
[381] Executive Order 13769, 'Protecting the Nation from Foreign Terrorist Entry into the United States' (27 January 2017).
[382] ibid s 1(f).
[383] Executive Order 13780, 'Protecting the Nation from Foreign Terrorist Entry into the United States' (6 March 2017).

North Korea and Venezuela.[384] While the administration maintained that these measures were necessary to prevent terrorist infiltration, legal challenges and independent assessments cast doubt on the evidentiary basis for the restrictions. Courts initially struck down several iterations of the ban, finding them arbitrary and discriminatory.[385] Nevertheless, the Supreme Court ultimately upheld the September 2017 proclamation in *Trump v. Hawaii (2017),*[386] accepting the executive's national security rationale while declining to interrogate the underlying assumptions linking nationality to threat. In doing so, the Court validated a legal framework in which collective suspicion based on national origin could be reconciled with constitutional doctrine through formal deference to executive judgment.

This securitized framing was reinforced by the administration's public discourse. During his 2015 campaign, Trump repeatedly characterized undocumented immigrants as criminals, claiming that border crossers included 'rapists' and other violent offenders.[387] Once in office, this rhetoric escalated: immigration was described as an 'invasion,' and migrants were portrayed in quasi-military terms. Such language blurred the conceptual boundary between civilian migration and wartime hostility, reframing immigration enforcement as an act of national defence rather than a matter of civil administration.

This rhetorical transformation acquired formal legal expression in January 2025, when the executive branch issued an order framing large-scale unauthorized migration as an 'invasion' of U.S. territory and directing an intensified enforcement posture at the border.[388] The order asserted that undocumented immigrants had committed 'vile and heinous' acts, including terrorism, espionage, and preparations for violent activity, and thus constituted a national security threat. By invoking the constitutional vocabulary of invasion, the administration sought to justify extraordinary executive authority in the absence of armed conflict. This wartime posture was echoed in parallel state-level actions: Texas officials argued in court that unauthorized crossings represented a justiciable 'invasion,' warranting the deployment of state military forces.[389] In this framework, military logic was transposed onto domestic policy, effectively recasting the border as a zone of emergency governance.

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[384] Presidential Proclamation 9645, 'Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats' (24 September 2017).
[385] *Hawaii v Trump* 878 F 3d 662 (9th Cir 2017); *Washington v Trump* 847 F 3d 1151 (9th Cir 2017).
[386] *Trump v Hawaii* 585 US 667 (2018).
[387] Jenna Johnson, 'Trump Calls Some Unauthorized Immigrants "Rapists"' *Washington Post* (16 June 2015).
[388] Executive Order 14159, 'Protecting the American People Against Invasion' (20 January 2025); Congressional Research Service, 'Executive Authority and Immigration Enforcement after January 2025' (CRS Legal Sidebar, 2025).
[389] *Texas v United States* 106 F 4th 202 (5th Cir 2024); Adam Liptak, 'Texas Presses "Invasion" Theory in Immigration Dispute' *New York Times* (2024).

These developments were not merely symbolic; they carried tangible legal consequences. Most notably, in March 2025, the executive branch invoked the Alien Enemies Act of 1798[390]—a statute historically reserved for declared wars—to authorize the detention and removal of Venezuelan nationals alleged to be affiliated with the criminal organization *Tren de Aragua.*[391] Although no formal war existed between the United States and Venezuela, the administration designated these individuals as 'alien enemies' under the eighteenth-century statute. This marked a significant doctrinal departure from the Act's[392] traditional wartime application but reflected a deeper continuity: the expansion of enemy logic beyond armed conflict to encompass foreignness and criminal suspicion. By designating certain migrants as enemy figures, the executive reaffirmed a legal structure in which identity and affiliation, rather than adjudicated conduct, serve as the basis for presumptive threat.

More broadly, Trump-era policies illustrate the deepening entanglement between national security doctrine and immigration enforcement. Legal tools once reserved for military emergencies—including group-based restrictions, indefinite detention, and reduced judicial scrutiny—were increasingly applied to civilian migration. Programs such as family separation, expedited removal, and prolonged detention were defended not merely as administrative policy but as extensions of counterterrorism strategy.[393] This conflation of war and law enforcement not only blurred legal categories but also weakened the procedural safeguards historically afforded to migrants and asylum seekers.

When considered in light of the historical context outlined in Section 3.4.1, these measures are better understood as a peacetime adaptation of a longstanding enemy-alien framework, rather than as a novel securitization of migration. The Trump administration's policies did not invent a new logic of exclusion; rather, they revived and repurposed dormant legal concepts—alienage, invasion, and enemy status—long embedded within U.S. national security law. In doing so, they further normalized treating migration as a security threat and extended emergency legal reasoning into the domain of ordinary governance.

3.4.3 The Expansion of 'Enmity' into the Civil Sphere

[390] Alien Enemies Act 1798 (n 168).
[391] Presidential Proclamation, 'Invocation of the Alien Enemies Act with Respect to Tren de Aragua' (15 March 2025).
[392] Alien Enemies Act 1798 (n 168)
[393] Hiroshi Motomura, *Immigration Outside the Law* (Oxford University Press 2014) 112–118.

If Section 3.4.1 shows how 'enemy' logics historically attach to alienage, the post-9/11 period illustrates a further expansion: the migration of enmity frameworks into domestic dissent and civil governance. In the decades following 9/11, the legal and rhetorical category of the 'enemy' has migrated from the battlefield into the domestic sphere. Drawing on Carl Schmitt's friend–enemy distinction[394]—a conception of politics grounded in existential conflict—U.S. authorities have increasingly applied national security paradigms to internal dissent. This transformation has blurred the traditional line between external adversaries and domestic critics, extending emergency powers into domains of ordinary civil governance.

A central feature of this shift is the growing conflation of political dissent with a national security threat. In 2025, a National Security Memorandum designated various civil society actors—including journalists, academics, and nonprofit organizations—as contributors to an 'internal threat environment,' effectively portraying critical speech as suspect.[395] Federal law enforcement similarly expanded the statutory definition of 'domestic terrorism' to encompass expressive conduct long protected by the First Amendment.[396] An FBI bulletin cited flyer distribution, graffiti, and even phone-bank disruptions as potential indicators of terrorist activity.[397] These developments reflect a recurring pattern in U.S. legal history: the reclassification of protest as subversion, now legitimized through the language of counterterrorism.

This securitized framing is particularly visible in the policing of protest movements. In recent years, demonstrations and activist campaigns have been increasingly subjected to surveillance and criminalization under counterterrorism frameworks. In 2017, the FBI coined the term 'Black Identity Extremists' to justify monitoring of racial justice activists—despite acknowledging internally that no such group existed.[398] In Georgia, over sixty environmental protesters opposing a police training facility were indicted under sweeping RICO and terrorism statutes.[399] Critics contend that such prosecutions are not aimed at genuine threats but at suppressing political opposition.[400] In states like Oregon, minor protest-related offenses have been reclassified as terrorism, imposing enhanced penalties for conduct

[394] Carl Schmitt, *The Concept of the Political* (n 23) 26–27.
[395] National Security Memorandum, 'Countering Emerging Domestic Threat Environments' (White House, January 2025)
[396] 18 USC § 2331(5).
[397] Federal Bureau of Investigation, 'Indicators of Domestic Violent Extremism' (Intelligence Bulletin, 2023).
[398] Federal Bureau of Investigation, 'Black Identity Extremists Likely Motivated to Target Law Enforcement Officers' (Intelligence Assessment, August 2017).
[399] *State of Georgia v McDonald* (Fulton County Superior Court, 2023).
[400] Amnesty International USA, *Human Rights Violations in the Policing of Protests* (Amnesty 2024).

previously treated as misdemeanours.[401] These developments reflect a broader legal pattern: the deployment of expansive, ideologically charged statutes to stigmatize dissent.

Parallel to this prosecutorial trend is the expansion of domestic surveillance. Under the USA PATRIOT Act,[402] federal agencies gained broad authority to issue 'national security letters' compelling disclosure of private data without judicial warrants. Institutions such as libraries and internet service providers have received such requests, often accompanied by gag orders. Meanwhile, the Foreign Intelligence Surveillance Act (FISA)[403] has enabled warrantless surveillance based on tenuous links to foreign entities. Analysts warn that classifying a domestic group as associated with a 'foreign terrorist organization' permits sweeping investigative powers.[404] At the local level, Joint Terrorism Task Forces and fusion centres monitor protest activity, sometimes using political ideology as a metric of threat. These practices recall Cold War-era programs like COINTELPRO,[405] where surveillance targeted ideology, not unlawful conduct.

Once an individual or group is designated as a security threat—whether as a 'domestic violent extremist,' 'special interest alien,' or ideological sympathizer—ordinary legal protections often recede. Tools such as no-fly lists, electronic monitoring, or immigration holds can be deployed without trial, based on opaque administrative processes.[406] Proceedings under FISA[407] and NSLs occur *ex parte* and remain shielded from adversarial review. Even when judicial mechanisms are available, courts often apply highly deferential standards, and affected individuals rarely receive notice or the opportunity to challenge the evidence. In practice, these mechanisms enable prolonged restrictions on liberty and movement while preserving only the appearance of due process.[408]

These dynamics mirror the logic of the 'state of exception' outlined earlier in this chapter. Just as foreign detainees were subjected to procedurally minimalist hearings that concealed sweeping deprivations of rights, domestic dissenters increasingly face legal architectures that obscure the suspension of substantive protections. Judicial oversight—where it exists—often relies on secret evidence or non-adversarial proceedings. Preventive detention mechanisms, once limited to armed

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[401] Oregon Revised Statutes § 166.382.
[402] USA PATRIOT Act 2001, Pub L No 107–56, 115 Stat 272; see also 18 USC § 2709 (National Security Letters).
[403] Foreign Intelligence Surveillance Act 1978, 50 USC §§ 1801–1885c.
[404] Jennifer Daskal, 'Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention' (2011) 99 *Cornell Law Review* 327, 362–368.
[405] Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Final Report*(Church Committee Report, 1976) bk III.
[406] *Latif v Holder* 686 F 3d 1122 (9th Cir 2012); see also *Mohamed v Holder* 995 F Supp 2d 520 (ED Va 2014).
[407] Foreign Intelligence Surveillance Court, Rules of Procedure (as amended 2023).
[408] David Cole and Jules Lobel, *Less Safe, Less Free: Why America Is Losing the War on Terror* (New Press 2007) 74–79.

conflict, have now migrated into civil law: administrative immigration holds, watchlisting, and security-based pretrial detention all reproduce the underlying logic of indefinite custody. In this context, the designation of 'enemy' functions not as a descriptor of conduct but as a legal trigger for exclusion from the rights-bearing community.[409]

The historical continuity of this legal strategy is unmistakable. From McCarthy-era loyalty investigations to COINTELPRO and the post-9/11 detention regime, U.S. law has repeatedly framed dissent—especially when voiced by racialized or marginalized communities—as an internal threat. Though contemporary domestic terrorism laws appear facially neutral, their enforcement disproportionately targets Black and Brown activists. Even when formal constitutional rights remain intact, the thresholds for surveillance, detention, or criminal labelling have been dramatically lowered. What emerges is a two-tiered legal order in which the forms of legality persist, but access to their protections is unequally distributed.[410]

In conclusion, the post-9/11 enmity paradigm has not remained confined to the foreign battlefield. It has reshaped the internal structure of legal authority, embedding the logic of emergency into the administration of civil life. The legal and rhetorical apparatuses once reserved for declared enemies are now routinely deployed against protesters, migrants, academics, and other perceived dissenters. This shift marks more than rhetorical excess: it represents a structural realignment in which the boundaries between citizen and enemy, civil order and national security, have become dangerously porous. As the category of the 'enemy' expands, so too does the zone of legal exceptionalism—and with it, the erosion of democratic protections

[409] Giorgio Agamben, *State of Exception* (n 66) 38–40.
[410] Aziz Rana, 'The Two Faces of American Freedom' (2010) 91 *Boston University Law Review* 1, 45–50.

CHAPTER 4: The Legal Construction of Uyghurs as Enemies in China

4.1 Historical and Political Context of Uyghur Marginalisation

4.1.1. Historical Roots of State Suspicion toward Uyghurs

Successive Chinese regimes have consistently characterised the Uyghur population of Xinjiang as potentially subversive, citing three main reasons: Xinjiang's remote frontier status, which has led authorities to view its people as less loyal; the Uyghurs' distinct culture and religion, which have marked them as resistant to integration; and a consistent depiction of Uyghur loyalty as unreliable in both imperial and PRC records.[411] These attitudes predate modern 'counterterrorism' discourse and continue to underpin state suspicion toward Uyghurs.

Xinjiang's frontier status has significantly influenced state perceptions and policies. The name 'Xinjiang,' meaning 'New Frontier,' highlights how rulers have viewed the region as a strategic borderland requiring strict control, rather than a standard province. The region's geographic remoteness and history of contested sovereignty have been seen as sources of vulnerability. Authorities view external influences and internal instability as mutually reinforcing. This perception shapes how Uyghurs have been governed. In the Qing and Republican eras, Uyghur-majority settlements were not only seen as culturally distinct but also as unstable parts of a broader security system. Uyghurs were often seen through a security lens, and the borderland status was invoked to justify more surveillance and militarised controls to maintain territorial integrity.[412]

The distinctive Uyghur culture and religion have played a central role in shaping internal alterity within the Chinese state. Instead of viewing Turkic language, Islamic practice, and Central Asian customs as neutral diversity, interpreters have regarded them as signs of unreliability and incomplete assimilation. State narratives often equate cultural difference with divided loyalty. As a result, non-Han traditions are cast as both administrative and geopolitical problems.[413] Assimilationist interventions have ranged from late-Qing Confucian schooling mandates to the intensification of Hanification under Xi Jinping. These

[411] Millward (n 185); Gardner Bovingdon, *The Uyghurs: Strangers in Their Own Land* (Columbia University Press 2010).
[412] Millward (n 185); Laura Newby, *The Empire and the Khanate: A Political History of Qing Relations with Khoqand c 1760–1860* (Brill 2005).
[413] Bovingdon (n 411); Arienne M Dwyer, *The Xinjiang Conflict: Uyghur Identity, Language Policy, and Political Discourse*(East–West Center 2005) 3–4, 16–17.

interventions serve less as inclusive efforts and more as strategies to manage and reduce perceived ideological estrangement.[414] In this context, maintaining Turkic-Islamic practices signals resistance to the normative order of the socialist, unitary nation-state.

Episodes of unrest and the formation of short-lived separatist regimes in Xinjiang, such as the 1860s rebellion and the two brief 'East Turkestan Republics' of the 1930s and 1940s, are used by the state to support a broader argument: Uyghur political allegiance is inherently unstable.[415] Rather than being treated as isolated incidents, these events are woven into the state narrative to justify persistent suspicion and equate Uyghur identity with separatist risk.

Under Communist rule, the management of Uyghur political loyalty shifted between co-optation and suspicion. Early efforts sought to incorporate Uyghur elites into the administration. These were soon replaced by campaigns against 'local nationalism' and alleged foreign ties, especially during the Sino-Soviet split. Perceived links to Soviet Central Asia justified increased surveillance and pre-emptive repression.[416] Uyghur unrest was not seen as episodic dissent, but as evidence of chronic national disunity. This justified ongoing securitisation.

Prior to the adoption of contemporary terrorism rhetoric, earlier Chinese regimes characterised Uyghur rebels as bandits or traitors supported by foreign powers,[417] while Mao-era campaigns labelled dissenters as 'counter-revolutionaries' or 'splittists.'[418] These designations consistently cast Uyghurs as state enemies, predating any association with Islamist militancy. The transition to 'terrorism' language in the 21st century represented a recalibration, rather than a fundamental transformation, of this longstanding threat narrative.

This pattern of suspicion is explicitly expressed in modern security discourse. Both imperial and Communist authorities have viewed internal dissent—especially among Uyghurs—as a direct threat to state power.[419] Under this logic, any sign of divided loyalty is seen as a threat to political stability. Drawing from Carl Schmitt,[420] Chinese state sovereignty is exercised by treating Uyghur opposition not as a common crime, but as an existential threat requiring eradication.

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[414] Millward (n 185); Roberts (n 194).
[415] Millward (n 185).
[416] Bovingdon (n 411); Christian Kraus, 'Sino-Soviet Relations and the "Yi–Ta" Incident in Xinjiang, 1962' (2019) 43(2) *Cold War History*.
[417] Millward (n 185); Newby (n 412).
[418] Bovingdon (n 411); Dwyer (n 413) 16–17, 70–71.
[419] Roberts (n 194).
[420] Carl Schmitt, *Political Theology* (n 25) 5.

This logic of suspicion has justified extraordinary governance. State responses to Uyghur unrest have included military colonisation, demographic change via Han settlement, and reduced legal protections for those labelled 'separatists.'[421] These steps replace ordinary legal constraints with exceptional administrative prerogatives. The persistence of this approach reflects a strategy in which creating and maintaining internal enemies becomes a tool for managing risk at the periphery.

In sum, the idea of Uyghurs as an inherently suspect group is embedded within a longstanding narrative architecture that predates contemporary security discourse. The intersection of frontier geography, cultural difference, and contested allegiance has long made Uyghurs objects of state suspicion and regulation. Understanding these patterns is key to seeing how today's legal and policy regime in Xinjiang developed. The current regime operates by legally managing a population deemed an internal enemy.

4.1.2. From Autonomy to Control: Transformation of Xinjiang Policy

In the first decades of PRC rule, Beijing's policy in Xinjiang was framed as ethnic autonomy and official recognition. The 1955 creation of the Xinjiang Uyghur Autonomous Region (XUAR) in nominally affirmed the Uyghur people's right to self-governance within the Chinese state. State discourse embraced a model of ethnic pluralism, granting minorities the right to their own languages, customs, and cultural institutions. Yet this pluralism was limited. Political power was highly centralised, and mass campaigns, especially during the Cultural Revolution, often prioritised ideology over ethnic differences. Even in times of cultural accommodation, Uyghur institutions were recognised, but real autonomy was limited. Key decisions stayed with Han-led Party groups.[422]

Although the autonomy framework may initially appear to signal institutional inclusion rather than securitised governance, in practice, it functioned less as a guarantee of self-rule and more as a conditional mode of incorporation. Autonomy was allowed only when it did not provoke concerns over loyalty or unity, so state control could easily supersede promises of self-government. This conditional autonomy meant that, even before explicit securitisation, centralisation remained dominant in practice.

By the late twentieth century, the constraints of this model became increasingly visible. Periodic outbreaks of unrest in the 1980s and 1990s revealed growing discontent among Uyghurs and signalled

[421] James D Seymour, 'Xinjiang's Production and Construction Corps, and the Sinification of Eastern Turkestan' (2000) 2(2) *Inner Asia* 171.
[422] Bovingdon (n 411) 41–68.

to Beijing that ethnic diversity might pose challenges to national unity.[423] These disruptions functioned as a stress test for the autonomy model: rather than prompting renewed accommodation, they led to a growing perception that pluralist governance was permissive or insufficiently robust in the face of instability. The 1990 Baren uprising, in particular, marked a turning point in this evolving approach. Interpreted by the state as a manifestation of militant separatism, the revolt prompted a more securitised policy orientation.[424] Throughout the 1990s, the government responded to further incidents—such as the 1997 Ghulja protests and Ürümqi bombings—with 'Strike Hard' campaigns that prioritised stability maintenance over cultural accommodation.[425] The CCP's post-Tiananmen emphasis on pre-empting instability found specific application in Xinjiang, where regional officials were evaluated based on their ability to suppress dissent. This shift reflected a broader redefinition of the region's governance logic: rather than a space of pluralistic inclusion, Xinjiang came to be treated as a zone of latent volatility requiring continual vigilance.

The post-9/11 international context deepened this transformation. The global 'War on Terror' provided Beijing with a strategic opportunity to reframe its domestic struggles in Xinjiang through the lens of counterterrorism. Where unrest had previously been understood largely as an issue of ethnic separatism, it was now discursively linked to global jihadist networks. The designation of the East Turkestan Islamic Movement (ETIM) as a terrorist organisation by the U.S. and the United Nations in 2002[426] lent international legitimacy to China's evolving narrative. Chinese officials increasingly portrayed Uyghur activists as religious extremists with transnational connections, collapsing distinctions between political dissent, religious identity, and violent militancy. This rhetorical convergence with global security discourse gave cover to a more preventive posture: expressions of Uyghur religious practice or cultural identity were recoded as early warning signs of radicalisation.

Concurrently, influential voices within Chinese academic and policy circles began questioning the pluralist foundations of China's ethnic system. Scholars such as Ma Rong and, later, Hu Angang and Hu Lianhe, proposed reevaluating the autonomy framework, arguing that it contributed to ethnic segmentation and separatist sentiment. Advocating for a 'second-generation' ethnic policy, they proposed dismantling regional autonomy, eroding minority distinctions, and promoting a singular, assimilationist

[423] Bovingdon (n 411) 73–102; Michael E Clarke, *Xinjiang and China's Rise in Central Asia: A History* (Routledge 2011) 64–78.
[424] Millward (n 185) 325–28; Clarke (n 423) 70–72; Roberts (n 194) 62–66.
[425] Bovingdon (n 411) 104–15; Clarke (n 423) 74–78.
[426] Roberts (n 194) 109–15.

national identity.[427] Their proposals gained traction under Xi Jinping, who explicitly tied ethnic harmony to national security. The language of 'Sinicisation' came to dominate Party rhetoric, with calls to align minority cultures more closely to Han norms and socialist values. In this new vision, cultural difference was not merely tolerated but actively problematized. What had once been presented as a feature of China's unity-in-diversity was now recast as a potential fracture in the body politic.

This ideological shift laid the foundation for the more intensive securitisation of Xinjiang in the 2010s. Following a series of high-profile violent incidents—most notably the 2014 Kunming station attack—Xi Jinping declared a 'People's War on Terror' and authorised a broad campaign to suppress extremism in the region.[428] Official language emphasised the need to address 'ideological viruses' before they could spread, invoking metaphors of contagion to justify anticipatory intervention.[429] At the policy level, this translated into an increasingly expansive understanding of what constituted a security threat. The boundary between cultural expression and political deviance became dangerously porous. Uyghur customs, language, and religious practices were not banned outright but were increasingly interpreted by authorities as indicators of latent radicalisation risk. Regional autonomy was no longer viewed as a constitutional commitment, but as a structural vulnerability to be corrected.

By 2016, this logic had become entrenched. The appointment of Chen Quanguo as Party Secretary of Xinjiang signalled a new phase in the region's administration. Drawing on his experience in Tibet, Chen institutionalised a strategy emphasising grid-style surveillance, mass data collection, and behavioural standardisation, with ideological assimilation as a core objective. Although the specific mechanisms of surveillance and detention would escalate under his leadership, the discursive and political foundations had already been laid. The shift from nominal autonomy to systemic securitisation was no longer reactive; it had become the enduring framework through which Uyghur identity was governed.[430]

Despite significant differences in legal structure and human rights protections, both China and the United States illustrate how security logics can normalise anticipatory governance. The transformation of Xinjiang policy was not a sudden reaction to terrorism, but a gradual reconfiguration of governance logic. Over time, cultural differences were interpreted as political risks, and autonomy

[427] Ma Rong, 'A New Perspective in Guiding Ethnic Relations in the 21st Century: "De-politicization" of Ethnicity in China' (2007) *Asian Ethnicity* 199; James Leibold, 'Toward a Second Generation of Ethnic Policies?' (2013) 4(1) *China Brief*.
[428] Roberts (n 194) 165–72; Joanne Smith Finley (n 194) 8–10.
[429] Smith Finley (n 194) 11–15.
[430] Darren Byler, 'China's Hi-Tech War on Its Muslim Minority' (2018) 16(1) *Current History* 18; Roberts (n 194) 178-88.

was reframed as a liability rather than a right. Subsequent policies, regardless of their coercive nature, were rooted in this redefinition. The state ceased to accommodate Uyghur identity within the PRC's pluralist framework and instead sought to render it governable through anticipatory control. The region's policy trajectory parallels the dynamics described in Chapter 3: just as the United States adopted open-ended emergency powers after 2001, China institutionalised a permanent internal security paradigm in Xinjiang. The distinction between threat and identity collapsed, and the management of potential enmity became central to governance. The retreat from autonomy did not represent the abandonment of a stable pluralist settlement but rather revealed its underlying conditionality as a mode of governance. Cultural accommodation proved sustainable only as long as it did not generate concerns about loyalty or control; once such concerns arose, autonomy itself was reframed as a security vulnerability.

4.1.3. Propaganda and the Enemy Narrative in State Discourse

Before the law designates a subject as dangerous, the political system often names the enemy discursively. In the case of Xinjiang, the construction of the Uyghur population as a threat preceded the formal legal apparatus and was rooted in a sustained discursive strategy by the Chinese state. The official vocabulary—consisting of terms such as 'terrorism,' 'separatism,' and 'religious extremism'—has served not simply to describe acts or ideologies, but to fuse identity, belief, and violence into a singular narrative of internal enmity. These labels have become central to justifying exceptional policies and to collapsing the distinction between cultural expression and political subversion.[431] In this context, discourse is not merely a reflection of security concerns; it is a constitutive element of the enemy-making process.

In this context, the designation of the Uyghur 'enemy' should not be understood solely in classical military terms, nor as a mere by-product of technocratic risk management. Rather, contemporary governance in Xinjiang collapses multiple categories—political enemy, criminal suspect, and risk population—into a single object of security. This collapse is analytically significant: it allows cultural identity itself to function simultaneously as a marker of political threat, legal suspicion, and algorithmic risk.

As pluralist accommodation was increasingly characterised as permissive or naïve, discursive enemy-making provided the rationale for transforming conditional inclusion into preventive control. Following the unrest of the 1990s and especially after September 11, 2001, the Chinese state

[431] Smith Finley (n 194) 3–7; Roberts (n 194) 9–13.

systematically framed Uyghur activism and religious practice through the lens of international terrorism. The 'Three Evils' framework—terrorism, separatism, and religious extremism—became the discursive triad around which state narratives were organised.[432] Official documents, state media, and public speeches repeatedly invoked these terms to describe a wide range of Uyghur behaviours, regardless of their actual connection to violence or organised dissent. For instance, peaceful protests were frequently described as separatist, while expressions of Islamic faith, such as wearing a headscarf or refusing alcohol, were rhetorically linked to extremism.[433] These deliberately elastic categories enabled the state to portray an entire cultural community as a latent security risk.

The elasticity of these terms has enabled the state to act pre-emptively. 'Religious extremism,' for example, is not defined by any necessary link to violence but instead by its divergence from state-sanctioned expressions of Islam.[434] The result is a framework in which a subjective sense of deviance becomes synonymous with a threat to national unity. Similarly, 'separatism' need not involve organised political activity or calls for independence; the assertion of cultural distinctiveness alone can be interpreted as harbouring separatist intent.[435] This fusion of identity with political danger renders Uyghur subjectivity inherently suspicious. Under this schema, to be visibly Uyghur is to risk being perceived as potentially disloyal. It is not an individual's actions but their affiliations, beliefs, and heritage that are problematized.

This mechanism of discursive construction precedes and prepares the ground for legal formalisation. Before counterterrorism laws are enacted or re-education centres are built, the figure of the enemy must be established as intelligible and legitimate. As Carl Schmitt famously argued, the act of identifying the enemy is a fundamental expression of sovereignty—it is the moment in which the political asserts its prerogative over life, identity, and exception.[436] In the Chinese context, the sovereign act is located not only in legislation or military command but also in discourse. The Party-state's repeated invocation of Uyghur terrorism and extremism functions as a declarative act: it plays a central role in constructing the figure of the enemy. This naming is not a conclusion derived from evidence; it is a foundational gesture that establishes the frame within which all evidence will be interpreted.

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[432] Michael Clarke, 'China's "War on Terror" in Xinjiang: Human Security and the Causes of Violent Uighur Separatism' (2008) 20(2) *Terrorism and Political Violence* 271, 276–78; Roberts (n 194) 97–104.
[433] Bovingdon (n 411) 104–15; Smith Finley (n 194) 8–12.
[434] Smith Finley (n 194) 11–15.
[435] Bovingdon (n 411) 27–34, 79–82.
[436] Carl Schmitt, *The Concept of the Political* (n 23) 26–27.

Indeed, once the enemy has been discursively constituted, the law's role becomes one of confirmation rather than discovery. The 2015 Counterterrorism Law,[437] for instance, codifies already-circulating narratives by adopting broad, undefined concepts of terrorism that reflect existing propaganda rather than constrain it. In this way, the law appears not as a check on discretionary power but as its extension. Legal norms do not delimit who can be targeted; they follow the sovereign naming that has already rendered certain subjects—particularly Uyghurs—suspect. The process is circular: discourse defines the threat, law ratifies that definition, and both work to reinforce the legitimacy of surveillance, detention, and coercive assimilation.[438]

It is critical to note that this discursive construction operates not only through overt propaganda but also through more subtle bureaucratic and institutional channels. Internal security documents, police training manuals, and school educational materials reiterate the association between Uyghur identity and deviance.[439] This repetition builds what might be called a 'common sense' of threat—a perception so embedded that it ceases to be questioned. In this way, the enemy narrative is naturalised within the apparatus of governance. Uyghur language education, religious observance, or overseas travel ceases to be neutral facts and becomes indicators of a risk profile. The categories of 'normal' and 'extremist' are no longer grounded in behaviour but in statistical or algorithmic suspicion, further insulating the enemy narrative from empirical challenge.

Moreover, the use of these discursive labels creates strategic ambiguity, enabling flexible and adaptive repression. Because the terms are underdefined, they can be expanded or narrowed as the state sees fit, enabling the Party to justify new forms of control without formally revising the law. This discursive flexibility is essential to the architecture of enmity: it permits continuous recalibration of who counts as a threat, what behaviours are deemed suspect, and how surveillance technologies should be applied.[440] As new technologies emerge—facial recognition, predictive policing algorithms, and data fusion platforms—they are embedded within the same enemy narrative, now enhanced by the appearance of scientific objectivity.

In summary, the construction of the Uyghur enemy is not simply a response to violence or instability; it is a proactive discursive project that precedes and legitimises legal action. The state's use of terms such as 'terrorism' and 'separatism' does not reflect empirical realities as much as it produces

[437] Counterterrorism Law (n 145), arts 2–3.
[438] Smith Finley (n 194) 13–16; Roberts (n 194) 165–72.
[439] Darren Byler, *In the Camps: China's High-Tech Penal Colony* (Columbia Global Reports 2021) 31–45.
[440] Byler (n 430) 19–22.

the interpretive framework in which repression becomes both conceivable and necessary. As Schmitt observes, the political begins with the drawing of distinctions, and in Xinjiang, the distinction between the loyal citizen and the internal enemy has been established not through law, but through language. The result is a form of governance in which entire populations are rendered intelligible only as potential threats, and in which the law becomes the final instrument in a process initiated by the sovereign act of naming. Although incidents of political violence and unrest in Xinjiang provided episodic triggers for securitised responses, the scope and permanence of the resulting governance regime cannot be explained by these events alone. Rather, they served as catalytic moments through which a pre-existing threat framework was generalised from specific acts to an entire population.

4.2 Domestic Legal Framework: Counterterrorism and Security Laws

4.2.1. The 2015 Counterterrorism Law and Its Broad Definitions

Before turning to the substance of the 2015 Counterterrorism Law,[441] it is necessary to situate it within the formal hierarchy of Chinese legislation. Under the PRC legal system, national statutes enacted by the National People's Congress (NPC) and its Standing Committee have the highest binding authority, followed by State Council administrative regulations, and then by local regulations adopted by provincial or autonomous regional people's congresses. In principle, only national legislation may authorise deprivation of personal liberty, while regional regulations are limited to implementation within that framework.[442] The counterterrorism regime in Xinjiang, therefore, operates through a layered legal structure, combining the 2015 national law[443] with regional implementing measures and administrative directives. Examining how authority is distributed across these levels is essential to understanding how large-scale preventive detention and surveillance have been juridically constructed.

The 2015 Counterterrorism Law[444] marks a pivotal legal shift in the People's Republic of China's approach to internal security, transforming governance in regions such as Xinjiang. While framed as a response to rising terrorist threats, the law's true significance lies in its expansive and ambiguous

[441] Counterterrorism Law (n 145).
[442] PRC Legislation Law 2000 (amended 2015), arts 7–9, 80; Clarke (n 197) 392–95.
[443] Counterterrorism Law (n 145); Xinjiang Uyghur Autonomous Region Regulation on De-extremification 2017 (as amended).
[444] Counterterrorism Law (n 145).

definitions of key concepts—especially 'terrorism.' Through legal language that is strikingly broad and ideologically loaded, the legislation enables a form of anticipatory governance: one in which suspicion replaces proof, and potentiality becomes the basis for punishment.[445] In contrast to the American framework outlined in Chapter 3—where judicial institutions, however imperfectly, attempt to delineate the outer bounds of security exceptionalism—China's counterterrorism architecture consolidates discretion within the administrative and security apparatus, largely insulated from judicial oversight or interpretive restraint.

The law defines terrorism not through specific acts of violence, but through a sweeping formulation that includes 'propositions' and 'speech' that, for example, 'create social panic,' 'endanger public safety,' or 'coerce state organs'—phrasing that collapses the boundary between expression and threat.[446] While Article 3[447] defines terrorism broadly, related legal provisions specify that even the possession or dissemination of 'extremist thought' may qualify as terrorist activity, regardless of any link to violence.[448] The vagueness of these provisions means that what counts as extremism is left to the discretion of security agencies and local officials. Religious beliefs, cultural practices, or dissenting opinions can all fall within the scope of suspicion. In this context, legal categories serve not to protect individual rights but to enable a flexible apparatus of pre-emptive control.

Doctrinally, this breadth is evident in the structure of the statute itself. Article 3[449] defines terrorism to include not only violent acts but also 'propositions and actions' that create social panic or coerce state organs, while Article 80[450] authorises public security organs to impose restrictive measures on individuals merely suspected of involvement in terrorist activities. Articles 82 and 83[451] further permit compulsory 'education and assistance' for persons influenced by extremism, even in the absence of criminal liability. These provisions collectively establish a graduated continuum of intervention, ranging from surveillance and movement restrictions to ideological correction, without requiring prosecutorial thresholds normally associated with criminal law. The statutory design thus embeds preventive authority directly within the counterterrorism framework, allowing administrative measures to substitute for judicial process.

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[445] Fu Hualing, 'Wielding the Sword: President Xi's New Anti-Corruption Campaign' (2015) 24(1) *Journal of Contemporary China* 134, 140–42.
[446] Counterterrorism Law (n 145), art 3.
[447] ibid.
[448] ibid arts 18–21;
[449] ibid art 3.
[450] ibid art 80.
[451] ibid 82–83.

Crucially, the law does not require intent to commit violence as a threshold for intervention.[452] There is no clear standard of individual conduct that must be met before a person can be subject to surveillance, detention, or ideological 'correction.' Instead, what matters is perceived ideological orientation or associations with groups designated as 'extremist' or 'separatist.'[453] In Xinjiang, this has included the criminalisation of behaviours that, in other contexts, would be protected cultural or religious expressions: wearing religious attire, avoiding alcohol, possessing religious texts, or maintaining contact with relatives abroad.[454] The absence of intent requirements enables the law to function not as a response to harm, but as a tool for managing identity under the guise of national security.

Collectively, these provisions establish a system of anticipatory intervention. Individuals are targeted not for their actions, but for what they might think, believe, or become. The law thus authorises a preventive logic: to detect, neutralise, and reshape individual behaviour before any perceived deviance emerges. Functionally, this approach undermines the presumption of innocence. Politically, it reframes entire populations—particularly Uyghurs—as pre-emptively suspicious. The legal architecture thereby mirrors the previously outlined discursive move: the enemy is not discovered but named in advance, and the law serves to institutionalise that naming.[455]

Moreover, the enforcement of the 2015 law[456] occurs in a context devoid of independent judicial review. Unlike the U.S. system, where vague security laws such as the Authorisation for Use of Military Force[457] and the USA PATRIOT Act[458] have been challenged in court, albeit with limited success, China's counterterrorism framework operates within a closed administrative ecosystem. Courts in China are formally subordinate to the Chinese Communist Party, and legal interpretations of terrorism are typically issued by Party-aligned institutions. This means that the expansive definitions in the law are not narrowed through case law or jurisprudential constraint. Instead, they are operationalised through police regulations, internal security protocols, and local government directives, all of which expand the scope of surveillance and coercion without external accountability.[459]

[452] ibid arts 3, 80–83.
[453] Roberts (n 194) 165–72.
[454] Byler (n 439) 31–45; Human Rights Watch, *Eradicating Ideological Viruses: China's Campaign of Repression Against Xinjiang's Muslims* (2018) 47–58.
[455] Roberts (n 194) 165–72.
[456] Counterterrorism Law (n 145).
[457] Authorization for Use of Military Force 2001 (n 79).
[458] USA PATRIOT Act 2001 (n 402).
[459] Randall Peerenboom (n 135) 280–309.

The result is a legal regime in which the boundaries between criminal law, administrative control, and political loyalty are blurred. Terrorism becomes not a category of action but a category of identity. By including 'ideological influence' and 'extremist thought' within its ambit, the law turns the act of being different into a potential threat.[460] This is particularly evident in how the law has been applied in Xinjiang. As discussed in the next section, the legal framework supports mass administrative detention, predictive policing, and the forced transformation of cultural identity—all without requiring proof of individualised wrongdoing.

In summary, the 2015 Counterterrorism Law[461] does not merely respond to threats; it constructs them. By embedding political ideology and religious expression into the legal definition of terrorism, the state transforms the legal system into a mechanism for managing enmity. The law does not simply fail to protect rights; rather, it, in practice, institutionalises suspicion, justifies coercion, and preempts dissent. The enemy is not produced through trial but through classification, and the law operates not to judge guilt, but to authorise intervention before legal guilt is even at stake. This anticipatory logic, in contrast to the U.S. model, proceeds without meaningful institutional constraint.

4.2.2. Xinjiang-Specific Regulations and Administrative Orders

While the 2015 Counterterrorism Law[462] laid the legal groundwork for expansive definitions of threat and anticipatory intervention, its implementation in Xinjiang has proceeded through a distinct layer of region-specific regulations and administrative orders. These measures do not merely apply the national law locally—they systematically intensify it. In doing so, they establish a form of governance in which what elsewhere might be considered exceptional becomes entrenched and routine. The legal architecture in Xinjiang is thus not a declared state of exception but a territorially embedded system of normalised exceptional governance.

While overall policy direction originates at the centre, implementation in Xinjiang is mediated through regional authorities and local cadres operating under strong performance incentives tied to stability maintenance, creating pressures toward over-compliance and expansive interpretation of administrative authority under counterterrorism regulations. This incentive structure converts vague legal

[460] Roberts (n 194) 165–72; Byler (n 439) 23–30.
[461] Counterterrorism Law (n 145)
[462] ibid.

mandates into expansive local enforcement, transforming regulatory ambiguity into operational excess.[463]

Beginning in 2016, Xinjiang authorities introduced a series of regulatory instruments that greatly expanded the operational scope of the national counterterrorism framework.[464] Among the most consequential was the 'Xinjiang Uyghur Autonomous Region De-extremification Regulations',[465] adopted in 2017. This legal document codified a wide range of behaviours as signs of 'extremism,' including, among others, wearing 'abnormal' beards, or refusing to watch state television.[466] The Regulations further authorise compulsory 'education and transformation' for individuals influenced by extremism, without specifying evidentiary standards or maximum duration, thereby formally embedding ideological correction within administrative governance.[467] These provisions do not criminalise specific actions so much as construct a moral-ideological template against which behaviour is judged. By design, the regulations are not narrowly targeted at acts of violence but at cultural, religious, and personal practices that deviate from officially sanctioned norms. The effect is to render an entire way of life potentially subversive.

In practice, this delegation of authority has meant that ordinary administrative actors become security agents. For example, leaked county-level administrative records from Karakax (Moyu)[468] show local officials assigning residents to 'training' based on criteria such as mosque attendance, possession of religious materials, or contact with relatives abroad, with neighbourhood cadres responsible for compiling risk assessments and enforcing placements. What appears at the statutory level as counterterrorism implementation thus materialises locally as routine bureaucratic classification. Placement decisions are made by grassroots administrators rather than by courts.[469]

Significantly, the Xinjiang regulations[470] authorise administrative rather than judicial forms of coercive intervention. Individuals may be detained, surveilled, or subjected to political re-education without formal charges, trial, or access to legal counsel. Enforcement mechanisms—including

[463] Yongshun Cai, *Collective Resistance in China: Why Popular Protests Succeed or Fail* (Stanford University Press 2010) 63–67.
[464] Roberts (n 194) 165–80.
[465] Xinjiang De-extremification Regulation (n 443).
[466] Xinjiang De-extremification Regulation (n 443) art 9; Human Rights Watch, *China: New Xinjiang Regulation Tightens Religious Restrictions* (2017).
[467] Xinjiang De-extremification Regulation (n 443) arts 14–16.
[468] Adrian Zenz, ''Thoroughly Reforming Them Towards a Healthy Heart Attitude': China's Political Re-Education Campaign in Xinjiang' (2019) *Central Asian Survey* 1, 12–18.
[469] Byler (n 439) 31–45.
[470] Xinjiang Uyghur Autonomous Region Regulation (n 443).

'vocational training centres,' ideological retraining programs, and home visits by Party cadres—are legitimised through the rhetoric of stability and counter-extremism. However, their legal basis relies not on individualised assessments of wrongdoing, but on the regional government's authority to apply vague ideological criteria as proxies for risk. The threshold for intervention is intentionally low, and legal ambiguity is treated as a functional feature.[471] In this context, administrative detention operates as a tool of preventive governance, justified by perceived beliefs or affiliations rather than concrete actions.

From a doctrinal perspective, this reliance on administrative measures is significant. Chinese law traditionally distinguishes criminal punishment, which requires judicial adjudication, from administrative sanctions, which may be imposed directly by executive organs.[472] The Xinjiang framework systematically exploits this distinction by characterising detention, ideological training, and behavioural correction as administrative 'education' rather than penal confinement. This classification allows public security bureaus and local Party authorities to exercise coercive power without triggering criminal procedural safeguards. In effect, the deprivation of liberty is relocated from the judicial sphere to the administrative domain, enabling prolonged confinement through regulatory mechanisms insulated from adversarial review.

This administrative architecture is further formalised in the Xinjiang Uyghur Autonomous Region's 2016 Implementing Measures for the Counterterrorism Law,[473] which translates national security mandates into concrete local obligations. These Measures[474] require neighbourhood committees, employers, and grassroots Party organisations to participate in counterterrorism work, including reporting suspicious behaviour, assisting public security organs, and monitoring residents' ideological 'conditions.'[475] By legally embedding security responsibilities within everyday governance structures, the Measures[476] extend counterterrorism from specialised agencies into ordinary social administration. This regulatory delegation illustrates how preventive control is institutionalised through law itself. In doing so, it disperses coercive authority across multiple layers of the local state.

This model of governance is further reinforced by a dense network of local regulations and informal directives. Local Party branches, public security bureaus, and grassroots governance bodies are

[471] Roberts (n 194) 165–80.
[472] Administrative Punishment Law of the People's Republic of China 1996 (amended 2017) arts 8–9; Peerenboom (n 135) 280–309.
[473] Xinjiang Uyghur Autonomous Region Implementing Measures for the Counterterrorism Law 2016.
[474] ibid.
[475] Xinjiang Implementing Measures (n 473) arts 7–12; Leibold (n 198) 49–55.
[476] Xinjiang Implementing Measures (n 473).

empowered to implement 'grid-style' management, in which each block or village is monitored by officials who collect information on residents' behaviour and attitudes. The structure of control is both vertical and horizontal: vertically, it reflects directives from the highest levels of the Party-state; horizontally, it operates through granular social monitoring. Administrative orders mandate ideological training sessions, public denunciations of religious extremism, and, according to numerous reports, compelled participation in state-sponsored rituals. These are not temporary emergency measures—they constitute a sustained and codified mode of governance.[477]

The legal form this regime takes is notable. There is no formal declaration of emergency, nor is there an invocation of martial law. Instead, the exceptional is normalised through administrative layering. The Xinjiang-specific regulations do not suspend existing legal structures; they create parallel ones. Structurally, the region becomes a laboratory for security governance, where legal thresholds are lowered. Consistent with the administrative displacement of criminal procedure described above, judicial oversight is bypassed not through open legal rupture, but through bureaucratic accretion. The language of law remains, but its content shifts. Terms such as 'education,' 'training,' and 'guidance' obscure the coercive nature of the practices they describe. Legal normality becomes the very vehicle through which coercive governance operates.[478]

Rather than declare a break with legality, the Chinese state embeds exception within the law itself. In Xinjiang, this is achieved through the territorialisation of legal abnormality: practices that would be extraordinary elsewhere in the PRC—such as mass detention without trial, pervasive ideological scrutiny, and behavioural surveillance—are rendered standard in the region.[479] While the PRC formally affirms constitutional rights to religious freedom, cultural expression, and due process,[480] these guarantees are overridden not by formal repeal, but by regulatory excess. The accumulation of administrative measures, local decrees, and Party interpretations produces a dense legal environment in which standard protections are effectively nullified. The result is not a contradiction between law and repression, but their fusion. In Xinjiang, law does not restrain power; it provides its vocabulary and infrastructure.

In summary, the Xinjiang-specific regulatory regime demonstrates how exception becomes territorially normalised. Through administrative orders and localised legislation, the region has been transformed into a legal enclave where broad powers of surveillance, detention, and ideological

[477] Roberts (n 194) 178–88; Byler (n 439) 23–45.
[478] Pils (n 144) 7–8.
[479] Roberts (n 194) 165–88.
[480] Constitution of the People's Republic of China 1982 (as amended), arts 33, 36, 37.

correction are routinised. This development does not represent a deviation from the legal order, but rather its regional intensification. The distinction between normal law and emergency suspension collapses not through a dramatic rupture but through the gradual proliferation of rules. Exception is no longer a temporary state invoked in crisis; it has become a permanent mode of rule, spatially confined, legally encoded, and bureaucratically enforced.

4.2.3. Constitutional Guarantees vs. Security Practices

At first glance, the People's Republic of China appears to maintain a robust set of constitutional protections for its citizens. The 1982 Constitution[481] guarantees, among other things, freedom of religious belief,[482] the right to personal dignity,[483] freedom of speech and of the press,[484] and protection against unlawful detention.[485] These provisions seem to echo liberal constitutional norms and suggest a formal legal order in which state power is constrained by law. Yet, in practice, these rights are largely non-justiciable. They coexist with, and are subordinated to, an operative regime of security governance in which constitutional protections are not judicially enforceable and do not constrain the exercise of Party authority. In the context of Xinjiang, this disjunction is particularly stark: the constitutional promise of rights is displaced by a security apparatus that functions independently of legal contestation or redress.

This institutional reality follows directly from China's constitutional design. The PRC does not provide for constitutional adjudication by ordinary courts, and individuals lack standing to challenge legislation or administrative action on constitutional grounds. Interpretive authority rests exclusively with the NPC Standing Committee, a political body that has never invalidated security legislation for rights violations. Courts are further subordinated to Party leadership through Political-Legal Committees, which coordinate law enforcement and judicial activity in matters deemed sensitive. Judges are not insulated from political influence but are expected to uphold Party directives as a core part of their institutional role. As a result, constitutional rights operate primarily as declaratory principles rather than enforceable constraints, leaving security governance largely insulated from legal challenge and legality increasingly operating as a function of political loyalty rather than juridical neutrality.[486]

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[481] ibid.
[482] ibid art 36.
[483] ibid art 38.
[484] ibid art 35.
[485] ibid art 37.
[486] Donald C Clarke, 'Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?' in C Stephen Hsu (ed), *Understanding China's Legal System* (NYU Press 2003) 93–94; Peerenboom (n 135) 280–309.

This divergence gives rise to what scholars have called symbolic constitutionalism—a system in which constitutional rights exist as textual affirmations but lack institutional mechanisms of enforcement. The Constitution functions primarily as a legitimating document, affirming the state's commitment to legal order and human rights without subjecting its actions to judicial scrutiny. In parallel, a system of operative governance emerges, structured around stability maintenance, administrative control, and preventive security. This system does not openly reject constitutional norms; rather, it marginalises them through bureaucratic proliferation and political prioritisation.[487] In Xinjiang, the coexistence of constitutional rights and authoritarian practices is not a contradiction to be resolved, but a design to be managed.

Indeed, the structure of Chinese governance precludes any meaningful conflict between constitutionalism and security. In the Chinese legal-political system, the Constitution is not a higher law to which state power is subordinated. Rather, it is one of several normative instruments through which the Party governs.[488] Party supremacy is not extra-constitutional—it is embedded within the constitutional framework itself. Article 1 of the Constitution proclaims that 'the leadership of the Communist Party of China is the defining feature of socialism with Chinese characteristics.'[489] This fusion of Party and state ensures that legal interpretation is inherently political, and that security imperatives will always override individual rights when the two come into tension.

From this perspective, the repression of Uyghur cultural and religious life in Xinjiang does not indicate a failure of law, but rather its effective operation under conditions of authoritarian legality. The legal system functions as designed: to enable state control, suppress dissent, and institutionalise ideological conformity. Rights exist in principle, but their implementation is conditional, discretionary, and dependent on political utility. Legal structures serve not to limit state action, but to structure and legitimise it.[490]

This is the central theoretical insight: in China, law does not fail to constrain power because it is weak, but because it is structurally subordinated to the political logic of the Party-state. The constitutional text serves as a symbolic frame, while actual governance is carried out through extra-judicial mechanisms, administrative regulation, and political directives. In the case of Xinjiang, this duality

[487] Peerenboom (n 135) 45–50.
[488] Larry Catá Backer, 'The Party as Polity, the Communist Party, and the Chinese Constitutional State' (2009) 16(1) *Journal of Chinese and Comparative Law* 29, 32–38
[489]Constitution (n 480) art 1 (as amended 2018).
[490] Peerenboom (n 135) 67–72.

allows the state to maintain the appearance of legal order while pursuing a comprehensive strategy of securitisation, assimilation, and control.

4.3 Mechanisms of Legalised Discrimination

4.3.1. Mass Detentions and 'Re-Education Camps'

A prominent example of the legal construction of Uyghurs as a security-issue related population is the system of mass administrative detention that developed in Xinjiang after 2017. At the height of this campaign, credible estimates indicate that over one million Uyghurs and other Turkic Muslims were confined in a network of so-called 're-education' or 'vocational training' centres.[491] Individuals were detained without formal charges, trials, or fixed terms of confinement. Within these facilities, detainees were subjected to compulsory political instruction, forced abandonment of religious and cultural practices, and intensive ideological correction. Notably, those held in the camps were not convicted of criminal offences. Their confinement functioned as a preventive measure, justified by perceived future risk rather than past actions.[492]

In contrast to detention within China's ordinary criminal justice system, placement in these camps occurs entirely outside judicial procedures. Internees receive no formal indictment, no public hearing, and no opportunity to contest the allegations against them. Authorities explicitly characterise detainees not as criminal suspects but as individuals requiring 'education and transformation,' thereby administratively reclassifying deprivation of liberty as training. Consequently, fundamental procedural guarantees such as access to legal counsel, evidentiary review, or independent adjudication are absent. Families often receive minimal or no information regarding the location or status of detained relatives. The camps, therefore, function as a parallel system of confinement, insulated from the procedural safeguards typically associated with criminal law.[493]

A key characteristic of this regime is the absence of temporal limits. While custodial sentences imposed by courts are determinate, confinement in 'education and training centres' remains open-ended. Neither national legislation nor regional regulations specifies maximum placement periods. Instead,

[491] UN Office of the High Commissioner for Human Rights, *Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China* (2022) 4–6.
[492] Roberts (n 194) 165–72; Byler (n 439) 23–30.
[493] UN Office of the High Commissioner for Human Rights (n 491) 16–20; Human Rights Watch (n 454) 28–40.

official discourse frames release as contingent upon ideological 'results,' with detainees described as 'graduating' only after demonstrating sufficient political transformation.[494] In practice, this allows for potentially indefinite detention, with reported periods ranging from months to several years. Senior officials have stated that the policy framework in Xinjiang is designed to operate 'for the long run,' indicating that the camps are intended as a permanent governance mechanism rather than a temporary emergency response.[495]

The legal foundation for this system is rooted primarily in administrative regulation rather than criminal law. In 2017, Xinjiang enacted De-Extremification Regulations (amended in 2018),[496] which formally recognised the existence of 'vocational skills education and training centres.' Alongside regional measures implementing the 2015 Counterterrorism Law,[497] these regulations authorise local authorities to subject individuals deemed influenced by 'extremist ideology' to compulsory education, even when their conduct does not constitute a criminal offence.[498] The framework is explicitly rehabilitative: officials refer to 'aid and education' and to waiving criminal punishment for those who 'voluntarily' accept placement. However, this voluntariness is largely nominal. Decisions are made administratively by police and Party bodies through opaque procedures, without judicial oversight.[499]

This administrative approach is particularly significant. According to China's Legislation Law,[500] only national statutes may authorise deprivation of liberty, and the previous system of Re-education Through Labour (RTL)[501] was abolished in 2013 due to its lack of statutory foundation. Unlike RTL, which operated outside statutory law, Xinjiang's detention system is established through layered regulatory authorisation, enabling the state to maintain formal legality while circumventing criminal procedure.[502] However, no national law explicitly authorises prolonged ideological detention in Xinjiang. The Counterterrorism Law[503] allows only short-term detention for minor offences and does not provide a legal basis for months- or years-long confinement.[504] As a result, the camps rest on a legally fragile

[494] UN Office of the High Commissioner for Human Rights (n 491) 17–19; Roberts (n 194) 175–80.
[495] Roberts (n 194) 178–88; Smith Finley (n 194) 13–16.
[496] Xinjiang De-extremification Regulations (n 443).
[497] Counterterrorism Law (n 145); Xinjiang Implementing Measures (n 473).
[498] Xinjiang De-extremification Regulations (n 443) arts 14–16; UN Office of the High Commissioner for Human Rights (n 491) 16–20.
[499] Human Rights Watch (n 454) 31–40; Byler (n 439) 31–45.
[500] Legislation Law (n 442) arts 8–9.
[501] Standing Committee of the National People's Congress, Decision on Abolishing Re–education Through Labour (28 December 2013).
[502] Carl Minzner (n 135) 121–29.
[503] Counterterrorism Law (n 145).
[504] ibid arts 80–83.

foundation: a combination of regional regulations and administrative practices that facilitate large-scale incarceration while bypassing the procedural safeguards of criminal law.

Equally significant is the lack of meaningful avenues to challenge detention. Individuals labelled as 'extremist' or deemed politically unreliable—often based on religious observance, overseas contacts, or other non-criminal indicators—are confined without formal charges that can be contested in court. Leaked documents, such as the Karakax List,[505] reveal that authorities relied on subjective criteria, including levels of religious devotion or perceived trustworthiness, when determining placement. Because detainees are not treated as criminal defendants, they cannot access the evidentiary standards or procedural rights associated with prosecution. Their legal status is effectively suspended, with confinement imposed by executive decision rather than judicial determination.[506]

Chinese officials have explicitly described this system in preventive terms, often using epidemiological metaphors that depict extremism as an ideological 'virus' necessitating early intervention. Senior leaders have characterised the campaign as a form of inoculation, intended to neutralise perceived risks before they manifest.[507] This framing signals a shift from reactive law enforcement to anticipatory population management. Detention is employed not to punish completed offences, but to reshape beliefs and identities considered potentially destabilising.

Collectively, the camp system demonstrates how administrative legality has been used to institutionalise large-scale preventive detention. Through regional regulation, discretionary classification, and the rebranding of confinement as education, Xinjiang has established a parallel governance structure in which deprivation of liberty is normalised outside the criminal justice system. Thus, mass detention operates not as an exceptional response to individual wrongdoing, but as a routine mechanism of security administration targeting a population constructed as inherently risky.

4.3.2. Surveillance and Predictive Policing as Legalised Control

While mass detention forms the institutional core of Xinjiang's security regime, surveillance serves as its principal mechanism for identifying individuals. Instead of responding to established criminal conduct, authorities employ continuous data collection and predictive assessment to identify

[505] Adrian Zenz, 'The 'Karakax List': Dissecting the Anatomy of China's Internment Drive in Xinjiang' (2020) *Journal of Political Risk* 1–15.
[506] UN Office of the High Commissioner for Human Rights (n 491) 17–20; Human Rights Watch (n 454) 28–40.
[507] Roberts (n 194) 168–72; Human Rights Watch (n 454) 20–25.

those considered politically or socially risky. Governance thereby shifts from adjudicating past acts to managing projected threats, with interventions triggered by risk profiles and behavioural patterns rather than legally defined offences.

The Integrated Joint Operations Platform (IJOP) is central to this surveillance architecture. This region-wide data aggregation system collects information from facial recognition cameras, biometric databases, vehicle tracking, travel records, utility usage, and data extracted from mobile phones via police-installed applications. The platform synthesises these inputs to generate automated alerts, flagging individuals for further monitoring, questioning, or possible detention. Reported criteria include behaviours such as using virtual private networks, possessing large numbers of books, travelling abroad, or displaying signs of religious observance. These indicators are not inherently criminal but serve as proxies for potential ideological deviation, abstracted from context and interpreted through risk-based profiling.[508]

This surveillance regime is enabled by a permissive legal environment established by the 2015 Counterterrorism Law[509] and Xinjiang-specific regulations.[510] These legal instruments authorise extensive monitoring under the pretext of preventing 'extremism,' while defining the term in broad, indeterminate terms.[511] Regional guidelines explicitly classify routine religious and cultural practices—such as fasting during Ramadan, abstaining from alcohol, or growing 'abnormal' beards—as indicators of extremist tendencies.[512] Consequently, the law conflates conduct with identity, formally authorising preventive surveillance that circumvents the principles of individualised suspicion. Predictive policing in Xinjiang is thus firmly embedded within administrative legality rather than operating outside legal structures.

This framework results in a significantly lowered threshold for state intervention. Individuals are targeted not for prosecutable acts, but through algorithmic risk assessments. In the absence of formal accusations, standard procedural protections—such as notification of charges, access to evidence, or judicial review—are largely unavailable. Those identified by surveillance systems are often unaware of which behaviours prompted official scrutiny, and there are no effective mechanisms to challenge or rectify risk classifications. Once labelled as suspicious, individuals may face intensified monitoring,

[508] Human Rights Watch, *China's Algorithms of Repression: Reverse Engineering a Xinjiang Police Mass Surveillance App*(2019) 9–20; Byler (n 439) 23–45.
[509] Counterterrorism Law (n 145).
[510] Xinjiang De-extremification Regulation (n 443); Xinjiang Implementing Measures (n 473).
[511] Counterterrorism Law (n 145), art 3.
[512] Xinjiang De-extremification Regulations (n 443) art 9; Human Rights Watch (n 454) 47–58.

social restrictions, or administrative detention, with decisions rendered by security agencies rather than judicial bodies.[513]

Surveillance in Xinjiang also operates relationally, mapping social networks and linking individuals through family ties, neighbourhood proximity, or digital associations. Risk is conceptualised as contagious, so that scrutiny of one individual extends to relatives, neighbours, or colleagues, irrespective of their own actions. This approach results in collective profiling, rendering entire communities as objects of security concern.[514] In practice, this logic disproportionately impacts Uyghur and other Muslim populations, transforming ordinary aspects of communal life—such as language use, religious practice, and social associations—into perceived indicators of latent threat.[515]

Through this process, surveillance functions as the link between administrative regulation and mass detention. Predictive systems identify individuals considered risky, after which administrative mechanisms authorise their confinement or 'education.' The lack of judicial oversight enables this process to operate continuously and without meaningful external constraint. Predictive monitoring thus becomes a routine instrument of population management, rather than an exceptional response to crisis.[516]

Xinjiang exemplifies a reconfiguration of legal governance in which surveillance not only supports law enforcement but actively structures it. Classification now precedes accusation, and risk assessment supplants evidentiary determination. The system's objective is not to establish guilt, but to pre-emptively neutralise perceived instability. Surveillance thereby operates as the bridge between legal categorisation and identity transformation, a dynamic further explored in the subsequent discussion of religious and cultural regulation.

4.3.3. Suppression of Religion and Cultural Practices through Law

The securitisation of Xinjiang's Uyghur population extends beyond detention and surveillance to encompass the regulation of daily cultural and religious practices. Legal and administrative instruments reclassify practices associated with Uyghur identity as indicators of 'extremism' or ideological risk.[517] Instead of prohibiting belief directly, the state reframes ordinary expressions of faith and tradition as

[513] UN Office of the High Commissioner for Human Rights (n 491) 16–21; Byler (n 439) 31–45.
[514] Human Rights Watch (n 508) 15–20; Leibold (n 198) 49–55.
[515] Roberts (n 194) 165–80; Smith Finley (n 194) 11–16.
[516] Roberts (n 194) 172–88.
[517] Smith Finley (n 194) 11–16; Roberts (n 194) 165–72.

early warning signs of radicalisation. Consequently, the law shifts from regulating conduct to managing identity as a security variable.

This process is facilitated by the broad definitions found in the 2015 Counterterrorism Law[518] and Xinjiang's regional regulations.[519] These legal instruments allow for restrictions on behaviours considered to promote or conceal 'extremist thought,' even without any link to violence or incitement. Regional guidelines specifically identify activities such as fasting during Ramadan, abstaining from alcohol, refusing to watch state television, or encouraging prayer as manifestations of religious extremism.[520] Consequently, routine Islamic practices are transformed into legally recognised risk markers. Religious observance, previously protected under China's constitutional framework, is now recoded as a potential precursor to political deviance.[521]

These measures are collective in scope rather than individualised. Suspicion is attached not to specific acts, but to categories of identity. Use of the Uyghur language, traditional dress, and participation in cultural customs are discouraged or restricted on the grounds that they may foster separatist sentiment. Uyghur-language education has been significantly reduced in favour of compulsory Mandarin instruction, while mosques and shrines have been demolished, Islamic names restricted, and unregistered religious gatherings criminalised.[522] Although presented as counter-extremism initiatives, these policies function in practice to marginalise and displace minority cultural expression.

Importantly, these interventions are implemented through formal legal channels rather than extra-legal means. Xinjiang's De-Extremification Regulations[523] specify numerous proscribed behaviours and mandate 'ideological education' for those identified as exhibiting them. Enforcement is conducted by local cadres and security personnel, generally without judicial oversight, and may result in surveillance, compulsory re-education, or administrative detention. As these measures are codified in law, their application is framed as legitimate governance rather than arbitrary repression. Legalisation thereby renders cultural suppression routine, bureaucratic, and enduring.[524]

The primary objective is not simply behavioural compliance, but normative transformation. The regulatory framework interprets divergence from state-sanctioned cultural standards as indicative of

[518] Counterterrorism Law (n 145).
[519] Xinjiang De-extremification Regulation (n 443).
[520] Xinjiang De-extremification Regulation (n 443), art 9; Human Rights Watch (n 454) 47–58.
[521] Constitution (n 480) art 36.
[522] UN Office of the High Commissioner for Human Rights (n 491) 21–27; Byler (n 439) 46–60.
[523] Xinjiang De-extremification Regulation (n 443).
[524] Roberts (n 194) 172–80.

latent threat, prompting intervention before any criminal conduct occurs. In this context, law operates as an instrument of preventive identity management. Cultural difference is problematized, and conformity is institutionalised as a prerequisite for security. Practices that once signified communal belonging are redefined as failures of assimilation and are subject to correction through education, discipline, or confinement.[525]

This approach signifies a broader transition from reactive law enforcement to proactive subject formation. Instead of adjudicating discrete violations, the legal system authorises ongoing intervention designed to reshape beliefs, habits, and affiliations. The aim is not accommodation, but replacement: producing compliant subjects through the systematic erosion of cultural difference. Cultural and religious life is subsumed under security administration, and conformity is institutionalised as a prerequisite for political belonging. Assimilation, therefore, emerges as a legally organised outcome, pursued through administrative regulation, ideological education, and coercive intervention.

4.4 International Legal and Human Rights Dimensions

4.4.1. Allegations of Genocide and Crimes Against Humanity

Allegations that the Chinese government has committed genocide and crimes against humanity in Xinjiang have attracted significant international attention, prompting complex questions regarding the application of international legal norms to the treatment of Uyghur and other Turkic Muslim minorities. Although the language of atrocity is prevalent in political and human rights discourse, its use in legal contexts requires rigorous scrutiny. This section seeks to evaluate how established international legal categories of genocide and crimes against humanity align with the available evidence and to identify areas where interpretive and evidentiary tensions persist.

The crime of genocide is defined in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[526] as certain acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. These acts include killing members of the group, causing them serious bodily or mental harm, deliberately inflicting conditions calculated to bring about the group's destruction, imposing measures to prevent births, and forcibly

[525] Darren Byler, *Terror Capitalism: Uyghur Dispossession and Masculinity in a Chinese City* (Duke University Press 2022) 23–45.
[526] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art II.

transferring children to another group. Crucially, the legal threshold for genocide requires the specific intent (*dolus specialis*) to destroy the group as such—a requirement that distinguishes genocide from other grave crimes and renders its legal application particularly exacting.

In the context of Xinjiang, reports from United Nations bodies, independent researchers, and human rights organisations have documented a range of coercive measures that may fall within the scope of the Genocide Convention.[527] These measures include mass internment in 're-education' camps, forced sterilisation and birth prevention policies, family separation, destruction of religious sites, and psychological and physical abuse of detainees.[528] Although substantial documentation exists regarding these practices, the primary point of contention concerns whether they are motivated by the specific intent to destroy the Uyghur population in whole or in part. Chinese authorities characterise their policies as counter-extremism and deradicalisation efforts, which complicates the evidentiary assessment of genocidal intent.[529] Some legal scholars contend that the scale and systematic nature of these interventions, particularly those related to reproductive control and cultural erasure, may support an inference of intent. [530] Others maintain that, in the absence of direct evidence of intent to physically or biologically annihilate the group, a determination of genocide remains legally contestable.[531]

Crimes against humanity, as defined in Article 7 of the Rome Statute of the International Criminal Court,[532] involve the commission of specified acts—such as imprisonment, torture, persecution, enforced sterilisation, or forced displacement—as part of a widespread or systematic attack against a civilian population, with knowledge of the attack. Unlike genocide, crimes against humanity do not require a specific intent to destroy a group, and the threshold for legal qualification is generally lower. Consequently, many of the practices documented in Xinjiang—including arbitrary mass detention, surveillance-driven persecution, forced labour, and restrictions on religious and cultural expression—may more clearly align with the crimes against humanity framework. The systematic implementation of these measures through state policy and their targeting of a specific civilian population further support this characterisation.

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[527] ibid.
[528] UN Office of the High Commissioner for Human Rights (n 491) 16–30; Human Rights Watch (n 454) 28–58.
[529] State Council Information Office of the People's Republic of China, *Vocational Education and Training in Xinjiang*(White Paper, August 2019).
[530] Roberts (n 194) 228–37.
[531] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 244–55; Donald Bloxham and A Dirk Moses (eds), *The Oxford Handbook of Genocide Studies* (OUP 2010) 23–27.
[532] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 7.

Several legal assessments, including those conducted by the UN Office of the High Commissioner for Human Rights (OHCHR) and the independent China Tribunal, have determined that the situation in Xinjiang may constitute crimes against humanity.[533] The OHCHR's 2022 report, for instance, identified credible evidence of arbitrary detention, torture, and sexual violence, concluding that these practices may amount to crimes against humanity under international law. Nevertheless, the report stopped short of issuing a definitive legal finding, citing the need for further investigation and improved access to the region.[534] Limited access to primary sources and the Chinese state's control over information have hindered the development of comprehensive evidentiary records, thereby complicating international legal adjudication.

The political implications of these legal assessments also warrant attention. Accusations of genocide and crimes against humanity carry considerable geopolitical weight and frequently provoke strong diplomatic responses. China has categorically denied all allegations, characterising them as politically motivated fabrications intended to undermine its sovereignty and development objectives. The Chinese government has further accused critics of applying double standards and engaging in selective human rights enforcement.[535] As a permanent member of the UN Security Council and a non-party to the Rome Statute,[536] China remains largely insulated from direct international legal enforcement, making accountability through existing mechanisms highly challenging.

In summary, although credible evidence indicates that serious human rights violations have occurred in Xinjiang, the application of international legal categories remains disputed. The genocide framework, in particular, requires a high evidentiary threshold that may not yet be satisfied in the absence of conclusive proof of intent. The crimes against humanity framework presents a more immediately plausible legal avenue, given the documented scale, systematic nature, and targeted character of the abuses. Nevertheless, both frameworks encounter significant structural and political barriers to enforcement. This situation underscores not only the gravity of the allegations but also the limitations of international legal mechanisms in addressing them. The following subsections will further examine the role of UN bodies and the structural constraints of human rights law.

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[533] UN Office of the High Commissioner for Human Rights (n 491) 43–45; China Tribunal, *Judgment* (London, December 2019) 58–63.
[534] UN Office of the High Commissioner for Human Rights (n 491) 45–46.
[535] State Council Information Office of the People's Republic of China, *The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang* (White Paper, March 2019).
[536] Rome Statute (n 532); United Nations Treaty Collection, 'Rome Statute of the International Criminal Court: Status of Ratification'.

4.4.2. Responses by UN Mechanisms and Human Rights Bodies

The United Nations human rights system has functioned primarily as a mechanism for documentation and publicity in relation to alleged abuses in Xinjiang, but its interventions have remained structurally non-coercive and institutionally limited. The architecture of international human rights law, predicated on state cooperation and lacking binding enforcement, has produced responses largely confined to reporting and dialogue rather than adjudication or sanctions. The following analysis examines the principal instruments used by UN bodies and considers the structural factors limiting their capacity to effect change in Chinese policy.

One of the most significant institutional interventions was undertaken by the Office of the High Commissioner for Human Rights. In August 2022, the OHCHR published an assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, finding that the scale and nature of detentions may constitute crimes against humanity. The report drew on public sources, satellite imagery, and interviews with former detainees, and it identified credible evidence of arbitrary detention, torture, forced labour, and severe restrictions on religious and cultural practices. Although methodologically cautious and legalistic in tone, the OHCHR report represented a milestone in the United Nations' formal engagement with the issue.[537] Notably, the report was released at the conclusion of High Commissioner Michelle Bachelet's term, after prolonged delays and considerable diplomatic pressure from China, which underscored the political fragility of the UN's human rights apparatus.

UN special procedures, including Special Rapporteurs and Working Groups, have also expressed concern over the situation. In particular, the UN Special Rapporteur on contemporary forms of slavery and the Working Group on Arbitrary Detention have issued communications raising alarm over forced labour and extrajudicial detention in Xinjiang. These communications are sent directly to states and often request clarification or redress, but they are non-binding and carry no enforcement authority.[538] While they may contribute to international pressure and media visibility, their legal effect is symbolic rather than coercive.

Moreover, several UN treaty bodies, such as the Committee on the Elimination of Racial Discrimination (CERD), have taken up the issue in their periodic review processes. In 2018, CERD noted

[537] UN Office of the High Commissioner for Human Rights (n 491) 4–6, 43–45.
[538] UN Special Rapporteurs and Working Groups, 'China: UN experts deeply concerned about alleged detention, forced labour and trafficking of Uyghurs' (Office of the High Commissioner for Human Rights, Press Release, 26 June 2020).

credible reports that up to one million Uyghurs were being held in what it called 'massive internment camps,' and it urged China to release those detained without lawful justification.[539] China, however, has consistently rejected such findings as politically motivated and has provided alternative narratives portraying the camps as voluntary vocational centres aimed at poverty alleviation and deradicalisation. The treaty body mechanisms, while important for record-keeping and norm articulation, lack investigative powers and rely on state cooperation — which, in the case of China, has been partial and strategically selective.

The UN Human Rights Council (HRC) has served as another forum for international attention, but with limited results. In October 2022, a motion by Western states to hold a debate at the HRC on the Xinjiang situation was narrowly defeated — the first time in the Council's history that a motion was voted down concerning a permanent member.[540] This failure underscored the geopolitical limits of the UN's institutional response, particularly when dealing with powerful states that command significant influence among other member states, especially in the Global South. Attempts to pass formal resolutions condemning the abuses or to initiate investigative mandates have so far failed, largely due to diplomatic alliances and vote trading. As such, the HRC has been unable to trigger even the minimal procedural mechanisms available to it, let alone substantive accountability processes.[541]

Taken together, these mechanisms highlight the structural limitations of international human rights law in the face of significant geopolitical asymmetry. United Nations procedures are fundamentally reactive, relying on state self-reporting, voluntary access, and discretionary engagement with allegations. Without judicial enforcement or compulsory investigatory authority, their effectiveness is largely confined to reputational sanctions, which can be neutralised when a state possesses substantial global influence and rejects external criticism. China's economic and political leverage allows it to absorb reputational costs and to frame international scrutiny as neocolonialism or as the selective application of norms.

The United Nations' engagement with Xinjiang reveals a fundamental tension within the international human rights regime: robust normative prohibitions on arbitrary detention, torture, and

[539] Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Fourteenth to Seventeenth Periodic Reports of China (including Hong Kong, China and Macao, China)*, UN Doc CERD/C/CHN/CO/14-17 (19 September 2018) [40]–[42].
[540] UN Human Rights Council, 'Draft decision on holding a debate on the human rights situation in Xinjiang, China' (6 October 2022) UN Doc A/HRC/51/L.6 (rejected).
[541] Rosa Freedman, *Failing to Protect: The UN and the Politicisation of Human Rights* (Hurst 2015) 35–52; Philip Alston and Ryan Goodman, *International Human Rights* (2nd edn, OUP 2013) 733–40.

cultural repression exist, but are not matched by an institutional apparatus capable of enforcing them. Legal norms endure without effective enforcement, and condemnation is separated from material consequences. Although this structural deficit is not unique to China, the scale and systematic nature of the Xinjiang case make it a particularly salient example of the limitations of international constraint.

4.4.3. Sovereignty vs. International Legal Norms: The Limits of Accountability

The case of Xinjiang reveals a fundamental tension at the heart of contemporary international law: the persistent power of state sovereignty to override, absorb, or deflect international legal norms. Despite sustained allegations of mass detention, forced assimilation, and possible crimes against humanity, international mechanisms have been unable to impose meaningful constraints on Chinese policy. This outcome is not simply a failure of will or diplomacy, but rather an expression of deeper structural limits in the international legal order — limits that become visible when the concept of sovereignty is mobilised against the enforcement of global norms.[542]

As examined in Chapter 3, the post-9/11 United States constructed a legal architecture of exception — most notably through the Authorisation for Use of Military Force[543] and the Guantánamo detention regime — that strained traditional legal categories. Yet in that case, the exception was in some measure managed under pressure. U.S. courts intervened, albeit unevenly, to delimit the scope of detention and to preserve a procedural framework, however attenuated. There was contestation, litigation, and at times judicial pushback. Moreover, the United States remained susceptible to reputational consequences, human rights advocacy, and judicial scrutiny — both domestic and international. In this way, the American exception was precarious and negotiated: it occurred within a legal culture that acknowledged its own tensions.[544]

In contrast, the Chinese model of exception in Xinjiang appears deliberately insulated. Preventive detention, pervasive surveillance, and ideological re-engineering have been legalised domestically through administrative law and regional regulation and are embedded within a broader framework of national security governance. There is no avenue for judicial review, no institutional separation of powers, and no independent media or civil society capable of mounting a sustained legal challenge.

[542] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) 500–09; Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005) 13–36.
[543] Authorisation for Use of Military Force 2001 (n 79).
[544] *Rasul v Bush* (n 80); *Hamdi v Rumsfeld* (n 81); *Hamdan v Rumsfeld* (n 249); *Boumediene v Bush* (n 82).

Chinese authorities do not characterise their actions as extralegal or temporary; instead, they present their policies as lawful, necessary, and permanent, reflecting a logic of rule rather than exception. In this way, the People's Republic of China avoids the paradoxes that challenge Western liberal democracies in managing emergencies: the Chinese state does not attempt to balance rights and security, but rather subordinates rights entirely to security.[545]

This contrast foregrounds the broader question of what sovereignty means in the contemporary legal order. As developed in Chapter 1, sovereignty has long been linked to the power to decide the exception — the prerogative to determine when law is suspended, when threats become enemies, and when norms no longer bind. In Schmittian terms, sovereignty is not merely the capacity to enforce law, but the authority to define its limits.[546] The Xinjiang case reflects this logic in full: the Chinese state has named the Uyghur population as a latent threat, constructed an enemy image rooted in ethnic and religious identity, and activated a legal framework that renders this threat governable through control, not rights. The result is an internalised enmity, where the enemy is not outside the polity but within it — a condition that justifies expansive state intervention in the name of unity and survival.

International law, in theory, is meant to restrain precisely such exercises of sovereign power. It provides norms against torture, arbitrary detention, cultural destruction, and religious persecution. But in practice, these norms are not self-executing. They depend on institutional mechanisms, political consensus, and — most crucially — state consent.[547] When sovereignty is deployed as a shield and a powerful state refuses access or rejects legal findings, international law's capacity to act is severely curtailed. This is the structural asymmetry that defines the Xinjiang case: while the legal categories of international human rights law are clear, the means to enforce them are weak, particularly against a state that is both influential and ideologically committed to its own model of governance.

The limits of accountability in Xinjiang are not anomalous but rather reflect international law's persistent reliance on the sovereignty it aims to regulate. The global legal order remains state-centric, and when sovereignty is invoked to resist external scrutiny, particularly in the name of security, unity, or anti-terrorism, international norms frequently recede. Once sovereign power designates an enemy, that entity is shielded from external judgment. This outcome requires not despair, but clarity: it necessitates recognition that law alone cannot restrain the sovereign act of enmity. Law can document, denounce, and

[545] Peerenboom (n 135) 280–309; Minzner (n 135) 41–64.
[546] Schmitt, *Political Theology* (n 25) 5.
[547] Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950) 421–23; Goldsmith and Posner (n 542) 111–32.

normatively challenge, but it cannot override the structural primacy of state power. In this respect, the Xinjiang case underscores that, in the construction of the enemy, sovereignty constitutes the ultimate legal boundary.

CONCLUSION

The analysis developed throughout this dissertation has sought to clarify how legal systems construct and regulate the figure of the enemy and what this process reveals about the relationship between sovereignty, constitutional structure, and the limits of law. By tracing the philosophical foundations of enmity and examining their juridical expression in the United States and the People's Republic of China, the study has argued that the legal designation of enemies is not an anomalous or exceptional feature of particular regimes but a structural dimension of political order itself. The comparative inquiry has demonstrated that even constitutional systems grounded in divergent normative premises—liberal constitutionalism in the United States and party-state socialism in China—rely on analogous logics of exclusion through law. At the same time, the analysis has shown that the constitutional form of each system shapes the location, justification, and legal articulation of enmity in distinct ways.

The theoretical chapters established that the identification of enemies is historically intertwined with claims of political necessity and sovereign authority. From Hobbes's depiction of insecurity in the absence of common power to Schmitt's insistence that the political is constituted through the friend–enemy distinction,[548] the philosophical tradition repeatedly links the preservation of order to the capacity to designate threats and to suspend ordinary norms in response to them. The legal history of public enemies, rebels, and traitors similarly illustrates that categories of exclusion have long functioned as instruments through which states mark the boundaries of membership and justify exceptional coercion.[549] The contemporary legal frameworks examined in this dissertation continue to reflect these underlying logics, even where constitutional discourse emphasises rights, legality, and procedural restraint. The persistence of emergency powers, preventive detention, and expansive security legislation indicates that the tension between universal norms and the sovereign imperative of protection remains unresolved within modern law.

The comparative constitutional analysis in Chapter 2 demonstrated that the United States and China embody contrasting configurations of sovereignty that orient their respective constructions of enmity. The American constitutional tradition is marked by a deep suspicion of concentrated power and a corresponding commitment to institutional checks, separation of powers, and individual rights. Within

[548] Hobbes, *Leviathan* (n 4) chs 13–18; Schmitt, *The Concept of the Political* (n 23).
[549] Agamben, *Homo Sacer* (n 63) 84–91.

this framework, threats to the political community are typically conceptualised as external to it, arising from foreign enemies, hostile actors abroad, or non-citizens at the margins of the constitutional order. The Chinese constitutional order, by contrast, is organised around the primacy of political unity and the leadership of the Communist Party, and it therefore conceptualises threats primarily as internal disruptions to social stability and territorial integrity. These divergent premises generate different narratives of danger: one centred on invasion or infiltration from outside, the other on fragmentation or subversion from within. The comparative chapters, however, have shown that despite these differences in orientation, both systems employ law to transform perceived threats into juridically actionable categories of enmity.

The United States case study traced the evolution of the "enemy combatant" designation and its constitutional ramifications after the attacks of 11 September 2001. The analysis showed how executive claims of wartime necessity enabled the creation of a legal category positioned at the margins of both criminal law and the law of armed conflict,[550] permitting indefinite detention and attenuated procedural guarantees. Judicial interventions partially constrained these measures but did not eliminate the underlying logic that certain individuals could be treated as outside the normal constitutional order. The subsequent extension of security rhetoric into migration governance further illustrated the diffusion of enmity into the civil sphere. Policies that framed migrants or asylum seekers as dangers to national security blurred distinctions between external wartime enemies and domestic administrative subjects, demonstrating how the externalisation of threat can expand inward through legal mechanisms without abandoning liberal constitutional language.

The Chinese case study examined the construction of Uyghurs as internal enemies through counterterrorism legislation, administrative regulation, and security practice in Xinjiang. The analysis demonstrated that this construction was not solely the product of contemporary security concerns but the culmination of a longer historical narrative linking frontier governance, cultural difference, and political suspicion. Under the contemporary security paradigm, particularly during the leadership of Xi Jinping, Uyghur identity has been recast as a risk category associated with separatism and extremism, legitimising pervasive surveillance, preventive detention, and ideological re-education.[551] The legal framework does not merely respond to acts of violence but operates anticipatorily, treating cultural and religious expression as indicators of potential threat. In this context, the boundary between identity and enmity

[550] Authorization for Use of Military Force 2001 (n 79); *Hamdi v Rumsfeld* (n 81); *Boumediene v Bush* (n 82).
[551] Human Rights Watch (n 454); UN Office of the High Commissioner for Human Rights (n 491).

collapses, and the law becomes an instrument for managing a population constructed as inherently suspect.

The comparative analysis of these case studies supports the dissertation's central claim: that the legal construction of enemies reflects a shared structural logic across regimes yet diverges in constitutional articulation. In both the United States and China, law not only regulates conduct but also sets boundaries for political membership and authorises exceptional coercion against those deemed threats to the community. The American system tends to locate such threats outside the constitutional polity, justifying exceptional measures through war and national defence. In contrast, the Chinese system identifies threats within the social body and justifies exceptional measures in the name of unity and stability. In both cases, designating enemies suspends or attenuates ordinary legal protections and expands state power. Thus, the comparison shows that the difference between liberal and authoritarian legal orders shapes rather than eliminates the structural role of enmity.

Recent developments in both jurisdictions underscore the continuing relevance of these findings. In the United States, political and legal discourse surrounding immigration enforcement during the Trump administration illustrated the extension of security rhetoric into domestic governance. Migrants and asylum seekers were increasingly portrayed as vectors of crime, terrorism, or national insecurity, and administrative measures such as expanded detention, expedited removal procedures, and militarised border enforcement treated them as quasi-enemy figures despite their civilian status.[552] Although these policies operated within the formal framework of constitutional law, they reflected a logic analogous to that applied to enemy combatants: the marginalisation of certain persons through their association with threat. This evolution demonstrates how the externalisation of enmity characteristic of the American constitutional imagination can migrate into the legal order's interior without abandoning its normative vocabulary.

In China, the consolidation of a comprehensive national-security paradigm under Xi Jinping has reinforced the internalisation of enmity as a principle of governance. Constitutional amendments expanded counterterrorism legislation, and ideological campaigns have emphasised the inseparability of political loyalty, cultural conformity, and national unity. Regions associated with ethnic or political dissent, particularly Xinjiang, have been subjected to intensified surveillance and administrative control justified by the need to pre-empt instability.[553] The resulting governance model treats security not as an

[552] Jennifer M Chacón, 'Immigration Detention: No Turning Back?' (2014) 113 Columbia Law Review Sidebar 8.
[553] Counterterrorism Law (n 145); Zenz (n 468)

episodic response to crisis but as a permanent organising principle of law. This development illustrates the trajectory identified in the dissertation: the transformation of conditional autonomy into systematic securitisation through the legal construction of internal enemies.

Taken together, these trajectories indicate that enmity adapts to changing political contexts rather than diminishing in an era of globalised rights discourse. The extension of preventive security measures, the diffusion of exceptionality into ordinary law, and the growing reliance on risk-based governance all reinforce the theoretical framework developed in this study. The friend–enemy distinction, as identified by Schmitt, endures implicitly within legal responses to perceived threats.[554] Whether articulated as terrorism, migration, separatism, or extremism, the enemy remains the figure through which political communities mark their boundaries and justify extraordinary authority.

The dissertation does not suggest that all legal constructions of enmity are equivalent in their consequences or normative implications. The scale, intensity, and institutional context of security measures differ substantially between liberal and authoritarian systems, with profound implications for rights and accountability. What the comparative analysis demonstrates, however, is that the underlying mechanism by which law produces enemies and legitimises exceptional governance operates across constitutional forms. Recognising this shared structure is essential for understanding both the resilience of security-oriented law and the limits of formal constitutional guarantees. Legal norms alone do not dissolve the political imperative to identify threats; they channel and shape it.

The study also points toward broader implications for comparative constitutional scholarship. Analyses that treat liberal and authoritarian systems as categorically distinct risk obscuring the ways in which similar logics operate beneath divergent normative vocabularies. Conversely, approaches that reduce all security law to a universal pattern overlook how constitutional structure conditions its expression. By situating doctrinal developments within a shared theoretical framework while attending to institutional differences, the dissertation demonstrates the value of comparative analysis that is both structurally and contextually sensitive. It shows that the legal construction of enemies is simultaneously a universal feature of political order and a variable product of constitutional design.

Ultimately, the persistence of enmity within law reflects a deeper paradox at the heart of constitutional governance. Law aspires to universality, equality, and predictability, yet political communities reserve the capacity to exclude and to suspend those norms in the name of survival. The figure of the enemy embodies this paradox, marking the point at which legality encounters its limits. The

[554] Carl Schmitt, *The Concept of the Political* (n 23).

comparative examination of the United States and China reveals that this tension does not disappear under different ideological or institutional arrangements; it reappears in new forms, shaped by each system's conception of sovereignty and political identity. Understanding how legal orders construct their enemies is therefore indispensable not only to the study of security law, but to understanding the very limits of constitutionalism itself.

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