INDEFINITE DETENTION AS A DEMOCRATIC COUNTERTERRORISM POLICY

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I HEREBY RECOMMEND THAT THE THESIS PREPARED UNDER MY SUPERVISION BY JARED MCPHERSON ENTITLED "INDEFINITE DETENTION AS A DEMOCRATIC COUNTERTERRORISM POLICY" BE ACCEPTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF ARTS.

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ABSTRACT

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Indefinite Detention as a Democratic Counterterrorism Policy

Indefinite detention is better defined as "detention without trial," where the government has no plans for a prisoner's arraignment, release, or deportation. While this policy has been used by democratic countries in the past and present, it appears to violate a core democratic concept—that of due process of law. This study examines US, British, and French counterterrorism efforts against al-Qaeda, the Provisional Irish Republican Army, and the Armed Islamic Group, to determine which factors are most likely to lead to the employment of indefinite detention. Based on case study analysis, it appears that (1) extraterritoriality and sovereignty, (2) the nature of the arresting agency, (3) the capabilities of the domestic court system, and (4) the presence or absence of war are the most significant factors in this regard. These findings provide academic insight and policy guidance for democratic governments confronting terrorist threats.

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LIST OF ACRONYMS

DST	Directorate of Territorial Surveillance (Fr., *Direction de la Surveillance du Territoire*)
ECHR	European Convention on Human Rights
FISA	Foreign Intelligence Surveillance Act
FISC	Foreign Intelligence Surveillance Court
GIA	Armed Islamic Group (Fr., *Groupe Islamique Armé*)
GIGN	National Gendarmerie Intervention Group (Fr., *Groupe d'Intervention de la Gendarmerie Nationale*)
ICCPR	International Covenant on Civil and Political Rights
INS	Bureau of Immigration and Naturalization Services
IRA	Irish Republican Army
ISAF	International Assistance Force Afghanistan
MI5	Military Intelligence, Section 5
MSS	Most Similar Systems
NDAA	National Defense Authorization Act
OEF	Operation Enduring Freedom
OIF	Operation Iraqi Freedom
OLC	Office of Legal Counsel
PIRA	Provisional Irish Republican Army
PM	Prime Minister
RG	Central Directorate of General Intelligence (Fr., *Direction Centrale des Renseignements Généraux*)
RUC	Royal Ulster Constabulary
SCLAT	Antiterrorism Coordination Service (Fr., *Service Central de la Lutte Anti-Terroriste*)
SPA	Special Powers Act
UCLAT	Antiterrorism Coordination Unit (Fr., *Unité de Coordination de la Lutte Anti-Terroriste*)
UDHR	Universal Declaration of Human Rights

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1. INTRODUCTION

1.1 Background

A fundamental liberty safeguarded by democracy is the right to "due process" of law. While due process may be referred to by different terms in different countries, under US law it refers to those laws and legal proceedings that curb the power of the government on behalf of the individual. Due process restricts a government's ability to deprive an individual of "life, liberty, or property" without first taking steps to protect his or her fundamental rights: such as by providing a trial by jury, the right to counsel, or protection against self-incrimination.

In the United States, due process is most clearly defined by the Fifth and Fourteenth Amendments of the Constitution. However, similar concepts are encountered in the fundamental laws and constitutions of many liberal democracies. At least, this is the contention of political scientists such as William Riker (1965), Robert A. Dahl (1971), Philipe Schmitter (1991), Terry Lynn Karl (1991), and Amartya Sen (1999). Furthermore, international watchdog groups such as Freedom House and Amnesty International argue that due process is an *inalienable right* with universal applicability: an argument enshrined in international treaties such as the Hague Convention, the Charter of the United Nations, the Universal Declaration of Human Rights (UDHR), the Geneva Convention, the European Convention on Human Rights (ECHR), and the International Covenant on Civil and Political Rights (ICCPR).

Yet there often arise political situations that pose problems to international law: gaps where international laws and treaties fall short, such as in cases of illegal immigration, international crime, deportation, international terrorism, or in times of war. In scenarios such as these, governments are often forced to determine which measures should be applied and which

should not, particularly in the treatment and handling of non-citizens. International terrorism is particularly problematic since terrorist attacks are usually graver than criminal activities and yet customarily are not considered to be acts of war. And governments detaining terrorist suspects are often confronted with the dilemma of whether to extend civil liberties to detainees when doing so could put their country at risk.

Following the September 11th terrorist attacks, the US government argued that due process of law should be withheld from al-Qaeda and Taliban detainees. These were individuals without conscience and without country, it was reasoned, and they possessed information vital to national security. As such, the government incarcerated many of them at Guantanamo Bay, Cuba, where they have been held in a state of limbo for more than a decade. These individuals have not received formal charges nor is there a plan for their arraignment or release: a status referred to as "indefinite detention."

The US is not alone in this matter. There are numerous examples of indefinite detention being used by non-democratic governments and, on occasion, by democratic ones. One notable example was the United Kingdom's detention of Provisional Irish Republican Army (PIRA) members during "The Troubles," a period of social upheaval and civic unrest in Northern Ireland beginning in the late 1960s. Despite international and domestic opprobrium, the UK maintained the policy from 1971 to 1975: arguing that the ability to effectively combat terrorism was more important than maintaining a democratic rule of law. Furthermore, the British government argued, the legal challenges posed by terrorism made it difficult to prosecute terrorist suspects using standard security and judiciary protocols.

The US government has made similar justifications: arguing that detained al-Qaeda and Taliban suspects should be considered "unlawful combatants" who fall outside of the parameters

of the Geneva Convention, that the terrorism threat posed by al-Qaeda amounts to a national emergency, and that the US does not have the ability to prosecute its detainees. Despite these protestations, there are clear examples of democracies *not* resorting to using indefinite detention in order to counter terrorism—including the US and UK at other points of their histories. How, then, can we account for these incongruities?

1.2 Statement of the problem and research questions

The intent of this thesis is to examine when and why democratic regimes employ indefinite detention as a counterterrorism policy. Although indefinite detention is often used by non-democratic states, it is not typically employed by democracies. The reason for this is fairly clear. Indefinite detention appears to contradict a fundamental principle of democracy: i.e., the right to not be incarcerated without formal charges and the right to defend oneself in a court of law. As such, its appearance in democratic counterterrorism measures is both incongruent and alarming, and clearly deserves further examination.

This study will compare the US's use of indefinite detention post-9/11 with the British government's use of it during the Troubles. It will also examine France's counterterrorism measures used against the Armed Islamic Group (Fr., *Groupe Islamique Armé*, or GIA) from 1992 to 1996, wherein the French government successfully countered the GIA without resorting to using indefinite detention. By comparing these case studies, I hope to identify which factors might lead a democracy to employ indefinite detention in one circumstance but not in another.

1.3 Methodology

I will employ a Most Similar Systems (MSS) design in this study, as it is best suited to the problem at hand. First, the US, the UK, and France can all be considered liberal democracies with firmly institutionalized human rights policies. Second, all three countries were challenged by terrorist groups who carried out terrorist attacks, in part, upon their homelands. And yet all three countries did not employ the same detention policies, leaving us to wonder why. This study will examine six contextual aspects of American, British, and French counterterrorism campaigns to determine what impact, if any, each variable had on detention policies. These variables will include: (1) sovereignty and extraterritoriality; (2) the nature of the arresting agency; (3) domestic court systems; (4) domestic public opinion; (5) the presence or absence of war; and (6) a country's level of deference to international law.

In discussing "sovereignty," this study is primarily concerned with the recognition of another state's right to self-governance and its ability to control its own territory, citizens, and residents within its borders. This definition is widely recognized and serves as the basis for most international treaties and organizations as well as international law. "Extraterritoriality," meanwhile, refers to geographic territory located outside of one's national borders.

When discussing the "arresting agency," this paper refers to the agency *in charge* of apprehending and detaining terrorist suspects. While acknowledging that counterterrorism operations often include joint efforts from police, military, intelligence, judicial, border patrol, and customs forces; for the sake of argument we will consider the "head" arresting agency that agency that holds directorial authority—typically as granted by the government or by state constitution.

"Domestic court systems," as defined by this paper, will include those judiciary courts charged with dispensing *criminal* justice at the local, regional, or national level. While military courts and tribunals may fall under a loose definition of "domestic courts," we will primarily focus on non-military courts: i.e., those courts charged with dispensing justice unrelated to codes of military conduct or offenses related to times of war. This approach is supported by the fact that many governments, including the United States and United Kingdom, treat terrorist activities as falling outside the purview of the Geneva Conventions.

In this study, "domestic public opinion" will be operationally defined as those views, attitudes, and opinions of the *civilian populace having the most influence* on the government engaged in counterterrorism activities. While it might be argued that public opinion has little influence on government policies, this point will be addressed in the analysis.

Determining the "presence or absence of war" is more complicated than the statement suggests. Modern governments have been reluctant to declare war since WWII: making a formal declaration of war, in some respects, an outdated phenomenon. Moreover, many states would be hampered by the inappropriateness of declaring war against a non-state actor such as a terrorist group. As such, this paper will take a loose definition of "war" and "state of war," as supported by the scholarship of Martha Crenshaw (1995), John Arquilla (1999), David Ronfeldt (Ibid.), and Michele Zanini (Ibid.)—particularly as it applies to counterterrorism.

Lastly, a country's "level of deference to international law" will be defined as a state's historical tendency and legal obligation to defer to international treaties or organizations.

1.4 Structure

This paper will be comprised of six chapters. Chapters two through four will explore the concept of due process of law within the three countries' legal systems and will describe, in a general sense, each country's counterterrorism efforts and detention practices. Chapter Five will examine the six contextual aspects of counterterrorism (as described in the section above), and will make an initial assessment of each variable's impact on indefinite detention. Chapter Six will address conclusions, potential weaknesses of this study, prospects for future research, and real-world applications.

2. The United States

2.1 Due process and detention powers in the US legal system

The American concept of due process of law dates back to the American colonies, where it was rooted in colonial law and founded upon the British legal system. The phrase "due process" was first used in 13th century England, where it was nearly synonymous with "law of the land"—as codified by the Magna Carta (1215) and the Great Charter of Ireland (1216) (Stevens 2003).

Following the colonies' separation from the British Empire, the concept of due process was integrated into the US Constitution, where the Bill of Rights and later amendments strictly limited the power of the government in favor of the citizen. Most particularly, the Fifth and Fourteenth Amendments stipulated that a citizen cannot be punished for a crime without first being indicted by a court of law and cannot be deprived of "life, liberty, or property," without due process of law. The US Constitution also holds that any individual accused of a crime will be afforded the right to trial by jury, the right to counsel, and the right to protection against self-incrimination.

2.1.1 The provision of due process to non-US citizens

The Fourteenth Amendment states that due process of law shall be extended to all individuals "born or naturalized in the United States, and subject to the jurisdiction thereof." Nevertheless, the specific inclusion of US citizens and naturalized residents does not necessarily *exclude* noncitizens from the same provisions. As of 2010, there were an estimated 11.2 million unauthorized immigrants living in the United States (Passel and Cohn 2011). Under a strict interpretation of the Fourteenth Amendment these individuals could be deprived of life, liberty,

or property without legal recourse. Yet a long history of legal precedent shows that this is not the case. In *Yick Wo v. Hopkins* (1886), for example, the Supreme Court determined that the Fourteenth Amendment applies to all persons "without regard to any differences of race, of color, or of nationality." Moreover, in *Mathews v. Diaz* (1976), the Court determined that due process applies to individuals whose presence "is unlawful, involuntary, or transitory." Despite these rulings, the US government maintains its right to bar foreigners from entering the country and its right to deport illegal or unwanted aliens (The Immigration and Nationality Act of 1952, 8 U.S.C. § 1251). This latter power is most often exercised when individuals are found to have violated immigration laws, have committed subversive acts against the government, or are found to have criminal records. However, the government can exercise its deportation powers with little provocation.

In deportation cases there is in fact some degree of ambiguity when it comes to due process of law. For instance, while the standard detention period for deportees is 90 days, since 1996 the Bureau of Immigration and Naturalization Services (INS) has had the authority to detain deportees for months or years while deportation arrangements are made. This detention power is based on antiterrorism legislation passed in the aftermath of the first World Trade Center attack (1993) and the Oklahoma City bombing (1995): namely the Antiterrorism and Effective Death Penalty Act of 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

This is not to say that the INS's detention powers are limitless. On the contrary, in a landmark decision handed down just two months before the September 11th attacks (*Zadvydas v. Davis* [2001]), the Supreme Court concluded that there are limits to the INS's detention powers. While the government is allowed to detain immigrants longer than 90 days if removal is

unfeasible, the detention period must be reasonable in length, cannot exceed six months, and is subject to review (*Zadvydas v. Davis*, 533 U.S. 678 [2001]).

2.1.2 Executive powers and emergency powers

In the United States, the president is head of the executive branch. As such, he or she is "responsible for enforcing the law and maintaining order" under normal circumstances, and during times of emergency is responsible for restoring law and order (Fatovic 2009, 2). Because these demands are inherent to a national crisis, the legislative and judicial branches have historically allowed the president significant latitude to wield "emergency powers" during these times. As Clement Fatovic explains in *Outside the Law: Emergency and Executive Power*:

> Given the unique and irrepressible nature of emergencies, the law often provides little effective guidance, leaving executives to their own devices. Executives possess special resources and characteristics that enable them to formulate responses more rapidly, flexibly, and decisively than can legislatures, courts, and bureaucracies (2).

Emergency powers allow the president to bypass normal administrative and jurisdictional processes to restore law and order. American history is replete with examples of presidents invoking executive power during times of war or emergency, including Woodrow Wilson's order to detain 2,000 German-Americans during World War I and FDR's order to detain 110,000 Japanese-Americans (as well as others) during World War II. Although FDR's order was challenged four times in the Supreme Court, the Court found in his favor three out of four times.[*] In one of these cases, *Korematsu v. United States* (1944), the Court even determined that "mass

[*] *Hirabayashi v United States* (1943), *Yasui v. United States* (1943), and *Korematsu v. United States* (1944). The only case thrown out by the Supreme Court was *Ex parte Endo* (1944), where the Court found that the government could not continue to detain a plaintiff after his loyalty had been proven. *Ex parte Endo* laid the groundwork for Japanese-American resettlement at the end of World War II.

race-based evacuation [is] a constitutional use of wartime presidential authority" (Robinson 2009, 224).

It is important to note that although detained Japanese-Americans and German-Americans were not considered "terrorists" *per se*, the rationale for their detention was rooted in fears for national security and driven by paranoia and xenophobia—very similar in many ways to the circumstances following 9/11. Although the focus of this study is not to examine these historical examples of internment, particularly since they are not counterterrorism-related, they do provide examples of democratic uses of indefinite detention. As such, they can provide opportunities for future avenues of research.

2.1.3 The impact of 9/11 on US detention policies

The September 11th attacks had an immediate, drastic effect on US foreign and domestic policies. Within weeks, Pres. George W. Bush began preparing the US military and its allies for an offensive assault on Afghanistan. Meanwhile, Congress passed the USA PATRIOT Act (more simply known as "the Patriot Act"), which among other things gave the attorney general unprecedented power to detain and interrogate terrorist suspects. For example, the attorney general was now authorized to detain any alien determined to be a "suspected terrorist" even if he or she were a legal US resident. Moreover, illegal aliens could be held indefinitely even if they were not scheduled for deportation (Cole and Dempsey 2002, 156). According to David Cole and James Dempsey, authors of *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, "The INS has never before had the power to detain persons that it has no authority to expel, yet [the Patriot Act] gives it exactly that" (156). Under the provisions of the act, the government could maintain permanent control of an alien as long as

there were "reasonable grounds to believe" that he was a terrorist, even if he posed no threat to national security, was not a flight risk, and had "prevailed in […] removal proceedings" (Ibid., 157).

It is clear that US law even prior to the 9/11 attacks allowed for some form of indefinite detention. The Supreme Court has determined on multiple occasions that the president has the right to invoke emergency powers and detain individuals posing a threat to national security. Still, the United States' use of indefinite detention as a *counterterrorism measure* was without precedent until after 9/11 as part of the so-called Global War on Terrorism.

2.2 Indefinite detention in the War on Terrorism

There is no official start for the Global War on Terrorism, although one could argue that it began sometime between September 20 and October 7, 2001. The first date marks President Bush's State of the Union address where he declared "war" on al-Qaeda and the Taliban government. The second date marks the commencement of the US-led invasion of Afghanistan—otherwise known as Operation Enduring Freedom (OEF).

The first phase of OEF consisted of US and British Commonwealth special operations forces, intelligence personnel, and air units providing military assistance to the Northern Alliance: an assortment of ethnic and tribal forces opposed to the Taliban government. With Western backing, the Northern Alliance took five of Afghanistan's six largest cities in a little over a month, capturing thousands of Taliban fighters and an unknown number of al-Qaeda suspects (Jones 2009, 92-95). Although the vast majority of these captives were sent to prisons in Afghanistan, a few hundred were transferred to Guantanamo Bay.

From September 2001 to January 2002, President Bush, the Office of Legal Counsel (OLC), and lawyers from the departments of Justice, State, and Defense issued executive orders and memoranda that lay the foundation for US detention policies. Of particular importance was a military order issued on November 13, 2001, mandating that non-citizen terrorist suspects be tried under military law ("Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism," 66 Fed. Reg. 57,833, 57,833). This was followed by a January 9, 2002, memo from the OLC arguing that the Third Geneva Convention[†] does not apply to al-Qaeda or Taliban detainees. By issuing these contradictory directives, the Bush administration effectively removed al-Qaeda and Taliban detainees from domestic and military legal jurisdictions.

Concurrently, a group of government lawyers met to discuss potential locations in which to hold the detainees. According to John Yoo, a former OLC and Department of Justice lawyer who served on the task force, the "one thing we all agreed on was that any detention facility should be located outside the United States" (Fletcher and Stover 2009, 4). The US Naval Station at Guantanamo Bay was eventually selected due to its secure location, its use as an immigration processing station, and its status as a legal "no-mans-land" (Greenberg, 2009). As Karen Greenberg states in *The Least Worst Place*, "The matter of sovereignty was unclear [in Guantanamo]. There was no embassy, nor did rules governing embassies abroad apply. Even ships had clearer jurisdictional mandates than did Guantanamo" (19).

On January 11, 2002, the first 20 detainees arrived at Guantanamo Bay—the first of 779 prisoners who would eventually be held at the detention center. While the majority of these prisoners have been repatriated over the past decade, 149 of them remain in US custody as of the publication of this paper (Associated Press, "US Readies to Transfer Six Guantánamo Bay Detainees to Uruguay, Officials Say," *The Guardian*, July 17, 2014).

[†] Also called the Geneva Convention Relative to the Treatment of Prisoners of War.

3. The United Kingdom

3.1 Due process and detention powers under British law

As mentioned in Chapter Two, "due process of law" was largely synonymous with "law of the land" in 13th-century England, where the Magna Carta (1215) and Great Charter of Ireland (1215) granted British subjects a form of rudimentary legal protection (Stevens 2003). The following passage is taken from Chapter 39 of the Magna Carta:

> No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, except by the legal judgment of his peers or by the laws of the land. (Kempin 1990, 65)

It is important to note that the term "peers" used in the passage is not a reference to a jury, but instead referred to existing legal institutions of the time such as the King's Council and, later, the House of Lords. Still, as Frederick Kempin Jr. argues in *Historical Introduction to Anglo-American Law in a Nutshell* (1990), the Magna Carta "opposed the unbridled power of the Crown" and supported the rule of law (66). Another such document was the Petition of Right, passed in 1628, which made imprisonment by the king illegal without parliamentary consent (Banaszak 2002, 3). A third key document was the Bill of Rights, written in 1689, which guaranteed religious freedom, prohibited excessive bail, excessive fines, cruel and unusual punishment, property seizures before conviction, and guaranteed a subject's right to trial by jury (Ibid., 7).

Although the United Kingdom does not have a written constitution, fundamental legal documents such as the Magna Carta, the Petition of Right, and the Bill of Rights lay the foundation for an "unwritten constitution" that serves as the basis for British law. This unwritten

constitution comprises legal statutes and common law conventions that are, as Kempin suggests, "no less definite and certain" than the US Constitution (16-17).

3.2 The rule of law in Northern Ireland

Northern Ireland was created by the Government of Ireland Act 1920, which was drafted during the Anglo-Irish War. In July 1921, the UK signed the Anglo-Irish Treaty: formally ending the war and granting independence to Ireland's 26 southern counties, which were eventually called the Republic of Ireland. The remaining six counties were called Northern Ireland and would continue to be governed by the UK as a semi-autonomous region (Holliday 1999, 121).

Throughout most of its history, Northern Ireland's status has been best described as "devolved federalism" or "home rule." Under the home rule system, Northern Ireland is allowed a government but remains under the authority of the British Parliament. Northern Ireland's government, which was formed on May 3, 1921, was comprised of the Parliament of Northern Ireland and an executive office known as the Executive Committee or Stormont government. Stormont began its rule on June 7, 1921, but from its inception was besieged by trouble. As David McKittrick and David McVea explain in *Making Sense of the Troubles* (2002):

> Northern Ireland was born in violence. From the first months of its existence there were occasional IRA raids from across the new border as well as major outbreaks of sectarian violence, especially in Belfast. (4)

These surges of violence convinced the newly-formed government to pass sweeping emergency laws called the Civil Authorities (Special Powers) Act (Northern Ireland) 1922, better known as the Special Powers Act (SPA). The SPA provided Northern Irish constabularies with extensive discretionary powers, including the right to carry out "arrests without warrant" and

"internment without trial," the use of "unlimited search powers," and the ability to ban "meetings and publications" (McKittrick and McVea 2002, 11). One especially contentious provision allowed the minister for home affairs to "take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order" (Walsh 2000, 33). As originally drafted, the SPA was supposed to last for one year. However, the Parliament of Northern Ireland renewed it every year from 1923 to 1928, for a five-year period from 1928 to 1933, and made it permanent law in 1933 (Spjut 1986, 713). The SPA would last until 1972, after which the violence in Northern Ireland became too much for the British government. It dissolved Stormont and ruled Northern Ireland directly until 1998.

The first period of Stormont rule is significant for two reasons: First, it shows that even the far-reaching powers of the SPA were ultimately unable to curb sectarian violence. Second, it illustrates that Northern Ireland was never a fully independent state, but was actually semi-sovereign: a fact most clearly observed in its dissolution.

3.3 Previous uses of indefinite detention, 1922-1962

The year 1971 was not the United Kingdom's first employment of indefinite detention. In fact, internment had been used *four times* previously: in 1922-1924, 1938-1939, 1956-1962, and for one week in 1951 (Donohue 1998, 1092; Finnane 1989, 132).

In the first of these periods, the British Army was still in place following the Anglo-Irish War. The Stormont government was in process of creating the SPA, which would be signed into law in April, but felt the need to act preemptively to stem rising sectarian violence (Donohue 1998, 1090-1091; Hennessey 1997, 32-33). According to Laura K. Donohue, author of "Regulating Northern Ireland: The Special Powers Act, 1922-1972," the first employment of

internment was considered "extremely effective" by the British and Northern Irish governments: from May 1922 to December 1924, security forces rounded up over 700 IRA members and held them as a preventative security measure (1092). Politically-motivated violence dropped precipitously. According to Donohue, in April 1922, there had been more than 80 political murders and 57 attempted murders in Northern Ireland. Within five months, however, the violence had dropped to one murder and 11 attempted murders, and would continue to decline into 1923 (Ibid.).

This perceived success may have set the stage for subsequent uses of internment in Northern Ireland. In 1938-1939, internment was used in response to an IRA bombing campaign (Hennessey 1997, 85-86; Bell 1980, 155-170). In 1951, it was used as a precautionary measure during a royal visit (Finnane 1989, 132). And in 1956-1962, it was used to defeat a full-scale IRA military offensive—the last of its kind before the IRA's 1969 breakup (Bell 1980, 333-334). On the whole, the British public considered these incidents to be political and military victories.

3.4 The passage and repeal of indefinite detention, 1971-1975

In 1969, widespread sectarian violence once again threatened Northern Ireland. The Northern Irish constabulary—consisting of the RUC and the Ulster Special Constabulary (called the "B" Specials)—was quickly overwhelmed and the situation began to spiral out of control. The Stormont government, headed by Prime Minister (PM) James Chichester-Clark, was compelled to ask Britain to intervene (McKittrick and McVea 2002, 54-55).

The British Army arrived in Northern Ireland on August 14, 1969. Its mission—called Operation Banner—was to support the Northern Irish constabulary and restore order. One of the army's first tasks was to press Stormont to accept a series of security reforms, including the

dismantling of the "B" Specials and the reorganization of the RUC (McKittrick and McVea 2002, 57; Wichert 1999, 119). With these reforms the British Army hoped to assuage Catholic resentment toward the mainly Protestant constabulary forces. This was an empty hope. In March 1971, PM Chichester-Clark resigned and was succeeded by Brian Faulkner, a Unionist politician and former home secretary credited with having put down the IRA's campaign in 1956-1962 through the use of indefinite detention (McKittrick and McVea 2002, 65-67). Faulkner immediately pushed for decisive security policies in order to assure his Unionist base and the British government that he was the right man for the job. When these measures failed, Faulkner felt that he had no choice but to employ indefinite detention (Ibid., 67).

On the morning of August 9, 1971, British and Northern Irish security forces launched an operation to arrest 452 suspected PIRA and Official IRA members (McKittrick and McVea 2002, 67-68). Operation Demetrius, as it was called, was ostensibly designed to target members of both Catholic and Protestant paramilitaries; however, not a single Protestant was detained. And although the operation rounded up 342 individuals, intelligence was out-of-date and most of the suspects had to be "released within hours or days" (McKittrick and McVea 2002, 67-68; Hennessey 1997, 194). Notwithstanding the failings of Operation Demetrius, the Stormont government and British army would continue to employ indefinite detention for another four years.

In 1972, the British Parliament suspended home rule in Northern Ireland and dissolved the Stormont government, feeling that it was unable to remain impartial or restore peace. In so doing, Parliament hoped to signal to Northern Irish Catholics that it was taking a new approach. However, more than three years passed before the British administration finally phased out indefinite detention. And even then it did so cautiously: releasing prisoners in stages in order to

make political demands on the PIRA and avoid backlash from Protestants (Walsh 2000, 218; Spjut 1986, 717). When the peace talks stalled, the government unilaterally prosecuted terrorist suspects within its criminal justice system (Walsh 2000, 218). Meanwhile, the British government enacted a new "quasi-judicial" detention policy under which it could detain terrorist suspects for 28 days with a form of judicial review (Spjut 1986, 719).

By December 1975, the indefinite detention policy was no more. The last of the detainees had been released or processed through the criminal justice system. A reported 1,981 people were subjected to indefinite detention from 1971 to 1975—the vast majority of them Catholic Republicans (Melaugh 2014).

4. France

4.1 Due process under French law

The French concept of fundamental civil rights is long: dating back to the Declaration of the Rights of Man and of the Citizen and to French Enlightenment philosophers such as Rousseau, Voltaire and Montesquieu (Dickson 1994, 82). Notwithstanding France's seemingly illustrious history, however, in practice it has typically allowed public safety to trump individual rights (Ibid., 85).

Although the French Constitution explicitly states that "[n]o one may be arbitrarily detained," its justice system allows French police to detain suspects without charge and with minimal lawyer interaction for 24 hours—with an additional 24 hours granted pending approval from the prosecutor's office (Elliott, et al. 2006, 299; McKee 2001, 11; Davis and Kirry, 2011). In serious crimes such as robbery or assault, an individual can be detained up to 72 hours as long as his or her case undergoes judicial review (Bell 1992, 143). Meanwhile, illegal immigrants can be held in non-penal institutions up to six days; but in cases of "absolute urgency and a threat of special seriousness to public order," such as terrorism, additional leeway is granted (Bell 1992, 144; Dickson 1994, 91).

4.1.1 Antiterrorism laws and emergency powers

Similar to British and American law, French law allows its president emergency powers during times of crisis. Under Article 16 of the French Constitution, the president can suspend parliament and "rule by decree" if a crisis threatens the integrity of the state (Dickson 1994, 50, 84; Elliott, et al. 2006, 29-30). The president also has the power to limit civil liberties during

times of crisis, such as freedoms of movement and assembly, and has the ability to deport non-citizens (Dickson 1994, 84).

In addition to the emergency powers described above, French law provides extensive security powers when it comes to combatting terrorism—due, in a large part, to the Terrorism Law passed in 1986 under President Jacques Chirac (Elliott, et al. 2006, 199-200; Bell 1992, 144, 316-317).

4.2 France and the GIA

The GIA is a radical Islamic group formed in Algeria in 1992. The GIA carried out guerilla and terrorist attacks against the Algerian government and became a major contributor to Algeria's civil war. In 1993, in the midst of the conflict, the GIA began to worry that France would interfere. It decided to act preemptively, ordering all foreigners to leave and kidnapping three French consular officials. The French government retaliated by raiding two of the GIA's fundraising networks. In response, the GIA hijacked Air France Flight 8969 on December 25, 1994, planning to crash it into the Eiffel Tower or blow it up over Paris (Gregory 2003, 131). A French paramilitary unit retook the flight. However, this marked the beginning of the GIA's campaign against France.

Many of France's counterterrorism measures had been in place prior to its conflict with the GIA: having been created in response to Marxist terrorism of the 1970s and 80s. In the mid-1980s, for instance, France formed an administrative body at the Interior Ministry called the Antiterrorism Coordination Unit (UCLAT) and one at the Justice Ministry called the Antiterrorism Coordination Service (SCLAT). These units were charged with coordinating counterterrorism efforts among France's police, intelligence, and judicial structures (Shapiro and

Suzan 2003, 76; Parmentier 2006, 54-57). Critical to this effort was a corps of magistrates who specialized in prosecuting terrorism. These magistrates worked hand-in-hand with the Interior Ministry's domestic intelligence agency—the Directorate of Territorial Surveillance (DST)—which was both a domestic intelligence agency and a police service. The DST's relationship with the UCLAT and SCLAT allowed it to transform intelligence investigations into judicial investigations and to secure wiretaps, arrest warrants, and subpoenas with greater ease and efficiency (Shapiro 2007, 146).

France also instituted policy changes at the national level. In 1995, it reinstated a national security alert system called *Plan Vigipirate* that kept the public informed and gave the police augmented powers. Another policy allowed the National Police's domestic intelligence agency—the Central Directorate of General Intelligence (RG)—to use "informants, relationships with community leaders, and electronic listening devices" to monitor communities deemed likely to support terrorism (Shapiro 2007, 149).

A third critical aspect of France's counterterrorism efforts was a policy for international cooperation. For instance, in 1998, France, Belgium, Germany, Italy, and Switzerland arrested 78 GIA suspects or supporters, including three individuals charged with organizing European support networks for the GIA (ADL 1998). These efforts were quite effective at undermining the GIA's extended support network.

Meanwhile, in Algeria, the GIA was hemorrhaging from all-out government attacks and competition from its Islamist rivals. It was also losing popular support due to its divisive public statements and brutal tactics. By the late 1990s, it had splintered into factions. And by the early 2000s, it had ceased to be a coherent organization.

4.2.1 Detention laws under French administration, 1992-1996

How are we to understand French detention policies used against the GIA? Unfortunately, it is nearly impossible to find publications specifically addressing France's detention practices during this one period. However, as mentioned, the French justice system provided great leeway when it came to holding criminal suspects and additional leeway in cases of terrorism (Elliott, et al. 2006, 299; McKee 2001, 11; Davis and Kirry 2011; Dadamo and Farran 1993, 186-187; Bell 1992, 143-144).

This flexibility likely benefited France in its fight against the GIA. In some respects, one might even argue that this counts as a form of *administrative detention*, albeit one with defined periods and judicial oversight. As such, France's counterterrorism detention practices fall in a gray area between due process and indefinite detention, not quite fitting either definition. This has led to condemnation at the international level, where France has been censured for its use of police brutality, the harsh conditions of its jails, and for violating the spirit of its detention laws by overusing detention on remand and having excessively long trials (Elliott, et al. 2006, 212-217; Bell 1992, 193; Amnesty International 2011).

And yet the French government appears to have used its limited detention laws to full effect: a *Los Angeles Times* article from October 1995, for instance, states that "tens of thousands" of French denizens of Northern African descent were rounded up and questioned during a time of heightened tension (Scott Kraft, "2 dozen injured by bomb blast in Paris subway," *Los Angeles Times*, October 18, 1995). Even supposing that all of these individuals were provided due process under French law, it is difficult to see the same scenario occurring in the United States or United Kingdom without some form of emergency legislation.

5. The Case Studies: A Comparative Analysis

Having completed a general overview of the French, British, and American counterterrorism campaigns, I will now discuss whether the following variables had a significant impact on the application of indefinite detention: (1) sovereignty and extraterritoriality; (2) the nature of the arresting agency; (3) domestic legal systems; (4) domestic public opinion; (5) the presence or absence of war; and (6) deference to international law.

5.1 Sovereignty and extraterritoriality

United States

Like France and the United Kingdom, the US is a signatory of the Geneva Convention, which proscribes regulations regarding the treatment of prisoners of war. Despite this, the Bush administration argued that the Geneva Conventions had no bearing on captured al-Qaeda and Taliban detainees, since the US (1) did not recognize the sovereignty of the Afghan government and (2) felt that the detainees did not meet the criteria of "prisoners of war." Instead, the US government referred to al-Qaeda and Taliban detainees as "unlawful combatants" and withheld Geneva provisions.

However, there is a problem. Even if one makes the argument that al-Qaeda and Taliban detainees captured *in Afghanistan* do not count as legal combatants, the US cannot say the same for those individuals captured outside of Afghanistan: e.g., individuals arrested in foreign countries and transferred to US custody by way of secret detention facilities or "black sites" ("Secret US Prisons: Bush Admits CIA 'Black Sites,'" *Spiegel Online*, September 7, 2006). Neither can it be said about those individuals abducted by the CIA (or foreign allies) and then turned directly over to other allies for interrogation and torture—a process known as

"extraordinary rendition" ("Extraordinary Rendition," FRONTLINE, November 4, 2007; Bergen 2011, 97-102). Similar to their compatriots taken in battle, these individuals were not provided with due process of law *despite being detained in states not in conflict with the US and whose sovereignty is supposedly recognized*. Under these circumstances, then, it might be argued that the clandestine nature of the CIA's operations and the convoluted manner in which these individuals were transferred into US custody allowed for some degree of plausible deniability and diffused responsibility—for both the US and the host countries.

In fact, there is strong evidence for this argument. Even after 9/11, terrorist suspects detained within the United States, with one exception, were provided with due process of law and tried in US criminal courts. The sole exception is José Padilla, who was initially called an unlawful combatant and detained in a military prison for three-and-a-half years. Following public backlash, Padilla was transferred to a criminal court and given a 17-year sentence (Department of Justice 2007). This seems to suggest that the US is less prone to withhold due process of law when an individual is arrested in an open and transparent manner, rather than in a clandestine one.

Based on the differences in treatment between terrorist suspects detained in the US versus those detained abroad, it would appear that territoriality *does* influence the application of indefinite detention in US policies. Moreover, the degree with which the US recognizes a country's sovereignty appears to influence its decision on whether to employ indefinite detention, except in instances of clandestine operations.

United Kingdom

As with the United States, the United Kingdom appears to have based some of its detention policies on the fact that Northern Ireland—while perhaps not "extraterritorial"—had

diminished sovereignty. This was bolstered by the passage of the SPA, which allowed the government to encroach on civil liberties in ways that it could not in other parts of the UK: such as through warrantless arrests, internment without trial, unlimited search powers, and bans on meetings and publications (McKittrick and McVea 2002, 11). Yet the SPA is only one example of Northern Ireland's diminished sovereignty. In *The Dynamics of Conflict in Northern Ireland* (1996), Joseph Ruane and Jennifer Todd provide other examples:

> The perception of Northern Ireland as separate, different, ultimately detachable, has been concretised in a wide range of policies and assumptions: the great reluctance by the main political parties in the United Kingdom to organise in Northern Ireland; the willingness to administer affairs of state in Northern Ireland with minimal representation of the local populace; the acceptance of a situation in which a 'loyal' community polices a 'disloyal' one, and does so in part as a regiment of the British army; the official leniency given to soldiers responsible for the deaths of civilians in controversial circumstances; the statements – sometimes slips of the tongue – of British politicians and military that compare Northern Ireland with former colonies. (226)

And of course, the clearest example of Northern Ireland's diminished sovereignty is illustrated by the British Parliament's unilateral decision to dissolve the Stormont government in 1972.

Based on this argument, it might be said that the British government's decision to employ indefinite detention in Northern Ireland was contingent on Northern Ireland's semi-autonomous status. Although Northern Ireland was politically part of the United Kingdom, its distinct geography, culture, historical separation, and longstanding history of violence most likely influenced the British Army's decision to employ indefinite detention.

France

Unlike the US and UK, the French government predominantly confronted its terrorist threat domestically. That is to say, although France supported Algeria in its civil war and worked with its European allies to undermine the GIA's influence abroad, the French government chose to never pursue the GIA externally nor confront it on foreign soil (Shapiro 2007, 152.). As such, France's counterterrorism efforts against the GIA should be considered domestic.

In fact, France's decision to fight the GIA domestically was a willful decision on the government's part. The French government was allegedly afraid of overstep and did not want to become embroiled in Algeria's civil war (Safran 2009, 339). The government also did not want to treat the GIA as a political opponent, as this would give it undue deference (Shapiro 2007, 152). Rather, the French government decided to treat the GIA like a criminal network—albeit a violent one—and to confront it on French soil (Ibid.).

Based on the different contexts under which the French, British, and US governments countered their terrorist threats, one could argue that the geopolitical context does influence a democratic state's decision to employ indefinite detention in its counterterrorism operations—primarily in the forms of extraterritoriality and recognized sovereignty (Table 1). More especially, the territorial nature of counterterrorism operations and the level of sovereignty afforded to a host country will impact a democracy's decision to employ indefinite detention.

Table 1: Impact of sovereignty and extraterritoriality on indefinite detention employment

	Territorial operations?	Indefinite detention?
US	No	Yes
UK	No	Yes
France	Yes	No

	Recognition of foreign government sovereignty?	Indefinite detention?
US	No	Yes/Yes
UK	No (semi-sovereign)	Yes
France	Yes	No

C_1: There is a negative correlation between domestic territoriality and a democracy's decision to employ indefinite detention.

C_2: In extraterritorial counterterrorism operations, there is a negative correlation between the recognized sovereignty of the foreign host government and a democracy's decision to employ indefinite detention, except in clandestine operations.

5.2 The nature of the arresting agency

United States

Of those terrorist suspects captured in Afghanistan and Iraq, reporting suggests that the majority were either captured by US military forces, Coalition military forces, US intelligence agencies, Coalition intelligence agencies, the Northern Alliance (in Afghanistan), local warlords and civilians, or (later) components of the national security forces (including both military and police forces) (Jalali 2002, 80-85; Worthington 2007, 100-11, 114-124, 170, 177-178, 182-187).

We can argue, then, that of those terrorist suspects detained in Iraq or Afghanistan, the majority were detained by military or paramilitary forces, intelligence agencies, and police forces. Still, even in the case of Iraqi or Afghan police forces, one could argue that these units were functioning more as *paramilitary forces* than traditional police units due to the nature of

counterterrorism and counterinsurgency operations during times of war. This is supported by the writings of Beede (2008) and Friesendorf (2007).

Outside of Iraq and Afghanistan, there were an untold number of terrorist suspects spirited through the CIA's secret prisons program, some of whom were transferred to Guantanamo Bay (Worthington 2007, 216). Because of the widespread and secretive nature of the CIA's secret prisons program, it is impossible to make conclusive assessments regarding the arrest scenario of every detainee. However, of those detainees whose stories are known, there appears to be remarkable consistency regarding the alleged nature of their arrests: which were, in every case, allegedly carried out by US or foreign intelligence or immigration agencies, local militias, entrepreneurial tribes, or members of local or national police agencies (ACLU 2005; Worthington 2007, 40, 49, 62, 80-91, 135, 152, 158, 167, 216-243, 281-288; Pradhan 2011; Savage 2010; CCR 2013; The Rendition Project 2014).

Although we cannot confirm that these individual arrest scenarios are representative for all "ghost detainees," neither can their consistency and uniformity be ignored. It is therefore quite conceivable that the majority of detainees arrested outside of Iraq and Afghanistan were detained under scenarios similar to those given above.

United Kingdom

In comparison to the US, the UK's detention program was a relatively simple affair. Targets were nominated by British Military Intelligence (MI5) and the RUC's Special Branch, with the arrests carried out by the British Army and the RUC (McKittrick and McVea 2002, 67-68; Hughes 2011, 110; Soule 2012, 25). It should be noted, however, that the British Army operated primarily in Catholic areas, while the RUC was assigned to Protestant communities (Finnane 1989, 140-141; Bonner 2007, 90, 98). This is significant, since Catholic detainees

outnumbered Protestant detainees nine-to-one by 1974, suggesting that the British Army was more likely to employ internment than its constabulary counterparts (Finnane 1989, 140-141).

It should also be mentioned that, although the British Army was not initially the lead arresting agency when it arrived in Northern Ireland, it would rapidly become so. Following evidence that the RUC was unable to restore order or remain impartial, the British government designated the Army as lead executive agency and granted it full authority over antiterrorism and detention operations (Hamill 1985, 39, 60-65, 279-282; Soule 2012, 27).

France

In France, the military took a more subordinate role in its counterterrorism operations to police and judiciary services. This is not to say that the French military was not involved in counterterrorism operations. On the contrary, it was a French military unit that carried out the spectacular raid against Air France Flight 8969 on Christmas Day 1994. However, this unit—the National Gendarmerie Intervention Group (GIGN)—is actually part of the National Gendarmerie, an organization that acts as a police force during peacetime operations and which was under the supervision of the SCLAT and UCLAT during counterterrorism security operations (Shapiro and Suzan 2003, 76; Parmentier 2006, 54-57; Shapiro 2007, 139).

In this respect, it would appear that although all three governments used police and military forces to combat terrorism, only France appointed civilian organization as its lead arresting agency. As such, we can say that there is a positive correlation between a democracy's appointment of its military as the lead arresting agency and its decision to employ indefinite detention (Table 2).

Table 2: Nature of arresting agency and its effect on indefinite detention employment

	Lead arresting agency	Indefinite detention?
US	US Armed Forces	Yes
UK	British Armed Forces	Yes
France	UCLAT (Interior Ministry)	No

C_3: There is a positive correlation between a democracy's appointment of the military as lead arresting agency and that country's decision to employ indefinite detention.

5.3 Domestic legal systems

United States

In 1993, a group of al-Qaeda-affiliated terrorists attempted to bring down the World Trade Center: an incident some people consider to have been a "rehearsal" for 9/11. Within days, the FBI arrested four terrorist suspects; and two additional suspects were later arrested abroad and extradited to the US. In total, six men were tried and convicted for the attacks, with a seventh man being convicted *in absentia* (Joshua Norman, "The 1993 World Trade Center bombers: Where are they now?" CBS News, February 26, 2013). Considering the successful arrest and prosecution of these men, why could the US government not carry out similar prosecutions against al-Qaeda and Taliban suspects following 9/11?

The Bush administration provided two explanations for its actions following the September 11th attacks. First, it argued that al-Qaeda and Taliban suspects were illegal combatants without a home country or government recognized by the United States. As such, they were "unlawful combatants" who could not be tried in domestic courts ("Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism," 66 Fed. Reg. 57,833, 57,833 [November 13, 2001]). Second, it argued that it would be difficult to try al-Qaeda and Taliban detainees due to a lack of admissible evidence.

How did the US Supreme Court find these arguments? In two landmark decisions—*Hamdi v. Rumsfeld* (2004) and *Rasul v. Bush* (2004)—the Court determined that although the US government could detain unlawful combatants, the detainees had the right to challenge their "unlawful" status. Furthermore, the Court decided that any US citizen would be granted full due process of law and judicial review. The Court also shot down the administration's attempt to use military tribunals: finding that they did not reach the level of competency required by the Uniform Code of Military Justice or Geneva Conventions (*Hamdi v. Rumsfeld*, 542 U.S. 507 [2004]; *Rasul v. Bush*, 542 U.S. 466 [2004]).

Do these decisions suggest that the Court deemed the US judiciary capable of trying Guantanamo detainees? Not necessarily: It did not order the detainees transferred to civilian courts, neither did it grant them legal rights on par with other federal prisoners. It also left certain legal issues unresolved, such as the allowable length of confinement, among other things (Schulhofer 2004, 1913-1915). And yet the Supreme Court did not refuse to review the cases—as it often does with legally ambiguous cases. And by rendering the decisions that it did, the Court made it clear that it would have *some say* in the fate of the Guantanamo detainees.[‡]

Based on the Supreme Court's mixed messages, it is impossible to say whether it deemed the judiciary capable of trying al-Qaeda and Taliban detainees as of September 2001. Although the US has prosecuted or brought charges against a handful of al-Qaeda suspects since 9/11, these cases are certainly the exception and not the rule. And following Congress's passage of its National Defense Authorization Act (NDAA) of 2012, the White House has been severely limited in its ability to release detainees unilaterally—either through executive orders or by

[‡] For instance, in the Court's first rendered decision, *Rasul v. Bush*, it signified that even *unlawful combatants without recognized nationalities* fell under the purview of the US Judiciary. This was a watershed decision.

military tribunal. In this regard, Congress effectively closed the loophole opened by the Supreme Court's earlier decisions.

United Kingdom

Three notable cases from the 1970s illustrate the UK's ability to try PIRA members in criminal courts: the Guildford Four (1975), the Birmingham Six (1975), and the Maguire Seven (1976) (Lutz, Lutz, and Ulmschneider 2002, 227). The defendants in all three cases were alleged PIRA members or supporters accused of terrorist bombings carried out in 1974. All three cases were overturned on appeal in the 1990s, but only after the accused had spent decades in prison and one man died while incarcerated (Ibid., 232). Still, these cases illustrate the government's ability to try suspected terrorists in criminal courts, even during a time when indefinite detention was being used elsewhere in the UK.

How did the British government justify its use of indefinite detention? Domestically, British law certainly allowed for it: as mentioned, in Northern Ireland, the SPA allowed the minister for home affairs to "take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order" (Walsh 2000, 33). This was also supported by a British House of Lords ruling in 1942 (*Liversidge v. Anderson*), during which the "Law Lords" determined that the home secretary has the power to detain someone if there was "reasonable cause to believe [them] to be of hostile associations" (Dickson 2009). But how did the British stance fare at the international level?

In 1978, the British government was called before the ECHR by the Republic of Ireland to answer for its supposed human rights violations (*Case of Ireland v. The United Kingdom*). As part of its defense, the UK argued that it did not have sufficient evidence to prosecute the cases in ordinary courts. Moreover, it suggested that the PIRA used widespread intimidation,

including threats against judges and juries (Ibid.). Finally, it contended that the close proximity of the Irish border and the existence of "no-go" areas made it difficult to investigate and prosecute terrorist suspects (Ibid.). Based on these impediments, the British government argued that "extrajudicial" measures were necessary, and that its actions were justified—a supposition agreed to by the ECHR: as it found that the Troubles constituted a state of emergency that exceeded the capabilities of the British courts (Ibid.).

The United Kingdom was called before the ECHR again in 2009 due to its internment of 11 terrorist suspects between 2001 and 2004 (Human Rights Watch 2009). In this instance, however, the ECHR found *against* the British government. There was a major difference between the two cases, though, according to the ECHR. In the first instance, the British government had detained terrorism suspects to ensure public order and "[break] the influence of the IRA" (*Case of Ireland v. The United Kingdom* [1978]). In 2001-2004, however, the British government merely detained the men while it arranged for their deportation. Subsequently, the ECHR determined that the UK had delayed unnecessarily long in its deportation proceedings (Human Rights Watch 2009).

How should we interpret these two ECHR rulings? Do they intimate an underlying assumption that the British judiciary was capable of trying terrorist suspects? In the case of Operation Demetrius, yes: the ECHR agreed with the UK's argument that its domestic courts were "inadequate" to deal with IRA terrorists. However, in the case of the 11 terrorist suspects detained between 2001 and 2004, neither the British government nor the ECHR argued that the suspects should be tried in court, since they were merely being deported. Taking all of this into account, one could argue that British courts do have the capacity to try terrorist suspects but that

they did not have that capacity during Operation Demetrius, as determined by the ECHR's 1978 ruling.

France

How do the British and American legal systems compare to the French system? As mentioned in Chapter Four, France has a number of administrative bodies designed to centralize and coordinate antiterrorism efforts—many of them having been created during its antiterrorism efforts in the 1980s. One such policy was the decision to centralize terrorism-related cases in one criminal court called the Trial Court of Paris (Shapiro and Suzan 2003, 77-78). This court was presided over by seven magistrates who specialized in counterterrorist law, and had no jury in order to prevent intimidation or retribution against jurors (Shapiro and Suzan 2003, 77-78; Elliott, et al., 199-200; Bell, 144, 316-317).

The Trial Court of Paris has no clear equivalent in the British or US legal systems (at least not initially). The closest equivalency in the British system is the Diplock courts, which were not formed until 1973. Diplock courts are juryless courts designed to prosecute terrorism and paramilitary cases; however, unlike the Trial Court of Paris, they were presided over by a single judge who only oversaw terrorism cases on a temporary basis (Jacobs 2010, 657; Doran and Jackson 1993, 514).

The US also has no clear equivalent of the Trial Court of Paris. Its closest equivalent is the Foreign Intelligence Surveillance Court (FISC) or FISA Court, which is actually more similar to the SCLAT. Like the SCLAT, the FISA Court enhances cooperation between the judicial system and law enforcement on matters of terrorism. However, unlike the SCLAT, the FISA Court's primary focus is foreign electronic surveillance—while the SCLAT deals with every aspect of investigation and the investigative process, including making decisions regarding

lawyer visitation rights and indefinite detention procedures (Funk 2007, 1100-1101; Shapiro 2007, 146; Guitta 2005).

Bureaucratic responsibilities and court composition aside, the French judiciary also differs from the British and American legal systems in other significant ways. For one, the French system is more centralized than the US system, with its arrangement of checks and balances (Schmitt and Gerecht 2007). Furthermore, France's criminal code has a stricter and more far-reaching view of crime: under the French system, the "intention to commit a crime" is viewed at the same level as the crime itself, allowing the government to arrest anyone who played a role, however minimal, in connection to a terrorist plot (Rault 2010, 24). A third major difference involves France's use of entrapment: according to French law, it is permissible to induce criminals to break the law if the objective "is to prevent a more dangerous or impending offense" (Ibid.). There is no clear equivalent in the British or American legal systems.

Considering the sizable differences between the French, British, and American judiciaries, one might argue that France's domestic legal system was better prepared to combat terrorism at the time of its counterterrorist campaign. And although the US and UK have successfully prosecuted terrorists in their domestic courts at times, both governments appeared to have been incapable or unwilling to do so at the time of their indefinite detention policies.

Table 3: Domestic legal system's ability to prosecute terrorists and its effect on indefinite detention employment

	Able to prosecute?	Indefinite detention?
US	No*	Yes
UK	No	Yes
France	Yes	No

* By act of Congress.

C_4: There is a negative correlation between a democracy's ability to prosecute terrorist suspects and that country's decision to employ indefinite detention.

5.4 Domestic public opinion

Can public opinion influence government policies on indefinite detention? In a 1983 essay entitled "Effects of Public Opinion on Policy," Benjamin Page and Robert Shapiro argue that there is greater congruency between public opinion and governmental policy when an issue (1) has greater salience among the public and (2) when there is a "large and sustained" shift in public opinion immediately prior to the policy change (188-189). Page and Shapiro's conclusions were further substantiated by Paul Burstein in his study "The Impact of Public Opinion on Public Policy: A Review and an Agenda" (2003).

And yet it is often difficult to determine the degree in which public opinion influences government policy. For one, it is unclear whether the public influences its government or vice versa. Furthermore, special interest groups, political parties, economic elites, and media outlets can influence government policy as well as public perceptions (Page and Shapiro 1983, 175; Burstein 2003, 29-31). From a methodological perspective it is also difficult to find polls and statistical data comparable across multiple cultures and chronologies. Nevertheless, we will attempt to determine how "salient" terrorism was during the French, British, and American counterterrorism campaigns, whether there was a "large and sustained shift" in public opinion,

and whether French, British, or American publics supported indefinite detention as a counterterrorism measure.

United States

Terrorism was already a relatively significant issue in America prior to 9/11 thanks to al-Qaeda's attacks on the US embassies in Tanzania and Kenya (1998) and the *USS Cole* in Yemen (2000). Nevertheless, terrorism had not reached the level of political salience that it did following the September 11th attacks. In their essay "Public Prudence, the Policy Salience of Terrorism and Presidential Approval following Terrorism Incidents" (2004), George Shambaugh and William Josiger determine that although terrorism had been one of the lowest ranking issues prior to 9/11, it would become the most salient issue in America following 9/11 and would remain the second most salient issue from 2002 to 2003 (14). Not only does this suggest that terrorism achieved a level of salience following 9/11 hitherto unobserved, it also suggests that there may have been a large and sustained shift in public opinion just prior to the opening of the Guantanamo Bay detention facilities.

But did this salience translate into public support for indefinite detention? There are no polls of American opinion regarding indefinite detention prior to its implementation and no indication that the US public demanded it as a policy. At best, we can say that the American public appears to have supported indefinite detention *once it became public knowledge*. A Gallup poll from February 7, 2002—taken one month after the first detainees arrived at Guantanamo—found that 72 percent of Americans felt that prisoner treatment there was "acceptable" (Saad 2002). And a second poll from May 2009 found that 64 percent of Americans opposed closing Guantanamo if it meant transferring detainees to US prisons—an opinion that has held fairly consistent up to the present day (McCarthy 2014). While this is not

the same thing as prolonged support for indefinite detention, it does show a lack of support for the alternative.

This was similarly observed when President Barack Obama attempted to close Guantanamo and relocate its detainees to maximum-security federal penitentiaries. The proposal was vociferously opposed by politicians as well as citizens who held a "not in my backyard" mindset (Mark Mazzetti and Scott Shane, "Where Will Detainees from Guantánamo Go?" *New York Times*, January 23, 2009, http://www.nytimes.com/2009/01/24/us/politics/24intel.html). A compromise was later proposed where the federal government would purchase an unused maximum-security prison in Illinois and create a special prison for the detainees. However, the compromise was blocked by Republicans in the House of Representatives (Jean Casella and James Ridgeway, "Obama's 2014 Budget Confirms Plans for 'ADX Thomson,' New Federal Supermax Prison," SolitaryWatch.com, April 13, 2013, http://solitarywatch.com/2013/04/13/obamas-2014-budget-confirms-plans-for-adx-thomson-new-federal-supermax-prison/). Lacking a suitable alternative, the Obama administration was forced to maintain the status quo—a status that has endured to the present time.

Based on the US polling results and government and public reactions to alternative proposals, it would appear that terrorism achieved a level of salience and significance following 9/11 that, at least hypothetically, translated into support for indefinite detention. We can only say "hypothetically" since we do not know what level of support the American public might have had for indefinite detention prior to the attacks.

United Kingdom

Prior to discussing public opinion in Northern Ireland, we must first determine whose "public opinion" is most pertinent to the matter at hand: English, Northern Irish Catholic,

Northern Irish Protestant, or some combination of the above. Although the British government's decision to intervene in Northern Ireland was allegedly based on a desire to appease both Catholics and Protestants, its greater fear appears to have been that military intervention would provoke a backlash from Protestants (Smith 2011, 73). British PM James Callaghan allegedly informed his cabinet, "It was important to remember that the majority of the population […] were Protestant; in seeking to allay the apprehensions of the Catholics, they must not drive the majority beyond endurance" (Ibid.). This underlying fear appears to have driven much of the UK's policies in the first half of the Troubles, which only became more centrist once it became clear that they were alienating the Catholic population and making peace talks impossible. As such, we will focus on Northern Irish Protestant opinions predating and following Operation Demetrius in August 1971.

What, then, was the Northern Irish Protestant opinion on terrorism circa 1971? Unfortunately, there were no polls taken in 1971 that would settle this question. Instead, we will have to interpolate from polls taken in 1968 and 1973. In 1968, a study asked Northern Irish citizens whether it was right to "take up arms" in support of their political cause. Fifty-one percent of Protestants and 13 percent of Catholics responded in the affirmative. Five years later, when a study asked whether "[v]iolence is a legitimate way to achieve one's goals," only 16 percent of Protestants answered in the affirmative, while 25 percent of Catholics did (Table 4) (Hayes and McCallister 2001, 913).

Table 4: Public support for sectarian violence in Northern Ireland, 1968-1973

	Protestant	Catholic
Right for [Catholics/Protestants] to take up arms (1968)	51%	13%
Violence is a legitimate way to achieve one's goals (1973)	16%	25%

Source: Hayes and McCallister 2001, 913

What might account for this drop in Protestant support? For one, sectarian violence was on the rise and contributing to increased civilian deaths (Murray 1994, 112; Donohue 2001, 117-118). The PIRA had formed in 1969, and was much more violent than its predecessor—the IRA (Smith 2011, 116). According to William Beattie Smith, author of *The British State and The Northern Ireland Crisis, 1969-73*, although the Official IRA and loyalist paramilitaries were also active at this time, the PIRA was "responsible for a majority of the 298 explosions, 320 shooting incidents, and 600 injuries that occurred from January to July 1971" (Ibid.).

Civilian deaths alone cannot account for these polling results, however. Catholics were killed more often than Protestants and yet Catholic support for political violence *increased* between 1968 and 1973 (Hayes and McCallister 2001, 904, 913). One plausible explanation for this difference is Legitimate Violence Theory, as discussed in the works of Heather A. Wilson (1988), Robert Young (2004), Virginia Held (2005), and Christian Olsson (2013). According to Legitimate Violence Theory, a population's view on non-state violence is influenced by its views on government legitimacy. In Northern Ireland, although some Protestants felt that the government was unable to protect them, the majority viewed the government as having legitimate authority. To the Catholics, however, the government's disproportionate targeting of Catholics undermined its legitimacy and justified republican violence. By 1973, an estimated 60 percent of Catholics supported Irish unity: a historic high (Schuurman 2013, 157-158).

Taking the dramatic change in Protestant opinion between 1969 and 1973 at face value, we can argue that there was a large and sustained shift in popular opinion around the time of the

internment policy. Furthermore, considering the substantial jump in PIRA terrorist activity from January to July 1971, we can argue that terrorism had reached a new level of political salience just prior to Operation Demetrius (Smith 2011, 116).

As opposed to the American populace, we do have some indication of Protestant views on detention prior to its implementation. As mentioned in Chapter Three, indefinite detention had been employed four times previously in Northern Ireland's history, and PM Faulkner had been given credit for successfully using it against the IRA when he served as minister of home affairs (Ibid., 127). At Orange rallies held by Unionist politicians, agitators called for internment—arguing that if Stormont were unable to effectively govern, it should be replaced (Ibid., 125). This sentiment was also echoed in the *Daily Telegraph*, where editorialists argued that internment would stand "as a symbol" of the British government's "determination to defeat terrorism" (Ibid., 137). And on March 12, 1971, a rally of thousands of shipyard workers marched through the streets of Belfast demanding internment against the IRA (Ibid., 125).

Although we cannot determine what percentage of Northern Irish Protestants agreed with these public demonstrations and editorials, we can say that Protestant pressure was felt by the Stormont government and factored in its decision to impose internment. This is evidenced by behind-the-scenes discussions between PM Faulkner, his cabinet, and the British Army—as discussed in Faulkner's memoirs (1978).

France

When it comes to terrorist violence, it is not as if the French populace was somehow insulated from GIA attacks: during the four month period representing the height of the GIA's terrorism campaign (i.e., July-October 1995), France experienced eight bombings, two attempted bombings, and one assassination: leaving 10 dead and wounding between 167 and 250 (Shapiro

and Suzan 2003, 81; Gregory 2003, 131-132). In fact, there is evidence to suggest that terrorism was a ubiquitous concern for the French people. Contemporary newspaper articles suggest that fears of terrorism disrupted people's daily lives: causing delays on French commuter trains, the evacuation of the Louvre, the deployment of heavily armed police in the streets, random security checks, bag inspections in department stores, and the questioning of tens of thousands of North Africans.[§] Indeed, one of the clearest indications of terrorism's political salience was the implementation and revision of *Plan Vigipirate*. As Jeremy Shapiro points out in his essay "France and the GIA" (2004), Vigipirate increased "public awareness, and anger, over the issue of terrorism" and allowed the French government to take unprecedented steps to combat the GIA (Shapiro 2007, 147).

Why then, did the French public not push for indefinite detention? Perhaps because it sensed that the government was gaining ground against the GIA or that it already possessed sufficiently impressive detention abilities. In 1995, for instance, the French government reportedly inspected 3 million identity cards and detained 70,000 people for questioning (Hoffman 1999, 70). This must not have gone unnoticed by the public. Newspaper articles and editorials from this period highlight the animosity that raids and interrogations provoked among some French-Arab and Muslim French citizens, but suggest that the majority of French citizens were undaunted by both the terrorists and the government's response.[**]

Unfortunately, French newspaper accounts are hardly authoritative on this matter. Although they may give us a possible snapshot of French public opinion, they are ultimately the

[§] Marlise Simons, "French Police Search for Train Bombers; Death Toll at 7," *New York Times*, July 27, 1995; Scott Kraft, "2 Dozen Injured by Bomb Blast in Paris Subway," *Los Angeles Times* – Southern California Edition, October 18, 1995; Craig R. Whitney, "Bomb Rips Train Underneath Paris, with 29 Wounded," *New York Times*, October 18, 1995; Abraham McLaughlin and Suzanne MacLachlan, "The Armed Islamic Group (GIA)," *Christian Science Monitor*, October 19, 1995.

[**] Adam Sage, "France Finds One Million Suspects for Terrorist Train Bombing," *The Observer*, July 30, 1995; Alan Riding, "Terrorism Leaves French Undaunted," *New York Times*, September 9, 1995.

opinion of as interpreted by the newspaper's writers and editors), we have no indication what effect, *if any*, this public opinion had on government decision-making. As opposed to the Gallup polls in the United States and the dockyard workers' march in Northern Ireland, there is no indication that the French public had an opinion, one way or another, regarding governmental detention policies. As such, we cannot draw any definite conclusions regarding the influence French public opinion had on these policies.

Based on contemporary French, British, and American public opinions at the time of each country's counterterrorism efforts, it appears as though terrorism had a salient and sustained impact on domestic opinion among all three countries. In the US and UK, fears of terrorism appear to have generated public support for indefinite detention policies. As for France, we do not possess enough evidence to determine domestic views on detention policies, leaving us unable to make any firm determinations in this regard.

Table 5: Domestic opinion's impact on indefinite detention employment

	Did terrorism have salient and sustained impact?	**Public support for indefinite detention?**	**Indefinite detention?**
US	Yes	Yes	Yes
UK	Yes	Yes	Yes
France	Yes	Indeterminate	No

C_5: There is no notable correlation between domestic fears of terrorism and the employment of indefinite detention.

C_6: While there is a positive correlation between public support for indefinite detention and its employment; there is no evidence—in the case of the US—that public opinion had any bearing on the initial decision to implement it.

5.5 The presence or absence of war

United States

Despite its invasion of Iraq and Afghanistan, the United States never formally declared war against al-Qaeda or the Taliban. This is not without precedent. Since the end of WWII and the establishment of the United Nations in 1945, modern states are loath to define their military actions as "war." Furthermore, in regards to the United States, since the passage of the War Powers Resolution of 1973—which severely limited the president's ability to wage war—many presidents have engaged in armed hostilities using euphemistic terms such as "police action" to imply that they did not need congressional approval.

Still, it cannot be denied that following 9/11 the United States invaded two countries in large-scale military campaigns—campaigns that the State Department now refers to as the "War in Afghanistan" and the "Iraq War" (Rose 2010; US Department of State 2009). Furthermore, the US government selected the Department of Defense as its lead agency in the War on Terrorism, which had an estimated 188,000 troops deployed at the combined peak of those conflicts in 2008 (Belasco 2009, 9). As such, although the US did not formally "declare war" on al-Qaeda and the Taliban (who are technically not "states"), the scale and scope of the US's military operations were indicative of a state of war. Furthermore, although the United States did not make a formal declaration of war, it should be noted that President Bush did make an informal declaration of war which he referred to as a "Global War on Terrorism."

How might this have influenced US detention activities? Primarily, because it forced he Department of Defense to act as an ersatz police force and penal institution for detained combatants—roles which it may not have been capable of fulfilling. Secondarily, the declaration of "war" (i.e., the Global War on Terrorism) served a political purpose: galvanizing the

American public and stifling dissent from the opposition party. The subsequent "rally-round-the-flag" effect and general fears of terrorism smoothed the way for the Bush administration to impose its counterterrorism policies: including the passage of the USA PATRIOT Act, the invasion of Iraq and Afghanistan, and the imposition of indefinite detention.

United Kingdom

In Northern Ireland, terrorism existed as an outgrowth of sectarian tensions. By the time the British Army arrived in 1969, Northern Ireland was reeling from wide-scale rioting and mass demonstrations (McKittrick and McVea 2002, 54-55). In this political context, the real threat was that terrorism could lead to civil war. Under these circumstances, the British Army singled out the PIRA as its primary threat and treated it like an armed insurgency.

One possible reason for this was because the British military had just put down armed insurgencies in Kenya, Malaya, and Oman. According to Martyn Frampton, author of "Agents and Ambushes: Britain's 'Dirty War' in Northern Ireland" (2008), following on these other counterinsurgency campaigns, the British Army viewed Northern Ireland's unrest through a "postcolonial haze" (80).

Further evidence that the UK viewed the PIRA as a political rather than a criminal enemy can be observed in its policies towards PIRA prisoners, who were housed separately from the general prison populace and allowed to maintain their own order, arrange parades, hold educational classes, and wear their own clothing (Dingley 2012, 179). However, reports also exist of British officials subjecting PIRA prisoners to dehumanizing treatments including sleep and food deprivation, hooding, the subjection of white noise, and being put in stress positions such as "wall-standing" (Frampton 2008, 80-82; Mumford 2011, 13-14). Considering these two extremes, one could argue that PIRA members were treated like political prisoners or illegal

combatants—but not as common criminals. Like the US with its "Global War on Terrorism," it can be argued that the British Army declared "war" against the PIRA.

France

It should first be mentioned that France—like the UK—had good reason to treat Algerian terrorism as a military problem. For one, the bulk of the GIA's leadership, logistics, and manpower were located abroad. Secondly, the French military had a long history of interventionism in Algeria, culminating in the Algerian War of Independence. Lastly, GIA terrorism threatened not just France's homeland but also its economic interests in Algeria and tens of thousands of French citizens living there as expatriates. And yet France, unlike the UK, could withdraw its citizens relatively easily. Beginning in October 1993, the French government began to encourage its citizens to evacuate Algeria—slowly at first, but then with increasing urgency (Nundy 1993; Drozdiak 1994; Bremner 1994; Naylor 2000, 202). By April 1994, there were reportedly only 2,000 French citizens still living in Algeria, leaving the French government with less of an obligation to intervene (Bremner 1994).

Meanwhile, the French government's decision to investigate and prosecute GIA terrorists using its civilian infrastructure is indicative of an *a priori* assumption that GIA suspects should be treated as criminals rather than political prisoners. Granted, terrorist suspects were subjected to special provisions, such as 72-hour holding and interrogation period. Nevertheless, once charges were made, suspects were transferred to France's regular penal system and held like regular prisoners (Borricand 1997, 159-161; Northam 2003, 157). As security analyst Charles Rault suggests in his article "The French Approach to Counterterrorism" (2010), France deliberately treated terrorist suspects like criminals in order to "delegitimize their 'cause'"(24).

Considering the actions taken by the United States and United Kingdom, I argue that they declared "war" on their terrorist adversaries, as demonstrated by the employment of their militaries, the application of counterinsurgency tactics, the invasion of a sovereign or semi-sovereign state, and the non-standard treatment of prisoners. In contrast, the French government carried out arrest operations using civilian police, judicial, and domestic intelligence agencies. As such, I argue that France did not declare "war" on the GIA, but instead treated it as an international criminal organization.

Table 6: Declaration of war and its impact on indefinite detention employment

	War declared or implied?	Indefinite detention?
US	Yes	Yes
UK	Yes	Yes
France	No	No

C_6: There is a positive correlation between the declaration of war and the employment of indefinite detention.

5.6 Deference to international law

United States

From its earliest days as a nation, the US has shown an inclination to act autonomously and with a propensity for American exceptionalism. This was never more evident than in a series of administrative policies that were taken following 9/11 that are now referred to as the "Bush Doctrine" (Dockrill 2008, 113-119). Bush Doctrine policies promoted American unilateralism at the international level and executive power at the domestic level, most clearly observed through: first, the US's decision to invade Iraq despite a lack of support from the Security Council; second, the employment of secret CIA detention and transfer sites, often without the knowledge

of host countries; and third, through the circumvention of the Geneva Conventions by reclassifying detainees as "unlawful combatants."

How do these policies show a lack of deference for international law? First, the invasion of Iraq violated the spirit of the Kellogg-Briand Pact and the UN Charter, both of which outlaw offensive military action between states. Second, the CIA's use of black sites violated the sovereignty of other states by transferring prisoners without host nations' knowledge. Third, the classification of al-Qaeda and Taliban detainees as unlawful combatants undermined the Geneva Conventions and international treaties such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

It is important to note that unlike the UK, which also violated international treaties, the US made no attempt to file a notice of derogation. Many international treaties allow states to deviate from treaty provisions during times of public emergency as long as a derogation notice is filed. This notice is significant, as it allows other states to monitor compliance and prevents a state from derogating arbitrarily (Lehmann 2012, 104).

Although the United States made some attempt to secure the approval of the Security Council before invading Iraq; ultimately, it showed a clear willingness to act unilaterally—particularly against Iraq. Furthermore, the US's disregard for international guidelines regarding the treatment of detainees coupled with its blatant use of CIA black sites seems to uphold the argument that the US showed contempt for international law.

United Kingdom

Following the UK's use of indefinite detention, it was called before the ECHR to answer for its violation of the ECHR's provisions regarding due process of law. The UK defended its actions, however, by arguing that it had filed six notices of derogation prior to and following

1971 (*Case of Ireland v. The United Kingdom* [1978]). The ECHR found in the UK's favor: finding that the UK had respected its obligations by filing its notices of derogation and that, ultimately, its actions were covered by the ECHR since it was acting to maintain peace and security as part of emergency measures (Ibid.).

Considering the actions of the United Kingdom prior to and following its implementation of its indefinite detention policy, it can be argued that the UK showed a general respect for international law even as it showed an inclination to take whatever steps necessary to protect itself. In this respect, the UK differed from the United States, which also supposedly acted in its own best interest but made no effort to vindicate itself or justify its actions. Rather, it undermined the strength of the Geneva Conventions by suggesting that they were inadequate in the pursuit of justice against terrorists.

France

France has shown a long history of deference to international law—possibly due to its ties to the Declaration of the Rights of Man and of the Citizen, which serves as the basis for the French Constitution. And yet as Jeremy Shapiro and Bénédicte Suzan argue in "The French Experience of Counterterrorism" (2003), one of the most successful aspects of France's fight against the GIA had nothing to do with French deference to international law, but was rather a deliberate decision to confront the GIA domestically rather than in Algeria (92). According to Shapiro and Suzan, France learned in the 1980s and 90s "that it could not fight terrorism abroad" and consequently focused its efforts on restructuring its domestic services to better combat terrorism (Ibid.). Even those counterterrorism efforts that could be considered "cross-border" were accomplished through bilateral agreements, and in no way reflected a "go it alone" attitude or disrespect for France's international obligations (Shapiro 2007, 144-5; ADL 1998).

The United States, United Kingdom, and France show differing degrees of respect for international law and international opinion. Although the US has a long history of acting unilaterally while the UK showed some deference to its ECHR obligations, both countries ultimately behaved in a rather similar fashion. Meanwhile, the fact that France escaped much of the international censure leveled at the US and UK may have more to do with its decision to fight terrorism at home rather than abroad. Based on these findings, there appears to be no direct correlation between a democracy's decision to employ indefinite detention and its respect for international law.

Table 7: Deference to international law and its impact on indefinite detention employment

	Deference to international law?	Indefinite detention?
US	No	Yes
UK	Yes	Yes
France	Yes	No

C_7: There is a no correlation between deference to international law and the employment of indefinite detention.

6. Conclusions

6.1 Summation of findings

The purpose of this study was to examine when and why democracies employ indefinite detention as a counterterrorism method. I prefaced this argument by contending that indefinite detention appears to violate a central tenet of liberal democracy—due process of law—and sought to discover the circumstances under which a democracy might withhold this provision from terrorist suspects. I selected for my case studies the United States, the United Kingdom, and France, in order to seek out contextual differences that might have led to their different outcomes in the application of indefinite detention.

Through the course of my analysis I determined that among the democratic countries studied, a government is more prone to employ indefinite detention if it is (1) operating in an extraterritorial environment or in a country with diminished sovereignty. I also determined that a government is more likely to employ indefinite detention if its (2) arrest operations were headed by a military or intelligence service and (3) its domestic court system is incapable of prosecuting detained terrorists. Last, I determined that a government is (4) more likely to detain terrorists if it "declares war" against its enemy or acts as if it is in a state or war.

It is my contention that, when confronting their respective terrorism threats, the United States and United Kingdom placed themselves in situations where they were more prone to employ indefinite detention. Whether it was their initial intention to do so or they were driven in that direction is ultimately unprovable. It is this author's opinion that the Bush administration made a deliberate choice to employ indefinite detention to avoid restrictions on interrogating prisoners. Meanwhile, the British government appears to have used indefinite detention reluctantly and as a measure of last resort to quell Catholic unrest. Whatever their reasons or

intentions, both governments ended up in the same place…one which, for right or wrong, they later appear to have regretted.

6.2 Potential weaknesses of this study

Although every effort was made to carry this study out with thoroughness and impartiality, invariably there will be a few aspects that will allow for alternative viewpoints or criticism. For the sake of due diligence, I will discuss a few possible areas of concern. First, when discussing the composition of the arresting agency during the United States' Global War on Terrorism, it should be noted that the *massive scale* of the arrest operations and *geographical breadth* over which these operations took place make it difficult to draw tidy conclusions. This is further complicated by the fact that information of CIA arrest and detention operations remains classified or obfuscated.

While it is the author's opinion that this information is not necessary to conclude that the majority of US arrests were carried out by military or intelligence agencies; for the sake of argument, it is possible that foreign police forces were more heavily involved in these operations than we currently know. Nevertheless, the fact that it was the CIA who orchestrated these activities—and that these police forces likely did not follow local procedures—seems to suggest that we are safe in referring to these arrests as intelligence operations.

A second topic that posed difficulties from a research and methodological perspective was the discussion regarding the presence or absence of war. The fact that modern states often fail to declare war before engaging in hostilities, and the difficulty of defining war between state and non-state actors, makes it difficult to reach a satisfactory conclusion in this regard—or at least one that will appease all readers. For the purpose of this study, the author elected to use the

terrorism-as-war paradigm: examining a country's actions and rhetoric to determine whether they are tantamount to a state of war. This was substantially easier to argue about US operations in Iraq and Afghanistan than British operations in Northern Ireland. However, considering Britain's use of counterinsurgency tactics and non-standard treatment of PIRA prisoners, we feel the label is justified. Still, we must allow for the fact that some readers might favor a more straightforward approach.

Two final weaknesses of this study deal with the internal and external validity of case study comparisons. Qualitative studies such as these are often accused of being idiosyncratic and non-generalizable. This is particularly the case when a study examines a large number of variables but relies on a relatively small data set: i.e., the Small-n Problem. Considering the nature of our study this could not be helped, as there are few examples of democracies employing indefinite detention as a counterterrorism measure. Although indefinite detention is employed readily by autocratic and military regimes, in general democracies do not imprison people without charge. It is precisely for this reason that the author decided to examine this phenomenon: as it seems incongruous to the spirit of democracy and is, in the author's opinion, quite alarming.

And yet there are research methods that can mitigate the shortcomings of case study comparisons. For one, we can increase our number of case studies by including historical examples. As mentioned in Chapter Two and Chapter Three, the United States and United Kingdom both employed indefinite detention previously: the US, when it interned Japanese Americans during World War II; and the UK, in previous conflicts with the IRA (1922-1924, 1938-1939, 1951, 1956-1962). If these incidents were treated as distinct examples, they could potentially expand our population size and diminish the Small-n Problem. Furthermore, if these

examples were treated as "within-case comparisons," they would allow us to check for internal consistency by looking for similar variables across a longitudinal study (George and Bennett 2005, 205).

6.3 Areas for additional scholarship

The September 11th attacks placed terrorism front and center—both politically and in the academic world, where there has been a veritable flood of books and articles on the subject. These publications approach terrorism from numerous angles: descriptive, proscriptive, comparative, general, and specific; and from various political science schools of thought—including neorealist, liberalist, and constructivist.

Within these fields there has also been some effort to examine terrorism vis-à-vis its threat to democracy. Notable works have included *Freedom or Security: the Consequences for Democracies Using Emergency Powers to Fight Terror* (2003), by Michael Freeman; *Democracy and Counterterrorism: Lessons from the Past* (2007), by Robert Art and Louise Richardson; *Democracies at War against Terrorism: A Comparative Perspective* (2008), by Samy Cohen; *Terrorism and Counter-Terrorism: Ethics and Liberal Democracy* (2009), by Seumas Miller; and *Democracy at Risk: How Terrorist Threats Affect the Public* (2009), by Jennifer L. Merolla and Elizabeth Zechmeister.

Despite the considerable headway that these scholars have made, there remains much to be done. The field of terrorism studies is evolving and embryonic. For although there has been an increased focus on terrorism since 9/11, the vast majority of these works have been relegated to using case studies and qualitative analysis…with this study being no exception. What terrorism studies lack is a theoretical framework upon which these case studies can be hung and

which would adequately explain terrorism as a sub-phenomenon of international politics writ large: i.e., what is terrorism? Is it a form of criminality, warfare, or a byproduct of ethno-religious nationalism? With such a theory in place—even an inchoate one—case studies would become laboratories in which terrorism theories could be examined and improved upon. Without such an overarching theory, however, case study analyses are more prone to generate disparate theories tailor-made to specific examples and lacking any form of generalizability.

Meanwhile, focusing on the nexus between terrorism studies and democracy studies, it can be argued that there are two fields of areas dealing with terrorism's threat to democracy: first, the *unconventional threat* that terrorism poses to democracy. That is to say, terrorism poses a major threat to democracy because it takes advantage of democracy's rules of open society. This is a problem deserving a further study from both a descriptive and proscriptive standpoint. The second area is the *response* that terrorism generates from democratic governments: as it can be reactionary and *non-democratic* in nature. It is this author's argument that indefinite detention is one such response. Nevertheless, there are a wide range of counterterrorism actions that "push the envelope" of democratic behavior: from nation-building to propping up dictators to waterboarding. In this respect, terrorism poses both a physical and moral threat to democracy: simultaneously attacking a country's security as well as its ideologies. It is for this reason that terrorism continues to be a fascinating and provocative field of study for political scientists, and one with tangible and real-world applicability.

6.4 Real-world applications

Although indefinite detention is, unquestionably, fascinating from an academic perspective, it also holds undeniable importance from a political perspective. Indefinite

detention, like other aspects of counterterrorism, generates intense controversy at the societal and international level. The United States' continued use of Guantanamo Bay as a detention center for al-Qaeda and Taliban detainees, as well as its former practice of using black sites and extraordinary rendition, appears to have blackened the US's reputation as a defender of democracy, both in the world's eyes and in the eyes of its European allies.

And yet there is another more important aspect to this. Terrorism appears to be an *enduring* phenomenon. It would naïve not to consider another terrorist attack likely in the near future. And before that attack happens it would be helpful to consider what measures could and should be taken to avoid strategic political blunders.

Based on the findings of this study, it would seem that a democracy seeking to avoid using indefinite detention as a counterterrorism method should avoid using its military or intelligence services to detain terrorist suspects, particularly when operating overseas. While this may not always be feasible, one possible workaround might be for the military or intelligence service to execute the arrest but to immediate pass the detainee to federal law enforcement agencies or the civilian justice system. However, before taking that step, democracies must first put in place criminal justice systems capable of prosecuting terrorist suspects. As demonstrated by France's success against the GIA, particular emphasis might be placed on centralizing terrorism prosecution, using juryless court systems, re-examining laws regarding terrorism-related evidence collection and burden of proof, and creating unified administrative bodies for investigating and prosecuting terrorism cases.

Finally, democratic governments seeking to avoid using indefinite detention should be cautious in their rhetoric and strategic approach to counterterrorism. As Martha Crenshaw argues in *Terrorism in Context* (1995), the conceptual framework used by a government to

define a terrorist threat will influence its methods for confronting it (10). If a government frames a terrorist attack as an act of war, it is more likely to respond using bellicose methods: potentially forcing itself to treat detainees as political prisoners or unlawful combatants. If, however, a government chooses to treat terrorism as a form of criminality, it can delegitimize the terrorists' cause and improve the government's chance to prosecute detained terrorist suspects using conventional means.

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