Counterterrorism and the Comparative Law of Investigative Detention (Chapters on United Kingdom and France)

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Chapter 4

The United Kingdom

Commentators note that “English law regulating political violence has been continuously refined in the past 300 years since the Glorious Revolution and has served as a paradigm for other countries that derive their jurisprudence from that experience.” 421 That system of law has been required to adapt in significant ways over the past few decades, as the contemporary United Kingdom has endured a particularly violent struggle with terrorism. The United Kingdom's major counterterrorism challenge during the last century has been its confrontation with the Irish Republican Army (IRA). 422 In recent years, however, the United Kingdom has seen a rise in the number of terrorism-related incidents linked to foreign terrorist networks emanating from the Middle East. 423

This chapter reviews how the United Kingdom's response to terrorism and the role of laws regulating investigative detention (and other more preventive legal devices, such as “control orders”) have played into the effort to address the problem of terrorism. The analysis of criminal law and counterterrorism here is made especially complex due to the plurality of legal systems that exist under the mantle of the United Kingdom.

Although Parliament passes legislation that may apply throughout the United Kingdom, there are actually three separate and distinct
criminal justice systems within the United Kingdom—each with its own separate procedures and agencies. To maintain focus, therefore, the comparative analysis of the criminal justice system in this chapter shall largely focus on the criminal law of England and Wales. Even so, like the threat posed by terrorism, the recently enacted counterterrorism legislation applies—with a few minor exceptions and caveats—throughout the United Kingdom.

An Overview of the Criminal Justice System in England and Wales

To understand the counterterrorism legislation in force, the scope of its impact, and the degree to which its provisions could be exported, it is important to understand how the underlying legal system operates. English criminal law is entrenched in the common-law tradition and, thus, possesses a model of criminal procedure that is characterized as adversarial or accusatorial. As John Langbein has noted,

The lawyer-conducted criminal trial, our so-called adversary system, is the defining feature of criminal justice in England and in countries like the United States that are founded on English common law. What distinguishes criminal adjudication in the Anglo-American world from the European and European-derived systems is not simply that our system allows lawyers for the prosecution and defense. The European procedure does too. The striking particularity of the Anglo-American trial is that we remit to the lawyer-partisans the responsibility for gathering, selecting, presenting, and probing the evidence. Our trial court, traditionally a jury sitting under the supervision of the judge, conducts no investigation of its own. The court renders a verdict of guilt or innocence by picking
The United Kingdom

between or among the evidence that the contesting lawyers have presented to it. 427

This sort of procedural model, which also prevails in Australia, Canada, and the United States, begins with a police investigation that is designed to gain evidence of a suspect's guilt. Once enough evidence is adduced, the case is then brought before a court where an adversarial trial is conducted. Both the accused and the government are represented at that stage by an advocate who argues their side of the matter before a neutral decision maker with no prior knowledge of the case. 428 To assist in the defense, the accused is imbued with a number of rights that he or she may invoke in defense—such as a right to remain silent, a right to counsel, a right to confront witnesses, and protections against illegal detention. 429 Procedural protections, therefore, factor largely in the English system.

There is no formal code of criminal procedure in England and Wales. Instead, criminal procedure is formed from a patchwork of diverse sources, which date back to the thirteenth century. 430 Likewise, there is no single penal code from which all substantive criminal law is derived. Criminal law in England and Wales is, rather, derived from an archipelago of sundry cases and statutes. For instance, the offenses of assault and battery are found in the Offenses Against the Person Act of 1861, while larceny and other theft-related offenses are defined in the Theft Act of 1968. 431 Substantive criminal laws and changes to substantive criminal law are, therefore, made by amendments to statutes and by the passing of new statutes, rather than through the amendment of a single code.
English Pretrial Investigation
As in the United States, criminal investigations in England and Wales are conducted by professional police. Police are responsible for investigating offenses and obtaining evidence that can be used in the prosecution of the suspect. There are numerous different branches and specializations within the police force in the United Kingdom, with different specialist squads and departments, different missions, and different organizations. Police investigate crimes, gather evidence, question witnesses, and question the suspect. Thereafter, a custody officer within the police force makes the decision of whether to charge the suspect.

Charging and Prosecuting
Before 1986, police were responsible not only for the investigation of a crime but also for its prosecution. To accomplish this function, police employed their own solicitors who appeared on behalf of the prosecution in court and instructed counsel for the Crown Court. That system changed in 1986 with the introduction of the Crown Prosecution Service (“CPS”), a prosecutorial entity that assumed the responsibility for criminal prosecutions. It is composed of chief crown prosecutors, crown prosecutors, and a host of legal staff, all of which are subordinate to the director of public prosecutions.

Today, public prosecutions in England and Wales are commenced when, after a police investigation, the custody officer (in consultation with the prosecutor) decides that there is enough evidence to charge the suspect with an offense. Formerly, police (like private citizens) were able to make use of the procedure known as “laying an information,” discussed more fully later in this chapter. After the passage of the Criminal Justice Act of 2003, however, police and prosecutors were required to issue a formal, written charge.
remain certain kinds of cases that do not require coordination with the CPS in order for the police to charge a suspect, but these are minor offenses. In serious or difficult cases, however, the custody officer must now coordinate with the CPS in making the charging decision. The director of public prosecutions has set out a list of offenses that require consultation with the CPS.

Once a suspect has been charged, the case then moves from the realm of the police to that of the prosecutor. The evidence is brought to a lawyer within the appropriate branch office of the CPS who reviews it to determine whether charges are justified. The CPS lawyer may then discontinue the proceedings, add new charges, or decide to continue with the prosecution.

Although public prosecutions are the norm in the England and Wales, there are some exceptional situations in which the process for public prosecutions does not apply and another entity assumes responsibility for the prosecution. For instance, prosecutions can also be brought by private actors in England and Wales. This may be done by “laying an information,” which is a means of instituting criminal action. This may be done either orally or in writing. Using this procedure, the private actor tells a magistrate or a magistrate's clerk the nature of the allegation, as well as the name and address of the accused. The information is taken down and, if the information appears to be correct, a summons is issued by the magistrate requiring the accused to appear in court to answer the allegation. This process has been used by private citizens to secure convictions against individuals for libel and even manslaughter. The CPS, however, retains the authority to assume control over any such prosecution to carry it out or discontinue it.
Those limited exceptions aside, the paradigm of police investigation and CPS prosecution represents the general model for criminal justice in the United Kingdom.\引用标志 That basic paradigm is a relatively binary one: Police investigate and gather evidence; prosecutors review that evidence and, at their discretion, may choose to prosecute the accused.

The United Kingdom's Experience and Response

Like many countries in Europe, there are numerous examples of some form of terrorist violence throughout English history. Among the most famous is the “Gunpowder Plot” in which Guy Fawkes, along with a group of Roman Catholic restorationists from England, attempted to upend Protestant rule by planning to blow up—the Houses of Parliament while King James I and the House of Lords were inside. The cover of this book depicts a dramatic scene in which Fawkes is being arrested by Thomas Knyvet in the explosive-laden cellar of the Houses of Parliament before this act of political violence could be consummated. It serves as an excellent reminder of the danger of domestic terrorism, as well as the fact that acts of terrorism (and attempts to blow up government buildings) are no recent phenomenon.

Although the modern United Kingdom, in turn, has been dealing with the threat of terrorism for some time, it was not until 2000 that the British government adopted an organized, coherent legislative scheme aimed at combating it. Prior to that legislative moment, the laws that existed were piecemeal and primarily focused on containing violence in Northern Ireland.\引用标志 This focus on Northern Ireland was due to the fact that, until recently, the IRA was considered the predominant terrorist threat to the United Kingdom and, accordingly, the natural
The United Kingdom

focus of the majority of its counterterrorism legislation. It is against the backdrop of Ireland that the story of U.K. counterterrorism legislation begins. As Yonah Alexander and Edgar H. Brennar have noted,

In the name of uniting the Irish Republic and Northern Ireland (a British territory), the IRA resorted to bombings, assassinations, kidnappings, extortion, and robberies. The IRA has taken its fight to the streets of London and other cities in England. It attacked ordinary civilians, military personnel, police, and business centers. Militant Protestant groups in Northern Ireland have also undertaken terrorist operations resulting in 3,000 fatalities, woundings, and property damage. Despite the 1994 cease-fire and the ongoing peace process, which began under the Good Friday agreement of 1998, Catholic splinter groups, such as the real IRA, as well as Protestant extremists opposing a political solution, continue their violent activities.

The counterterrorism effort in Northern Ireland has, historically, been a blend of military and civilian law enforcement. Alongside the British military was the Royal Ulster Constabulary (RUC), which came into being in 1922 and served the dual role of providing law enforcement in Northern Ireland and protecting “the state from armed subversion from within and also from outside its borders.”

The military aspect of the counterterrorism operation was an enduring one. Only recently, in 2007, did the British army's longest continuous military operation come to an end when it formally passed responsibility for security in Northern Ireland to its civilian police.

Another key aspect of the United Kingdom's approach to counterterrorism was the use of the legal system and legislation aimed at restricting the physical freedom of certain individuals. As early as
1922, legislation allowed for executive orders prohibiting residence in or entry into specified areas. Such executive orders could also impose conditions requiring an individual to report to the police. In 1939 the British government enacted the Prevention of Violence Act (Temporary Provisions), which allowed for legal devices known as “control orders” by which a subject could be required to register with the police, photographed, measured, and required to report regularly. Such means of restriction, appearing so early in the twentieth century, would become a recurring theme.

In the late 1960s, Northern Ireland was the scene of increasing civil unrest. This resulted in the deployment of British military forces to the area in 1969 in an effort to quell the unrest and allow for the reform of local security forces. The aggressive British response also included the use of internment, a tactic used intermittently by the British since the early 1920s. The severity of these measures, however, only exacerbated the level of violence.

From thirty-seven explosions in April 1971, forty-seven in May, fifty in June and seventy eight in July, in August the number soared to 131, followed by 196 in September and 117 in October. In order to combat the rising violence, in November the government rearmed the RUC, but by the end of the year, the number of deaths had tripled from thirty pre-internment to 174.

Irish violence begat aggressive responses from Britain, which, in turn, begat an increased level of violence on the part of the IRA, thus fueling a downward spiral of instability and bloodshed. This downward spiral was characterized by incidents such as “Bloody Sunday” in 1972, in which several unarmed civilians were shot by British paratroopers.
In 1972 the British secretary of state issued an order known as “the Detention of Terrorists (Northern Ireland) Order,” which attempted to impose some level of legal restraint on the practice of internment. This new legal regime gave the secretary of state the power to issue an interim custody order, which could place an individual in detention for up to twenty-eight days. \(^464\) At the end of that period of detention, the suspect would be released to a commissioner who would hear evidence to determine whether the interim custody order should be sustained. \(^465\)

This hearing could be conducted outside the presence of the suspect and his solicitor, did not adhere to the normal rules of evidence, and could include information not available to the suspect or the suspect’s solicitor. \(^466\) A form of internment, therefore, still existed, but with some limitations and procedural requirements.

Such efforts notwithstanding, the inadequacy of the means used to address the problems in Ireland were becoming apparent, and the treatment of detainees in Northern Ireland continued to be an issue of concern. In an effort to find an alternative to internment and the other means used by Britain thus far to quell Irish violence, the “Diplock Commission” was appointed to review the procedures then in place and to suggest a new approach to counterterrorism in Ireland. \(^467\) This commission sought to normalize the treatment of terrorist suspects to some degree by limiting the use of internment and transferring cases of suspected terrorists to the criminal justice system—albeit a modified one. \(^468\) The recommendations of the commission still, however, allowed for continued internment and extrajudicial measures in certain limited circumstances. \(^469\) In such cases, the continued use of the provisions contained in the 1972 Detention of Terrorist Order was recommended. \(^470\)
The Diplock Commission's recommendations resulted in the enactment of the Emergency Provisions Act ("EPA") in 1973. This new legislative scheme altered the way in which terrorism trials were conducted by shifting the burden of proof at trial to the accused to demonstrate that torture, or inhumane or degrading treatment, had been used to extract a confession. 471 The statute also centralized trials of terrorism cases, requiring all such trials to be conducted in Belfast. 472 One of the most striking enactments of the EPA, however, was based on the Diplock Commission's recommendation that certain kinds of offenses should be tried in the ordinary courts, but without a jury. These sorts of trials became known as “Diplock Courts.” 473 Under this system, cases connected with terrorism were dealt with by a judge sitting alone. 474 Trials were held in the same courthouse where ordinary Crown Court jury trials are held, and were presided over by the same judges who conduct ordinary trials in Northern Ireland. 475 Nonetheless, there were significant differences between trial in a “Diplock Court” and an ordinary proceeding.

The Diplock courts provide for trial by judge alone (without a jury) of serious “scheduled offenses” (murder, manslaughter, firearms offenses, etc.), and the great majority (86 percent) of evidence against suspects consists of statements made during interrogation, in some instances (30 percent) supported by other evidence. These confessions are generally obtained in the course of lengthy interrogations, and the admissibility of the statement or confession becomes the primary focus in contested cases rather than the ultimate question of guilt or innocence. The standard by which a statement is judged is no longer that of voluntariness, but is reduced to the international legal minimum: a statement is admissible so long as it has
not been obtained by “torture, inhuman or degrading treatment.” 476

Sustained international criticism of the Diplock Courts focused on the elimination of the right to a jury trial and the admissibility of certain confessions and uncorroborated testimony. 477 Such criticism undoubtedly contributed to the decision to abolish the Diplock Courts in 2007. 478

Another notable characteristic of the EPA was the maintenance of the internment powers that had existed prior to the Diplock Commission's report. Sections 10 and 11 of the statute authorized police to arrest without warrant any individual suspected of terrorism or any of a number of listed offenses. Where it appeared that the person was involved in the commission, or attempted commission, of either an act of terrorism or the organization and/or training of terrorist activity, the secretary of state could issue an interim custody order and the liberty of that person could be significantly curtailed in the same manner as had been done under the prior legal regime. 479

Such measures, however, did not prove to be a panacea for the problem of Irish terrorism. Not only did the police powers and policies of internment fail to end the violence— in Northern Ireland, but violence was beginning to spread beyond Irish borders and into Great Britain. In 1973 there were eighty-six explosions in Great Britain, killing one person and injuring over 380. 480 In 1974 there were ninety-nine more terrorist incidents, which resulted in seventeen more deaths and 145 injuries. 481 An infamous attack on two pubs in Birmingham resulted in twenty-one dead and 160 injured. 482 The result of these attacks was a shifting of public sentiment and a call for greater legislative action. This resulted in the 1974 Prevention of Terrorism Act (“PTA”)—a
dramatic piece of legislation designed to counter IRA operations in Great Britain. 483

The PTA introduced into Great Britain the notion of “extraordinary powers,” which had previously been exclusive to Northern Ireland. 484 It outlawed the IRA, strengthened border control with Ireland, enhanced police powers of arrest and detention, and permitted “exclusion orders”—orders by the secretary of state that restricted the residents of Great Britain’s right to travel between Great Britain and Ireland. 485 Thus, laws and tactics that had been exclusively applicable in one isolated section of the realm now found more general applicability.

The PTA remained as the exclusive statutory regime regulating terrorist offenses for decades. 486 As previously noted, its focus was on issues related to Northern Ireland rather than on the prevention and deterrence of non-Irish or international terrorism. 487 A later review of counterterrorist legislation then in force, conducted by a member of the House of Lords, Anthony Lloyd, Baron Lloyd of Berwick, concluded that this Irish focus was too narrow as—though the threat of terrorism related to Northern Ireland was in the decline—an emerging global terrorist threat was on the rise and could be expected to intensify. 488 In order to refocus U.K. counterterrorism police, Lord Berwick made a number of recommendations regarding the changing trends in terrorism and how best to address them. He also made recommendations as to how British law could better comply with the European Convention on Human Rights. 489 Many of his recommendations were enacted in a new piece of legislation known as the Terrorism Act of 2000, which sought to provide the United Kingdom with a more progressive counterterrorism scheme and to codify the myriad of the then existing counterterrorism measures into one single source. 490
As for the Terrorism Act of 2000, some of the most eye-catching changes are structural. For the first time ever, anti-terrorism laws are stated comprehensively in one code, which draws together what was separate legislation for Great Britain, on the one hand, and Northern Ireland on the other. The legislation is intended to be not only comprehensive, but permanent, no longer requiring renewal or re-enactment save for one part relating exclusively to Northern Ireland. 491

The Terrorism Act of 2000, thus, replaced the Emergency Provisions Act and the Prevention of Terrorism Act. 492 It added new offenses to fill perceived gaps in existing provisions, developed the existing practice of proscribing terrorist organizations, and provided new powers of detention of suspects without charge, as well as search and seizure. 493 The 2000 act also provided a new definition of terrorism, 494 harmonized the laws of Great Britain and Ireland, and extended some measures to Great Britain that were previously exclusive to Northern Ireland. 495 It was not, however, a complete strengthening of the legal regime already in place. For instance, in this massive overhaul of U.K. counterterrorism legislation, the provisions allowing for exclusion orders and internment were largely abolished.

As the discussion thus far demonstrates, counterterrorism legislation has been the subject of significant attention for much of the past century in the United Kingdom. The events of September 11, however, would bring this subject into even sharper focus. As Home Secretary David Blunkett remarked, “On 11 September, families lost their loved ones, and the threat of terrorism touched us all. If we fail now to take the necessary action to protect our people, future generations will never forgive us.” 497 As a result, in December of
2001—on the heels of previous counterterrorism legislation—Britain passed the Anti-Terrorism, Crime, and Security Act of 2001. The purpose of the act was to ensure that the United Kingdom had the necessary powers to counter the kinds of terrorist attacks that struck New York and Washington, DC. This statute has a great deal of overlap with the terrorism act passed just a year prior, but it also added new provisions regarding the freezing of terrorist assets, the detention without trial of foreign persons who are denied asylum, and the retention of fingerprints in asylum and immigration cases.

Although the 2000 legislation served to enhance counterterrorism capabilities in the United Kingdom, subsequent events would prompt a call for ever greater legislative action. On July 7, 2005, a terrorist cell known as the Abu Hafas al-Masri Brigade conducted a terrorist attack on the London underground by detonating explosives on three subway cars and one street-level double-decker bus. The attacks resulted in the deaths of fifty-three people and roughly seven hundred injuries. Just as the attacks across the Atlantic in 2001 spurred a legislative response in the United Kingdom, the terrorist bombings in London resulted in yet another piece of counterterrorism legislation—the Terrorism Act of 2006, which supplements the provisions of the Terrorism Act of 2000 by extending the period for which terrorist suspects may be detained for questioning without charge and by enhancing the police powers of search and seizure. It also expands the jurisdiction of previous counterterrorism legislation by providing that there are now no geographical limits to the power of the United Kingdom to punish an act that is proscribed in either the 2000 or the 2006 legislation.

The history of counterterrorism legislation in the United Kingdom is, thus, far more lengthy than that of the United States. This
is due to the comparatively long and intense experience that the United Kingdom has had dealing with this threat. One sees from its experience numerous and varied attempts to deal with the issue—from internments and military engagements to specialized trials. As demonstrated in this chapter, the United Kingdom's long experience with counterterrorism has also resulted in the institutionalization of a formidable investigative detention regime. To attain a better understanding of that regime, this chapter now turns to the law of criminal detention in England and Wales.

**English and Welsh Law of Detention**

The Police and Criminal Evidence Act of 1984 (PACE) and supplementary Codes of Practice are, with some qualifications, the principal sources of law detailing police powers in the United Kingdom. Although section 120 of PACE indicates that it is applicable only to England and Wales, numerous provisions are made expressly applicable in Scotland and Northern Ireland by that same section.

Prior to the enactment of PACE, the detention of suspects and the treatment of suspects while in detention were governed by rules put forth by the King's Bench Division of the High Court. Although these nine “Judges' Rules” were later pronounced by the Queen's Bench Division of the High Court, they were never ratified by Parliament or the House of Lords and were, thus, considered mere guidelines rather than rules of law. The practicality of these rules was subject to debate throughout their existence, and they were characterized by the 1981 Royal Commission on Criminal Procedure as being imprecise “jigsaw pieces of two centuries of police and legal
They were, thus, later abolished in favor of PACE and the Codes of Practice, which remain in force today.

**Stop and Search**

Before the enactment of PACE, a police officer had the power to stop a person so long as he or she had “some grounds for suspicion.”

Today, according to sections 1–3 of PACE, police in the United Kingdom have the general power to detain an individual without arresting him or her for the purpose of conducting a search when there are reasonable grounds for suspecting that the person has stolen or prohibited articles. “Prohibited articles” are offensive weapons and articles made (or intended by those carrying them) for use in connection with burglary, theft, taking vehicles, obtaining property by deception, or criminal damage. In order to effect the stop and search, however, the police officer must have a reasonable suspicion and may not simply act arbitrarily or on a whim. Sprack has noted that such reasonable suspicion can be based on the nature of the property, which is either visible or which the suspect is suspected of carrying, coupled with facts such as the time, place, and the suspect's general behavior. Such reasonable suspicion may not, however, be based solely on race, religion, age, appearance, a previous conviction, generalizations, or stereotypes.

The detention that can be effected by this stop and search power is brief. It may only last long enough to carry out the search at either the place the individual was stopped or nearby. The police officer may search the person on the scene or take the suspect elsewhere, for example, to a nearby van or police station. Likewise, the intrusion by the police officer is limited in that the most the officer may do is require the suspect to remove his or her outer coat, jacket, or gloves.
Some amount of reasonable force may be employed but only as a last resort. 

Aside from the requirement for reasonable suspicion, there are other limitations on this power. The PACE power to stop and search can only be exercised in a place to which the general public has access. Although the officer may pose questions during the period of detention, the suspect is not obliged to answer them, and the officer may not detain the suspect solely for the purpose of asking questions. Further, suspects so detained have certain rights, such as a right to know the name of the arresting officer and the police station to which the officer is attached, the object of the proposed search, the grounds on which it is being made, and the right to have the record of the search.

Police, of course, have other powers at their disposal. In addition to the PACE power of stop and search, the Criminal Justice and Order Act of 1994 granted police the power to stop vehicles or pedestrians to search for offensive weapons or dangerous instruments without need for reasonable suspicion. This power can only be exercised, however, in a prespecified place, only where serious violence may occur, and only with the written authorization of a police officer of the rank of superintendent or above. Once granted, the power is valid for up to twenty-four hours but may be extended for an additional six hours.

The broad ability to create a suspicionless search zone aside, like the ordinary stop and search powers in the United States, police powers in England and Wales are somewhat limited. In fact, the U.S. equivalent (“the Terry stop”) may be broader than its English counterpart, as—being based on the idea of protecting the officer—it permits a police officer to stop and search an individual based on
reasonable suspicion that he or she is dealing with an armed and dangerous individual. The stop and

search powers of police in England and Wales, in contrast, are based on a more specific belief that a person has stolen or prohibited items. Although the expanded powers allowed in the Criminal Justice and Order Act of 1994 are far broader (permitting, when authorized, searches without suspicion), such powers require authorization from higher levels and are confined to particular areas. Thus, in ordinary criminal cases, the law in England and Wales generally affords police officers comparable and, arguably, more limited powers than are afforded to police in the United States. As discussed more fully in the pages that follow, however, the ordinary powers of U.K. police in this regard increase dramatically where terrorism is concerned.

**Arrest**

Originally, the sole purpose of an arrest in England and Wales was to secure the suspect so that he or she could be charged and brought before a court. According to Bradley, this assumed that the police would have had enough evidence to justify a charge before an arrest was made. In practice, however, police began to increasingly rely on postarrest interrogation to adduce enough evidence to charge a suspect—a practice that was given sanction in the 1920s when the Judges' Rules were changed to permit such interrogation so long as suspects were first informed that they did not have to say anything and that anything they said could be used against them in evidence.

Under the current law, arrests in England may be made with or without a warrant, with differing rules pertaining to both categories of arrest. A police officer may lawfully arrest anyone for whom a warrant has been issued. If, however, a police officer is to effect an arrest without a warrant, certain elements must be in place.
Specifically, PACE provides that police may arrest without warrant any person who is

(a) about to commit an offense or who is reasonably suspected of being about to commit an offense,

(b) in the act of committing an offense or who is reasonably suspected of being in the act of committing an offense, or

(c) reasonably suspected of having committed an offense. 529

Such warrantless arrests can only be carried out when necessary for specific, statutorily delineated reasons, such as to enable a person's name or address to be obtained, to prevent physical injury, to prevent loss or damage to property, to allow prompt and effective investigation of the offense or of the conduct of the person in question, or to prevent hindrance of the prosecution for the offense by the person's disappearance. 530

The kind of reasonable suspicion required in this regard has been articulated by U.K. jurisprudence as “a state of conjecture or surmise where proof is lacking [which arises] at or near the starting point of an investigation.” 531 Thus, while such arrests may not be based on a mere hunch, the level of information on which such suspicion is based is certainly not a demanding one. On that score, a key item to note is that one of the conditions in which warrantless arrests are permitted is the arrest of a person suspected of preparing to commit an offence; such an arrest would allow for prompt and effective investigation of the conduct in question, potentially preventing the offence from occurring in the first place. This is indicative of the modern acceptance of arrest for investigative purposes in the United Kingdom—a characteristic that will become even more pronounced upon analysis of the rules governing detention.
Police Detention

Prior to PACE, there was little regulation of the power of police to detain and question a suspect. English jurisprudence reveals instances of suspects being held incommunicado for several days in the course of ordinary criminal investigations.\(^532\) PACE, for the first time, gave police legally based instructions stating under what circumstances and for how long suspects could be detained in police custody.\(^533\) Under the current legal regime, once a person is arrested, he or she may be taken to a police station and held in police custody.\(^534\) There, the suspect is subject to police interrogation, but certain rights apply at various points throughout the course of the period of detention. J. R. Spencer has noted the following:

The power of the police to detain a person following arrest is governed by Part IV of PACE 1984. By section 37, a person may be detained where the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offense for which he is under arrest or to obtain such evidence by questioning him.\(^535\)

That period of detention can be carried out for days, depending on the seriousness of the crime and the need for further information. The process begins when a detained suspect arrives at the police station. At that time, the evidence against the suspect is reviewed by the custody officer, who considers the evidence against the suspect in order to determine whether the arrest was warranted. If the custody officer determines that the suspect should not have been arrested, then the suspect should be immediately released.\(^536\) Should the custody officer determine that the suspect was properly arrested, then the next determination made by the custody officer is whether there is
already enough information to charge the suspect. If enough evidence exists, the custody officer will require investigators to either charge the suspect with a crime—or release the suspect without charge. Sprack noted,

The latter course might be taken when, for discretionary reasons—the police or CPS feel that it is not in the public interest to commence a prosecution even though the evidence amply warrants it. A halfway house is to utilise the power given to the police by s 47(3)(b) of PACE to bail the detainee on condition he return to the station on a stated day. During the interim, a decision can be taken as to the desirability of prosecution and, if need be, the detainee can be released unconditionally from the police station, with a warning that consideration will be given to the question of whether to prosecute him. Proceedings may then be commenced by information and summons. Once a suspect has been charged, he may not, in general, be asked any further questions about the offense. It follows that a decision by the custody officer as to whether there is enough evidence to charge a detainee effectively prevents the investigating officers interrogating him at the police station, since he then either has to be charged (with the effect on questioning him just noted) or has to be released.

If, however, the custody officer finds that there is sufficient evidence to justify the arrest but that there is not yet enough to charge the suspect with a crime, then the custody officer may authorize detention without charge. In order to do so, the custody officer must find that such detention is necessary to secure or preserve evidence relating to the offence for which the detainee is under arrest or that detention is necessary to obtain such evidence through questioning. Therefore, one sees in the analysis of pretrial detention a Copernican distinction between the law of the United
States and that of the United Kingdom—an individual can be detained in the course of an ordinary criminal investigation so that evidence to support a charge can be obtained. Investigative detention is, therefore, expressly permitted.

Once the custody officer authorizes detention without charge, a separate officer known as the “review officer” becomes part of the process. A review officer is a police officer of at least the rank of inspector who was not directly involved in the investigation. He or she performs similar duties to the custody officer throughout the period of detention without charge.540

Within the first six hours of detention without charge, a review officer must, like the custody officer, again consider whether there is enough evidence to charge the detained suspect. If there is not, then the review officer must determine whether continued detention is warranted based on the need to secure or preserve evidence relating to the offence or the need to obtain evidence through questioning.541 The review officer must also give the suspect and/or the suspect's legal representative an opportunity to be heard on the validity of continued detention without warrant and the reasons, if any, for release. If it is decided that continued detention is necessary, the reasons for such detention must be given to the suspect orally and then entered into the custody record.542 A second review of the detention without warrant must be held within nine hours of the first review. Reviews are then carried out in nine-hour intervals.543

After twenty-four hours, a detained suspect normally must be either released or charged with a crime. The twenty-four hour period begins to run from either the time that he or she arrived at the station or the time the detained suspect was informed that he or she was no longer free to leave.544
This twenty-four hour period is not, however, absolute. Continued detention can be authorized by the station superintendent if the superintendent determines that the detained suspect has committed an indictable offense, that continued detention is warranted based on the need to secure or preserve evidence or to obtain evidence through questioning, and that the investigation is being conducted diligently and expeditiously. \(^{545}\)

After thirty-six hours, the detained suspect must be released unless charged, or unless a magistrate's court has issued what is called a “warrant for further detention.” \(^{546}\) Unlike the previous extensions—all of which are authorized by the police—such a warrant can only be issued by a magistrate. The magistrate will grant such an extension only after a hearing, at which the suspect is entitled to free legal representation. \(^{547}\) In order to request such an extension, a police officer must apply for an extension under oath and support the request with written information that details the nature of the offense for which the suspect was arrested, the inquiries which have been and which will be made, and the reason such inquiries require continued detention. \(^{548}\) The hearing should be conducted when the thirty-six hour period expires, but police may hold a suspect for an additional six hours if it is not possible for a court to hear the case at the end of the allotted period of time. \(^{549}\)

In order to grant the warrant for further detention, the magistrate must find that the suspect is being held for an indictable offense, that continued detention is necessary to secure or preserve evidence of the offense or to obtain evidence by questioning the suspect, and that the investigation is being conducted diligently and expeditiously. \(^{550}\) A warrant for further detention may not be for a period exceeding thirty-six hours of continued detention. Otherwise stated, with such a warrant, police may detain a suspect for up to seventy-two hours.
Finally, there is yet another opportunity to extend the period of detention by seeking an extension of that warrant of continued detention from a magistrate court, using the same procedure, which can authorize continued detention of the suspect up to a total of ninety-six hours—the maximum period a suspect may be held in ordinary criminal cases. At that point, the suspect must be either released or charged.

The maximum amount of time one may be ordinarily detained by police for investigative purposes in the British system is, therefore, ninety-six hours (or four days). To be sure, that period is not a time of unfettered police access to the suspect. It is, rather, tempered by rights that are afforded to the suspect and which serve to limit police action. In comparison to the rights available in the United States, however, the rights afforded to criminal suspects in the United Kingdom seem a bit tepid.

**Rights During Police Detention**

As noted, a criminal suspect who has been arrested can be taken to the police station and held under police custody. Upon arrival at the police station, a detained suspect must be informed of his or her right to free legal advice, the right to have someone notified of the fact of his or her arrest, and the right to read the Codes of Practice. Before a suspect can be questioned, the investigating officer must first obtain permission from the custody officer to transfer the suspect to the custody of the investigating officer. Once such a transfer occurs, a person suspected of an offense must generally be advised of his or her rights before any questions may be posed that might be used in a prosecution.
The United Kingdom

The Right to Counsel
A person who is held in police detention is entitled, if he or she requests, to consult a solicitor privately at any time.\(^{557}\) This solicitor is independent and is provided free of charge.\(^{558}\) A detained suspect must be told of this right when he or she arrives at the police station. Once a request to consult a solicitor has been made, the suspect should be allowed, under normal circumstances, to meet with the suspect.\(^{559}\) When a detainee, therefore, has been allowed to consult a solicitor, and the solicitor is available, the solicitor must be allowed to sit in on any interview of the suspect by the police.\(^{560}\)

If, during the period of detention, the suspect has not yet exercised his or her rights to consult a solicitor and to have someone informed of his or her arrest, the superintendent is obligated to remind the suspect of those rights.\(^{561}\) There is a significant limitation, however, to the suspect's right to counsel. In the case of “serious arrestable offenses,” the suspect can be delayed access to legal advice. Such a delay must be authorized by an officer of the rank of superintendent and is only possible where there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to a serious arrestable offense, will lead to harm to another, will lead to the alerting of other persons suspected of having committed such an offense but who are not yet arrested, or will hinder the recovery of property obtained as a result of such an offense.\(^{562}\) A detained suspect's access to a solicitor may not, however, be delayed beyond thirty-six hours in ordinary cases, as that marks the point at which police must go before a magistrate to request a warrant for further detention.\(^{563}\) Further, although the general rule is that police should not continue the interview until such advice has been granted, police may start questioning detained suspects before the solicitor has
arrived if the situation is an emergency or if the solicitor will likely not arrive for some time. 564

Thus, while a right to counsel exists in ordinary cases, it is by no means unlimited or inviolable. A detained suspect can be held by police and denied access to counsel for up to thirty-six hours, and questioning may, in certain circumstances, continue without counsel present. This is—a vast shift in the power dynamic of the U.S. model, wherein if, during interrogation, a suspect being held by police states that he or she wants an attorney, the interrogation must cease until an attorney is present, and the suspect must be given the chance to confer with the attorney and to have him or her present during any subsequent questioning. 565 Criminal law in the United Kingdom, thus, not only affords greater police access to suspects in terms of their ability to detain them—it provides greater ability to question them.

Questioning and the Right to Remain Silent
There is no legally enforceable obligation to answer questions posed by police in the British system. 566 There is, to the contrary, a qualified right to remain silent. This right, however, is not an absolute one in that the exercise of the right to remain silent may be used against a suspect in certain circumstances. As one author has noted,

“The common law of Northern Ireland and England has always permitted the jury to draw adverse inferences from silence, especially from a defendant's refusal to testify. The common law recognizes that adverse inferences drawn from a defendant's refusal to testify are only the result of ordinary common sense.” 567

While the right to remain silent exists, it is a more limited right than that which exists in the United States in that the exercise of it can be
used against you in a court of law. For instance, if, prior to a warning, a police officer makes an accusation against the suspect that an innocent person would be expected to deny, then the suspect's silence may be used against him or her as a tacit acknowledgment of the truth of the accusation.  

In such a way, the fact that someone remains silent during the information-gathering phase of an investigation may be used against the suspect at trial. This is reflected in the “caution” that must be read to the suspect before any questions are posed that might lead to information that could be incriminating: “You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.”

**Detention in Remand**

Under PACE, once a suspect is charged, the custody officer must order his or her release unless the suspect has refused to give his or her name or address, or there are reasonable grounds to believe that the name and address are not genuine. Likewise, the custody officer may detain a person after charge if

(a) there is reason to believe that the detainee will not answer bail,
(b) his or her detention is necessary to prevent commission of a further offense,
(c) detention is necessary to prevent the suspect from causing injury to another or loss of/damage to property,
(d) detention is necessary to prevent the suspect from interfering with the administration of justice or the investigation of an offense, or
If a suspect is not released, then he or she must be brought before a magistrate's court as soon as practicable and no later than the first sitting of the magistrate's court after the suspect is charged. 572 A magistrate's court, thereafter, has the power to remand the accused suspect—either by granting the accused bail or by committing the accused to custody until the next adjournment date. 573 This is in contrast with a simple adjournment, which does not carry any restrictions for the accused. 574

When a magistrate's court would decide to remand an accused into custody, former rules dictated that the period of remand should not exceed eight days. 575 At the end of that time, the accused was to be brought back before the court to determine whether he or she would be bailed or remanded yet again. 576 Subsequent legislation, however, extended the period of remand into custody for prudential considerations. As a result, an accused may now be remanded into custody for up to twenty-eight days without attending court. 577 In any event, regulations laying out the maximum periods during which a suspect may be kept in custody before trial dictate that, normally, no more than 182 days should elapse between the time the suspect's case is sent by the magistrate's court for trial and the start of trial—though that period of time may be extended for good cause. 578

**Bail**

The term *bail* refers to the release from custody, pending a criminal trial, of an accused with the promise that the accused will surrender to custody at an appointed time and place. 579 The Bail Act of 1974 gives to accused suspects what, as Sprack noted, “may be usefully,
if slightly inaccurately, be described as a right to bail.” Section 4 of that act provides that those individuals to whom it applies shall be granted bail except in certain enumerated circumstances—even if the accused does not apply for bail. There is no such right in situations where the custody officer is considering bailing an arrestee from the police station after he has been charged; where the magistrates, having summarily convicted an offender, commit him to the Crown Court for sentencing; or where a person who has been convicted and sentenced (by magistrates or the Crown Court) is appealing against his or her conviction or sentence.

In such cases, the custody officer or magistrate may still grant bail, but there is not a statutory presumption in favor it.

In addition, there are some situations in which a court may refuse to grant bail. For instance, when an accused has been charged with an offense punishable by imprisonment, a court need not grant bail when there are substantial grounds for believing that the accused, if released, would fail to surrender to custody, would commit an offense while on bail, or would interfere with witnesses or otherwise obstruct the course of justice. The court may also refuse to grant bail where it finds that the accused should remain in custody for his or her own protection or where the accused has previously failed to answer to bail. Likewise, the court may refuse to grant bail when there has not been enough time to obtain information for the court to properly analyze the factors and considerations necessary to make a determination. If an accused has not, however, been charged with an offense that carries a possible sentence of imprisonment, then bail may only be withheld if the accused has previously failed to surrender on bail and if the court finds that he or she will likely fail to surrender once again.
Terrorism Under the Law of the United Kingdom

Although modern counterterrorism legislation lays out a specific legal definition of terrorism that requires a specific terrorism-related mens rea and actus reus, until the late twentieth century, acts of terrorism in the United Kingdom were criminalized through the ordinary criminal laws. From time to time, certain new offenses were created to respond to specific activity, such as the Explosive Substances Act 1883, which was enacted after anarchist bombings in London. A distinct crime—or legal definition—of terrorism, however, did not exist.

The Prevention of Terrorism (Temporary Provisions) Act of 1989 defined terrorism as being “the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.” This rather straightforward definition was criticized for being too narrow and failing to take religious motivations into consideration. It was, therefore, replaced by the Terrorism Act of 2000, which defines terrorism in a much more complex fashion:

1. **Terrorism: interpretation**

(1) In this Act ‘terrorism’ means the use or threat of action where –

(a) The action falls within subsection (2),

(b) The use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) The use or threat is made for the purpose of advancing a political, religious, or ideological cause.
(2) Action falls within this subsection if it –

(a) Involves serious violence against a person,

(b) Involves serious damage to property,

(c) Endangers a person's life, other than that of the person committing the action,

(d) Creates a serious risk to the health or safety of the public or a section of the public, or

(e) Is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied. 591

Subsequent counterterrorism legislation, such as the Anti-Terrorism, Crime and Security Act 2001 592 and the Terrorism Act 2006, 593 largely refers back to this general definition in the Terrorism Act of 2000. Thus, the essence of the contemporary definition of terrorism is the use or threat of certain kinds of action designed to influence the government, or intimidate the public or a section of the public, when that action is made for the purpose of advancing a political, religious, or ideological cause. 594

The actions that can qualify as terrorism are those that involve serious violence against a person, serious damage to property, endanger the life of another, create a serious risk to public health or safety, or are designed to seriously interfere with or disrupt an electronic system. 595 The use of threat of action involving firearms
or explosives is considered terrorism whether or not it is designed to intimidate or influence. 596

**Terrorism and the U.K. Law of Detention**

A review of the counterterrorism legislation in force in the United Kingdom reveals a particularly expansive grant of power to police and prosecutors in their ability to detain and question terrorist suspects. Although these powers are impressive in their scope, they are mitigated by a cordon of legal limitations and judicial oversight, which limits their potential for abuse and renders them compatible with life in a liberal democracy. Even considering such protections, U.K. law has greatly enhanced the government's power to stop, search, arrest, and detain suspected terrorists.

**Stop and Search**

In contrast to the limited powers to stop and search ordinary criminal suspects, the Terrorism Act of 2000 allows a police officer to stop and search any person he or she reasonably suspects to be a terrorist in order to discover whether the suspect has possession of anything that may constitute evidence that he or she is a terrorist. 597 The act also grants to police officers the right to conduct blanket searches of specified areas, allowing police the power to stop a vehicle in an area or specified place and to search the vehicle, the driver, the passenger, and anything in the vehicle or carried by its occupants. 598

This power to stop and search in terrorism cases is vaguely reminiscent of the pre-PACE police powers in its breadth. Unlike in ordinary cases, where the ability of police to stop and search a suspect is tied to

“stolen or prohibited articles,” police in terrorism cases are free to stop any person suspected of being a terrorist and conduct a search. Thus,
police have far more discretionary power to stop and search terrorist suspects than in non-terrorism cases.

**Arrest**

The Prevention of Terrorism (Temporary Provisions) Act of 1974 gave police the power to arrest any person reasonably believed to be guilty of certain offenses or “concerned in the commission, preparation, or instigation of acts of terrorism” without a warrant. Article 41 of the Terrorism Act of 2000 continues the tradition of broad grounds for the warrantless arrest of terrorist suspects, allowing that “[a] constable may arrest without warrant a person whom he reasonably suspects to be a terrorist.”

This is a far greater grant of power and discretion to police than is given in ordinary cases, wherein police must first suspect an offense and then determine that certain additional reasons (identification, to prevent physical injury, to prevent loss of property, protect a child, etc.) also exist. The exception in U.K. law for terrorism cases does away with those requirements and replaces them with mere suspicion that a person is a terrorist. Commentators have noted that the effect of the particular formulation of this requirement in the legislation is that, in contrast with normal powers of arrest, there is no need for suspicion of any specific offense in the mind of the arresting officer. As a result, with regard to suspected terrorists, an officer may effect an arrest without a warrant and without needing to state the offense of which the person is suspected.

**Police Custody**

Under the Prevention of Terrorism (Temporary Provisions) Act of 1974, after a terrorist suspect was arrested, he or she could be detained for forty-eight hours, and the secretary of state could extend that power for another five days. Today, the overall scheme for
detention of terrorist suspects is placed under the judiciary, rather than the executive, but allows for far longer periods of detention for terrorist suspects.

The paradigm for police detention is tripartite: an initial arrest and a forty-eight-hour detention period, a warrant for further detention, and an extension of warrant. The paradigm for the detention of terrorist suspects mirrors that ordinary model but is greatly enhanced. As previously discussed, the forty-eight-hour period of detention can be extended up to a ninety-six-hour period. Under the 2000 act, that period could be extended—in the case of a terrorist suspect—for an additional five days. This period was incrementally increased to fourteen days by the Criminal Justice Act of 2003. The Terrorism Act of 2006 further enhanced the power of police to detain terrorist suspects by allowing, after the initial forty-eight-hour period of detention, subsequent extensions for up to twenty-eight days.

A series of checks and procedural safeguards exist, however, during that period of detention. Once a terrorist suspect is arrested, as in ordinary cases, police must periodically check on the status of the detained suspect through a “review officer,” a police officer who has not been involved in the investigation that has lead to the apprehension of the suspect. The first such review shall be carried out as soon as reasonably practicable after the suspect's arrest. Unlike in ordinary cases, however, subsequent reviews are carried out every twelve hours but may be postponed if the review would prejudice an ongoing interview, where no review officer is readily available, or where it is not practicable for any other reason to carry out the review. This is in contrast to the nine-hour reviews received by other suspects.
Further, in contrast to ordinary cases in which suspects must be normally charged or released after twenty-four hours, terrorist suspects may be detained without charge or action for forty-eight hours. In order to prolong detention beyond that initial forty-eight-hour period, a police officer of at least the rank of superintendent must apply to a “judicial authority” for a warrant prolonging the period of detention.\(^{612}\) Under the 2000 act, a “judicial authority” is defined as, in England or Wales, one of the following: the senior district judge, the deputy of the senior district judge, or a district judge who is designated for the purpose of approving such warrants by the lord chancellor.\(^{613}\)

After the initial period of forty-eight hours, the first extension of detention can be granted (via a warrant for further detention) for a period of seven days from the time of arrest (or five days beyond the expiration of the initial forty-eight-hour period).\(^{614}\) A request for a warrant to prolong detention must be made during the initial forty-eight-hours or within six hours of the end of that period.\(^{615}\) A written or oral notice to a judicial authority of an intention to make the application is considered an application for a warrant.\(^{616}\) Once an application for a warrant has been made, the terrorist suspect may be detained pending the processing of that application.\(^{617}\)

The differences in the handling of terrorist suspects are, thus, already evident at the outset of their period of detention. Whereas an ordinary suspect can be detained for twenty-four hours, with the police able to authorize their continued detention for up to thirty-six hours through internal mechanisms that do not involve judicial oversight, terrorist suspects can automatically be held for up to forty-eight hours (with less stringent reviews), and their detention is only subject to judicial oversight at the expiration of that period.

After the initial period of seven days from the time of arrest has been exhausted, further detention can then be authorized by
an extension of warrant. Applications for such extensions are made to a judicial authority by police officers of at least the rank of superintendent. The initial extension of a warrant of detention can be for an additional fourteen days. Each individual extension beyond the first fourteen additional days can be for no longer than seven days each. The absolute maximum period of time such a suspect may be detained is—in the aggregate—twenty-eight days from the time of arrest.

The 2006 legislation also increased the possible universe of actors who may request such an extension. As a result, a crown prosecutor (in England and Wales), a lord advocate or procurator fiscal (in Scotland), the director of public prosecutions for Northern Ireland (in Northern Ireland), and, as before, in any part of the United Kingdom, a police officer of at least the rank of superintendent may all request an extension.

**Rights During Police Custody**

As with ordinary suspects, certain procedural rights must be observed in continuing the detention of a terrorist suspect. Before determining whether a suspect's detention may be extended, the detained suspect or the suspect's attorney may be heard on the reasons for ending the detention. If the review officer decides to authorize continued detention, he or she shall then inform the detained suspect of his or her rights and of the fact that the period of detention is being prolonged.

In addition, terrorist suspects have the right to have a person informed of their detention and the right to have access to a legal advisor—though there are some limitations on the latter. Regarding a terrorist suspect's right to legal advice, the Terrorism Act of 2000 allows that it may be ordered that a detained suspect
is only to receive legal advice in the sight and hearing of a police officer. 625 Further, delays in the exercise of both of these rights may be authorized by a superintendent for up to forty-eight hours (twelve hours more than in regular cases). 626

The grounds for delaying the exercise of a suspect’s rights are the same as those that exist in ordinary cases, with the addition of the following: the interference with the gathering of information about the commission, preparation, or instigation of acts of terrorism; the alerting of a person that could thereby make it more difficult to prevent an act of terrorism; and the alerting of a person that could thereby make it more difficult to secure a person’s apprehension, prosecution, or conviction in connection with the commission, preparation, or instigation of an act of terrorism. 627 Where such a delay has been authorized, the terrorist suspect shall be told of the reason for the delay as soon as is reasonably practicable, and once that reason has ceased to exist, there should be no further delay in allowing the suspect to exercise his or her rights. 628

**Bail**

The Terrorism Act of 2000 provides, vis-à-vis Northern Ireland, that there is no presumption in favor of bail for terrorist suspects and that an application for bail in terrorist cases may only be granted by a High Court judge, a court of appeal judge, or a trial judge, rather than by a magistrate. If bail is not granted, then, as with an ordinary suspect, the maximum period of remand into custody is twenty-eight days. 629 It is interesting to note, however, that the only time the issue of bail is addressed in U.K. counterterrorism legislation is in part 7 of the 2000 act. Otherwise, outside of Northern Ireland, the granting of bail is governed by ordinary criminal legislation.
Control Orders

Another aspect of U.K. counterterrorism legislation that is distinct from investigative detention but worthy of note is the use of control orders. The U.K. Terrorism Act of 2005 was designed to strengthen police powers even further and contained provisions that created a means of quasi-detention known as a “control order.” This is an order against an individual that imposes obligations on that person for purposes connected with protecting members of the public from a risk of terrorism. Both British citizens and foreign nationals are subject to these control orders. Among the most striking features of this particular device is that it is not necessarily an order issued by a court but can be, rather, an order issued by the executive branch of government. Control orders are either issued by the home secretary or by a court on application of the secretary of state, depending on the level of control sought. Thus, it forms a sort of “executive detention” mechanism by which terrorist suspects can be subject to certain restrictions.

The obligations that can be imposed upon an individual pursuant to a control order include prohibitions or restrictions on a subject's possession, or use of specified articles or substances (such as a computer or cell phone); prohibitions or restrictions on a subject's use of specified services or specified facilities, or carrying on specified activities (such as banking); restrictions on a subject's association or communication with specified persons; and prohibitions or restrictions on a subject's movement to, from, and within the United Kingdom. A person's movements may be controlled by requiring him or her to remain in a particular place or to remain at a specific place at a particular time. The breach of an obligation imposed by a control order can be considered a criminal
offense punishable by up to five years' confinement and a fine. Thus, even though the actual control order is not considered a criminal sanction, it can lead to criminal sanctions if its terms are violated.

There are two types of control orders: “derogating control orders” and “non-derogating control orders.” The first group—derogating control orders—is so named because the restrictions imposed are so onerous that they require derogation from article 5 of the ECHR. Such control orders—which involve more serious restraints on a person's movement, thus impinging upon a right guaranteed by the ECHR, such as the right to liberty—can be made only by a court on application of the secretary of state, while all others may be issued by the home secretary. They are generally reserved for individuals who represent a serious risk to public safety and can only be imposed upon application by the home secretary, who must be satisfied that the subject of the order is or has been involved in “terrorism-related activity.” Further, the home secretary must consider that the imposition of obligations on the person is necessary for the protection of the public. In addition, the court must find that the risk arises out of, or is associated with, a public emergency in respect of which there has been a derogation from article 5 of the ECHR, and that the obligations are described in the designation order. Such an order ceases after six months unless renewed.

“Non-derogating control orders,” in contrast, impose specific combinations of restrictions upon individuals that, although restrictive, do not require derogation from the ECHR—restrictions such as curfew, electronic tagging, searches of residences and other premises, restrictions on association, and restrictions on the use of telephones and Internet. They may be imposed in cases where the home secretary has reasonable grounds for suspecting that an
individual is or has been involved in terrorism-related activity and
considers it necessary to make a control order imposing obligations on
that individual in order to protect the public. 645 The home secretary
must normally have the permission of the High Court to impose a
non-derogating control order. The High Court then reviews the home
secretary's decision. Such non-derogating control orders may last for
twelve months unless renewed. 646 Even with regard
to non-derogating control orders, however, a fair amount of judicial
scrutiny remains.

This means that the Home Secretary, and not the court,
remains the author of the order but only if he has
been granted permission to do so by the court [by
way of an early judicial check in the form of an ex
parte application for leave to make the order]. There
are, however, two exceptional measures. By section
3(1)(b), there is the possibility that the Secretary of
State has made, and included in the control order, a
statement saying that the urgency of the case requires
him to make the control order without permission from
the court. Alternatively, it is possible under section
3(1)(c) for an order to be made on the Secretary of
State's authority alone where the order is made before
March 14, 2005 against a detainee under Part IV of the
Anti-Terrorism, Crime, and Security Act of 2001. The
argument here is that if detention was justifiable, then
there was reduced urgency to check whether the lesser
intrusion of a non-derogating control order was needed.
For the exceptional cases under (b) or (c) above, the
Secretary of State must render the control order to the
court immediately, and the court must begin considering
such a reference not later than seven days after the day
on which the control order was made. 647

As previously noted, in order for such an order to be granted, it
must be found that there are reasonable grounds for suspecting that
the person is involved in terrorism-related activity and that a control order is necessary for purposes connected with protecting members of the public from a risk of terrorism. “Involvement in terrorism-related activity” is defined as

(a) the commission, preparation, or instigation of acts of terrorism;
(b) conduct that facilitates or is intended to facilitate the commission, preparation, or instigation of such acts;
(c) conduct that gives encouragement or is intended to give encouragement to the commission, preparation, or instigation of such acts; or
(d) conduct that gives support or assistance to those known or believed to be involved in terrorism-related activity.  

The burden of proof is based upon “the balance of probabilities” rather than beyond a reasonable doubt.  

It is worth noting that the advent of the control order in the United Kingdom was not without some debate. Amnesty International decried the practice early on, noting that such deprivation of liberty is violative of human rights.  

Based on such concerns, “non-derogating” control orders have since been challenged in court. In Secretary of State for the Home Department v. MB, the court of appeal overruled a High Court decision that held that the procedure for imposing non-derogating control orders violated article 6 of the ECHR, which protects the right to a fair trial.  

Ip has noted,

At issue was Section 3(10) of the PTA, which states that the court is to determine whether the Home Secretary's decision to impose a control order “was flawed.” The High Court Judge concluded that Section 3(10) limited
the court to considering material that was available to the Home Secretary at the time the decision was made. Consequently, judicial supervision was in actuality so weak as to breach Article 6 of the ECHR. In contrast, the Court of Appeal interpreted the section to mean flawed at the time of the court hearing, which allowed consideration of a wider range of information, including the response of the individual concerned. Accordingly, the court held there was no breach of Article 6. 652

Likewise, in Secretary of State for the Home Department v. JJ and Others 653 the House of Lords ruled on the case of six controls orders. By a majority of three to two, the House of Lords rejected the secretary of state's argument that the six control orders made in those cases did not deprive the individuals of their liberty. The lower courts ruled that the effect of the restrictions, considered cumulatively, was so restrictive of the individuals' liberty in the aggregate as to amount to a deprivation of liberty and, therefore, a breach of article 5 of the ECHR. The House of Lords upheld the decisions of lower courts, and the control orders were quashed. 654

In spite of these rulings, confusion and debate persist—even within the U.K. government—on the compatibility of control orders with applicable human rights law. Legal challenges have met with limited success but have failed to pose a significant obstacle to the use of this device by the United Kingdom. Accordingly, they remain a controversial but viable tool for the detention of terrorist suspects.

The Use of Detention in Counterterrorism

The available information from which one can measure the efficacy of the increased detention powers is limited. 655 What information has been released from the United Kingdom indicates, however, a level of success associated with the ability of police to detain suspects.
A recent report presented to Parliament by the prime minister and the secretary of state for the Home Department noted that “[t]he police and the security and intelligence agencies have disrupted many attacks against the U.K. since November 2000, including four since [July 2005] alone.” 656 The report noted that sixty-two people were subsequently charged with criminal offenses following arrest in 2005 under the Terrorism Act 2000 and that in the first three months of 2006, a further seven people have been charged with criminal offenses following arrests under the act. 657 This success has spurred recent calls for even longer periods of pre-charge detention. 658 Human Rights Watch noted that the British government has considered doubling the pre-charge detention period to fifty-six days—a proposition which sparked a fierce debate in the U.K. and among human rights advocates. 659 Most recently, Prime Minister Gordon Brown led a push to allow police to detain terrorist suspects without charge for up to forty-two days. 660 Such proposals, however, have received fierce criticism from human rights groups and have not succeeded in becoming law. 661

Critics of lengthy detention argue that there is little evidence to suggest that such victories are due to lengthy periods of investigative detention or that such detention is even necessary. 662 The National Council for Civil Liberties, a U.K.-based human rights advocacy group, noted that other countries (such as the United States) do not use prolonged pre-charge detention to deal with the threats and challenges from international terrorism. 663 Reports by the Home Office, however, offer a strong counterargument to such criticism, noting that the number of people charged with an offence after arrest under the terrorist legislation grew from just over fifty in 2004 to around eighty in 2006. 664 Further, as one report noted,
The police and Security Services have a duty to intervene early, to protect the public, at a point when there may not be much evidence against suspects. This means that more work needs to be done after suspects are arrested in terrorist investigations than is the case with other crimes. In the 2004 Barot case, for example, Deputy Assistant Commissioner Peter Clarke, the National Co-ordinator of Terrorist Investigations said that, “there was not one shred of admissible evidence” at the point of arrest. Barot subsequently pleaded guilty and was sentenced to 40 years. 665

Whether or not the Home Office ever succeeds in its effort to extend the length of pretrial detention, developments like the increase in people charged with a terrorist offense, the fact that terrorist investigations require postarrest evidence gathering, and the experience of successful terrorist convictions that have resulted from postarrest evidence gathering indicate that the length of pretrial detention in the United Kingdom has had a positive impact on the United Kingdom's ability to root out and prosecute terrorism.

Implications of International Human Rights Law

As noted, there is no prohibition on investigative detention under the ICCPR, so long as such detentions are not arbitrary, remain controlled by the judiciary, and otherwise comport with the requirements of article 9. The United Kingdom's system of investigative detention—with its extensive safeguards—certainly complies with those criteria and, thus, with the ICCPR. As noted, however, the nature of the HRC, which is the principal enforcer of the ICCPR, is considered neither a judicial nor even a quasi-judicial entity, and its decisions have no binding force—even among parties
The United Kingdom to the Optional Protocol. Therefore, member states are not legally obligated to comply with the committee's findings.  

The most critical international human rights instrument for the United Kingdom is the ECHR. Sprack noted that, until the passage of the Human Rights Act 1998 ("HRA"), the United Kingdom was one of the few members of the Council of Europe who had not made the ECHR directly enforceable in its domestic legal system.  

The HRA 1998 aims to integrate the ECHR into [the British] legal system, so that all courts have an obligation to consider arguments founded upon its provisions, and to act upon the rights which formerly could only be enforced in Strasbourg. The HRA came fully into force in October 2000. Section 2 places a duty upon any court, from the magistrate's court upwards, to take into account the decisions of the European Court of Human Rights, and other bodies in Strasbourg which have interpreted the provisions of the ECHR. Section 3 lays down that primary and secondary legislation must be interpreted in a way consistent with Convention rights if that is possible. If it is impossible, the legislation will be valid and enforceable, but the higher courts (including the House of Lords, the Court of Appeal and the High Court—but not the Crown Court) may make a declaration of incompatibility (s 4). Section 6 makes it unlawful for a public authority (including a court) to act in a way which is incompatible with a Convention right, unless required to do so by provisions contained in, or made under, primary legislation.  

Even so, as Spencer explained, not all aspects of the ECHR were incorporated by the Human Rights Act. Specifically, article 13 of the ECHR, which guarantees effective remedies before national
authorities, was not so incorporated.\textsuperscript{668} Likewise, when the Human Rights Act was passed, Parliament only gave courts the power to issue a declaration of incompatibility, which, in turn, gives the executive the power to amend the legislation in question if so desired.\textsuperscript{669} Nonetheless, the ECHR and its provisions are still capable of having a profound influence on domestic law in the United Kingdom and the jurisprudence of the ECtHR is illuminative of both the challenges and the limits of state actors in the struggle against terrorism.\textsuperscript{670}

For instance, in \textit{Murray v. United Kingdom}, the ECtHR considered a case which arose under section 14 of the Northern Ireland (Emergency Provisions) Act 1978. Murray challenged the reasonableness of her arrest and detention, arguing that it was not based on reasonable suspicion but, rather, was solely for intelligence-gathering purposes. The ECtHR, however, found that the government had met its standard of reasonableness through a declaration that it had reliable but confidential information grounding suspicion against Murray, as well as her visits to the United States and contact with her brothers who had recently been convicted in the United States for purchasing weapons for the Provisional IRA. Given the ongoing terrorist campaign in Northern Ireland, this was enough to support the reasonableness of Murray's arrest. For purposes of the ECHR, therefore, reliable information of terrorist associations—even if confidential in nature—was sufficient to arrest and detain an individual. International human rights law posed to bar to state action under such circumstances.

Aside from the question of arrest, there is the question of the amount a time a person may be detained. The ECtHR has never articulated an exact limit on the acceptable length of pre-charge detention.\textsuperscript{671} The court has, however, had the chance to consider the
issue in the case of *Brogan and Others v. United Kingdom*. In that case, a period of detention under the Prevention of Terrorism (Temporary Provisions) Act 1989 (previously discussed) lasting four days and six hours was deemed to fall below the convention standard.

The applicants argued that their arrest failed to comply with Article 5(1)(c) of the Convention on the grounds that they were not arrested on suspicion of responsibility for a specific offense. Empirical and testimonial evidence before the Court demonstrated strongly that arrests under Section 12 of the Prevention of Terrorism Act served information-gathering and counter-insurgency purposes for the state. The Court again demonstrated its reluctance to critically address the Government's assessment of fact. In this case, its avoidance mechanism was to move from a discussion of the concrete to a discussion of the abstract. The abstract discussion was grounded in a discussion of the validity of results. The Court stated that outcome per se did not determine the legitimacy of the arrest procedure. The Court's inability to respond to the general trend that arrest cases under Section 12 of the Prevention of Terrorism Act manifested in the Northern Ireland jurisdiction, allow the state to avoid scrutiny of the entire detention process.

After this decision, the United Kingdom chose to derogate from its international obligations, under article 51 of the ECHR and article 4 of the ICCPR. The ECtHR has subsequently held that a derogation involving seven days without presentment to a court was valid but emphasized that the delay was excessive by only a few days and that the suspects in question had access to counsel after forty-eight hours in detention. Human rights law has therefore
been an influential—but not necessarily prohibitive—force in U.K. counterterrorism law.

**Conclusion**

The law of the United Kingdom has been adapting to the threat of terrorism for centuries. In modern times, it has served its place in the bloody struggle against the IRA and international terrorists emanating from the Middle East. As part of an overall strategy and as a tactic in that struggle, the law of detention has been fortified to allow greater means of detaining terrorist suspects and the ability to hold them for longer periods. It has also allowed for the preventive restraint of individuals suspected of terrorist activity. Modern counterterrorism legislation in the United Kingdom, further, greatly amplifies the investigative detention powers of the government by allowing for longer periods of detention and a longer period of time during which a suspect's access to counsel can be effectively denied. These exceptions to the ordinary criminal process are dramatic in their scope and reflect the recognition that terrorism is a special class of crime for which ordinary procedures are inadequate. It also reflects the view that, in the shadow of terrorism, some ordinary rights must sometimes bend beneath the weight of a greater societal interest—national security.

The enhancements to the ordinary legal system detailed in this chapter were facilitated—at least in part—by the fact that investigative detention already existed as a normal, accepted part of the criminal justice system in the United Kingdom. As demonstrated, the criminal law that prevails in England and Wales, for example, ordinarily allows for a period of investigative detention in which a criminal suspect can be detained and interrogated. The suspect's right to counsel can
even be subjected to a form of interference insofar as it can be temporarily postponed in situations of sufficient gravity. The laws permitting prolonged investigative detention for terrorist suspects, therefore, were merely augmenting what already existed rather than fundamentally altering the United Kingdom's existing legal structure. This is in contrast to U.S. law, which, as noted, has an inherent aversion to the practice of investigative detention and has—in the jurisprudence regarding ordinary criminal suspects—erected certain fortifications against the practice. 680

In spite of their shared legal lineage, it would not be possible to simply graft the system of investigative detention of terrorist suspects that one sees in the United Kingdom onto the U.S. legal system. The fundamental differences in the two criminal justice systems make such a transplant too problematic. What can be done, however, is to isolate those defining characteristics of the United Kingdom's system and explore ways of replicating them within the U.S. legal system in a manner that is constitutionally permissible.

In that regard, the analysis of the laws governing detention in the United Kingdom reveals a formidable legal regime that gives government broad latitude to detain terrorist suspects. This regime consists of three main elements:

(1) the ability to stop and arrest a terrorist suspect based on minimal criteria,

(2) the ability to hold a terrorist suspect for a prolonged period of time without charge, and

(3) diminished protections for terrorist suspects during their period of detention.

Once a person in the United Kingdom is suspected of terrorism, that person can be stopped and searched by the police to discover whether
he or she has possession of anything that may constitute evidence that he or she is a terrorist. Should any evidence obtained in the course of that stop and search give rise to the mere suspicion that a person is a terrorist, then the suspect may be arrested. Thereafter, terrorist suspects in the United Kingdom may be detained without charge for twenty-eight days from the time of arrest. Further, a detained suspect is only to receive legal advice in the sight and hearing of a police officer. Further, delays in the exercise of both of these rights may be authorized by a superintendent for up to forty-eight hours (twelve hours more than in regular cases).

This system of investigative detention operates in a manner consistent with the legal tradition that prevails in the United Kingdom and, given the shared legal tradition, might provide some inspiration for counterterrorism legislation in the United States. There is, however, a plurality of possible models for such a regime. Another quite different model is that of the other European comparator, which is the next subject of this book—the Republic of France.
Chapter 5

France

Guillaume Parmentier noted, “France has suffered not one but several types of terrorism in which the players, demands, means, and modus operandi were different.” 686 The French experience with political violence is not an altogether recent phenomenon. Some examples of such violence on French soil occurred at least as far back as the nineteenth century. 687 Modern France, however, has had a particularly intense and varied experience with terrorism. The history of the Fifth Republic demonstrates encounters with almost every variety of terrorist group, as well as almost every variety of legislative reaction. The reaction to this problem since the early 1980s has been to target terrorist activity by enhancing the powers and institutions already existing in the organic criminal justice system. In this regard, French laws governing detention have been a central subject of reform.

Overview of the French Criminal System

The French ability to detain and investigate criminal suspects is famously potent. In short, under French law, an initial contact with police through

a kind of investigative stop known as a contrôlé d'identité can lead to the discovery of a criminal offense. 688 In such cases—or where
evidence has been otherwise obtained—an investigation is opened and the person may be placed in a period of prolonged police custody called garde à vue. 689 At that point, French police have the power to detain a witness for a prolonged period during the preliminary phase of the investigation, without ever charging the individual, before turning over the suspect to the judicial police, who may then hold the suspect for years and continue their investigation up until the time of trial. 690

To understand how this system works, however, it is important to understand the context of the larger procedural model in which this detention regime operates. French criminal procedure is normally characterized as inquisitorial in contrast to the adversarial systems that prevail in the United States and the United Kingdom. 691 This implies a judicial model that assumes a more centralized and institutionalized state role. 692 While French criminal procedure has taken on a number of adversarial elements in recent years, the system nonetheless remains strongly rooted in the inquisitorial model. 693

Whilst the UK system focuses very much on the roles of the individual parties, the French legal process continues to have a state-centered conception of justice. During the pretrial phase in particular, the focus of investigation is the offense rather than the suspect. The judge maintains a central role during the investigation. As a magistrat representing the public interest (rather than that of the prosecution or defence) she is charged with searching for the truth, gathering evidence which might exculpate as well as incriminate the suspect. The defence rights of the accused have been somewhat neglected, in part because the public orientation of the magistrat is considered sufficient protection and also, because the accused has been traditionally seen as an
France

object of the search for truth rather than a party to the proceedings. 694

It is upon this pretrial phase of the French investigation, and the concomitant mechanisms for detention, that this chapter shall focus. Before thrusting headlong into the topic of French detention, however, it is

prudent to briefly overview the basic parameters of that pretrial phase, its main players, and its terminology.

French Pretrial Investigation

Under French criminal law, as with other legal systems, there are different classifications of crime depending on the severity of the conduct: crimes, délits, and contraventions. 695 The most serious offense is known as a crime and is the rough equivalent of a felony in American law. 696 Délits carry a possible sentence of imprisonment, but are less severe than crimes. At the lowest end of the spectrum are contraventions, a classification reserved for petty offenses. 697 Each specific category of crime entails specific procedures and can be determinative not only of the course of the investigation, but also of the permissible parameters of detention. To avoid confusion with the term crime, which carries with it a specific meaning in the French context, this chapter shall use the term “offense” when referring generally to violations of the law.

There are two sorts of investigation under the French criminal system. The first is the police investigation and the second is the judicial investigation, or instruction. Prior to the judicial investigation, the police receive reports of crimes and conduct the initial inquiries. Depending on the type of crime, the case may remain under police investigation or may be referred to an investigative judge—the juge d’instruction—for further investigation. 698 In each
sort of investigation, French investigators can employ investigative detention mechanisms that allow for the detention of suspects while investigators ferret out evidence of crime.

**Police Investigation**

There are four different classifications of investigations under the French system. The preliminary inquiry (*enquête préliminaire*) is a kind of investigation that is possible under any circumstance, regardless of the gravity of the offense. This kind of investigation may be commenced by the *procureur de la République* or simply the police, though the police must thereafter report to the *procureur de la République* if they commence such an investigation on their own. Richard S. Frase has noted that these inquiries are the sole form of investigation for the majority of cases involving traffic violations and other minor infractions. Until recent changes in the law, searches and seizure of evidence during such investigations could not be effected without the written consent of the suspect, and police could not summon witnesses or detain suspects. Current legislation still in place requires citizens to cooperate with the preliminary inquiry and allow searches to be done in preliminary inquiries, in cases of terrorism or narcotrafficking, with judicial authorization.

The investigation into flagrant offenses (*enquête de flagrance*) is a separate sort of investigation. An offense is considered “flagrant” if it is in the process of being committed or has just been committed. An offense is likewise flagrant if, at a time very close to the action of the crime, the suspect is pursued by “a public clamor” or is found in possession of objects, or presents traces or indications of evidence that leads to a belief that he or she participated in the offense. In the event of an offense that is deemed “flagrant,” the judicial police may search the scene and seize evidence. Officers may also
search the domiciles of all persons who appear to have participated in the offense or who may have evidence and seize any evidence found. They may detain any person on the scene until completion of the investigation, and summon by force and interrogate any person capable of furnishing evidence. 704

In the majority of French criminal cases, however, the procureur directs and oversees the investigation. 705 As the work of the police is placed under his or her direction, he or she may order the opening of an investigation or even delay a full investigation and order a preliminary inquiry. 706

**Judicial Investigation (Instruction)**
The two main types of police in France are the administrative police (*police administrative*) and judicial police (*police judiciare*). 707 Administrative police are focused on the prevention of crimes and the maintenance of public order while judicial police are largely responsible for finding criminals once offenses have occurred. 708 Of these two groups,

the *police judiciare* conduct the investigations and are granted the primary police powers of detention. The *police judiciare* act pursuant to the orders of the *procureur de la République* or on their own during the preliminary inquiry, but once a judicial investigation has begun, they must act pursuant to the orders of the investigative judge. 709

Although the judiciary in France has an investigative role, the investigative judge may not, however, investigate on his or her own initiative. 710 Rather, once an offense is committed and evidence of it is brought before the *procureur de la République*, the *procureur* may request a judicial investigation (*instruction judiciaire*). 711 The *procureur* makes the request for an *instruction* to a separate judicial body known as the *Chambre de l'instruction*. That body may then
appoint a judge to investigate the matter. 712 It is, thus, only after some evaluation and oversight that such an investigation can be initiated.

The purpose of the *instruction* is to attain enough evidence that the case under investigation can be brought to trial. 713 It generally only takes place for serious offenses such as *crimes* or *délits*. It is obligatory where a *crime* has occurred but may also be used where a *délit* is suspected. It may technically even be used in the case of a *contravention*. 714 Thus, although the judicial investigation is reserved for more serious crimes, it remains technically available for minor matters. 715 Catherine Elliott has noted that the key practical difference between the police investigation and the *instruction judiciaire* is the greater coercive powers given to the investigators in the latter. 716

These judges have wide powers. They can visit the scene of the crime, carry out a reconstruction of the offense (when the accused and their lawyer will normally be present), hear witnesses, search and seize property, arrest the person charged, and, most importantly, place them on remand in custody, or release them on bail with conditions imposed. 717

In the course of the *instruction*, the investigating judge investigates the matters laid out in the *procureur's* request and has a broad mandate to pursue all possible investigative leads and avenues of inquiry. In this quest, the judge directs a special cadre of police known as the judicial police (*police judiciaire*) who interview witnesses and seek out evidence. 718 That evidence is compiled and given to the investigating judge. If the investigating judge feels the investigation has yielded
enough evidence to go forward with a prosecution, the evidence is then sent to the procureur de la République for prosecution. 719

The French Experience and the French Response

Jacqueline Hodgson, professor of law at the University of Warwick, has noted that the emphasis of modern French criminal legislation has vacillated between security concerns and concerns associated with individual rights. 720 This vacillation has been motivated by events impacting the French polity at various times in its recent history, including its experience with terrorism.

In the 1950s and the 1960s, France experienced a wave of terrorist attacks linked to Organisation de l'Armée Secrète (OAS), a French anti-independence group with links to the French armed forces, French nationals in Algeria, and Algerians who were dissatisfied with French policies in Algeria. 721 France acted aggressively to counter this phenomenon of terrorism by setting up a “military justice court” to judge cases involving Algeria and terrorism. This special court operated using alternative procedures and no appeal was allowed from convictions it adjudged—even capital convictions. 722 The military justice court operated for only a brief time before encountering judicial resistance from France's Conseil d'Etat, which found its procedures lacking, annulled the ordonnance establishing it, and ended its operation. In response, the French government replaced the military justice court with a State Security Court (Cour de sûreté de l'Etat) in 1963, under the direction of Charles DeGaulle. This second version contained civilian magistrates, as well as military members, and allowed for the possibility of an appeal from convictions it rendered. The Cour de sûreté de l'Etat continued to operate in this form for decades. 723 Thus, in its early experience with terrorism,
France first adopted a procedure that fell largely outside of its organic legal system.

Terrorism linked to Algeria was not, however, the only sort France would encounter. Between 1979 and 1987, France faced yet another source of terrorism from leftist groups. These groups were composed mainly of French citizens and were motivated by a plethora of diverse causes, such as opposition to capitalism, perceived American imperialism, and support for immigrant laborers and workers groups. The most prominent of these was Action Directe, an organization that perpetrated high-visibility attacks on government property and even conducted political assassinations. The violent attacks perpetrated on French soil by this group (and splinter elements) during their existence were numerous. They included the machine-gunning and bombing of government buildings, as well as robberies designed to finance further terrorist activities. The French government's response to Action Directe was quick, utilizing the State Security Court to capture and convict many of the group's leaders.

The most persistent source of terrorism in modern France, however, has been separatist groups advocating independence or autonomy for specific regions. Such groups have also been the least deadly, as their principal targets have been property. The first separatist groups became active in France in 1969, in the form of groups like the National Liberation Front of Brittany (FLB), which focused on inflicting material damage to property that associated with the French state. The FLB was responsible for such attacks as the bombing of several television transmitters in the early and mid-1970s, and the damaging of the Hall of Mirrors at Versailles in 1978. As with Action Directe, most of its members were taken into custody in the early 1980s, and many were convicted by the State Security Court.
This course of action against the FLB was rather effective and, as a result, the FLB largely ceased its activity.

Another prominent separatist movement to use terrorist tactics on French soil was the National Front for the Liberation of Corsica (FLNC), which became active in 1976. The FLNC carried out bombings, conducted attacks on politically significant property, and conducted political assassinations. In contrast to other groups, however, commentators note that repressive measures, such as swift police action and the use of the State Security Court, only served to radicalize this group and, thus, proved somewhat ineffective as a countermeasure.

Until the 1980s, the French government combated terrorism with the same instruments and methods that had been used against the OAS in the 1960. In 1981, however, with the regime of Francois Mitterrand in power, France abolished the State Security Court, which had become viewed as a symbol of political oppression. Thereafter, the French government initially took the view that no special legislation was required to address terrorism. Acts of terror or political violence were neither given special status nor addressed by any special procedure or mechanism. The beginning of 1980s would, however, bring a series of events that would alter that view and mark a turning point in the way the French government would deal with terrorist activity.

Notably, on October 3, 1980, a motorcycle loaded with explosives was detonated outside of a synagogue on the Rue Copernic in Paris, killing four people and wounding eleven. Five other attacks on Jewish targets already had been carried out that week. These attacks, which were perpetrated by terrorists from the Middle East,
were accompanied by other significant terrorist activity abroad, such as the suicide bombing that killed fifty-eight French troops in Lebanon. This resulted in a public outcry that demanded legislative action. First, the French government enacted the law of February 2, 1981, on Sécurité et Liberté. That law was followed by legislation in 1981 that codified and enhanced police powers to stop individuals and conduct identity checks. Nonetheless, terrorism in France continued unabated.


In September of 1986, with concerns over terrorism still growing, the French government responded with dramatic counterterrorism legislation that contained fundamental reforms to the domestic French criminal justice system. This legislation was remarkable in that it was the first French legislation to specifically address the concept of terrorism, and, for the first time in French legal history, terrorism was recognized as a distinct criminal act. These reforms also centralized all judicial proceedings relating to terrorism and created a streamlined judicial apparatus for such offenses. New, specialized
organs within the French government were created, centralizing all proceedings related to terrorism in the Trial Court of Paris, as well as creating a small section of prosecutors and investigating magistrates who focus exclusively on matters related to terrorism. It also, as discussed more fully later in this chapter, altered the French laws of detention. This new paradigm—a specialized entity within the organic criminal justice system—would define the contemporary French approach to counterterrorism.

The concerns about the dangers of terrorism had produced a dramatic impact on the French criminal justice system. Public outrage had led to greater government power. By 1993, however, the pendulum swung away from issues of security, and the legislative emphasis returned to concerns over individual rights. The Criminal Justice and Human Rights Commission (Commission justice pénale et droits de l'homme), which was chaired by Mireille Delmas-Marty, was formed to examine ways of reconciling French criminal procedure with the European Convention on Human Rights. Its proposals resulted in greater regulation of the detention of suspects by police and the weakening of the police detention powers by requiring that police inform the procureur of a person's detention at the beginning of the period of police detention. The 1993 legislation also granted new rights to suspects in detention, such as the right to inform another of one's detention and the right to see a doctor. French suspects were also given greater access to a lawyer during confinement. The strengthening of these rights for criminal suspects represents what Jacqueline Hodgson has called the French concept of sûreté—a notion that finds its roots in the 1789 Declaration of the Rights of Man and which concerns the freedom from arbitrary arrest.
The emphasis on usûreté and individual liberties would, however, be short-lived. Subsequent terrorist attacks would result in renewed emphasis on national security. In 1994 twelve French nationals were killed in Algeria by a fundamentalist Islamic terrorist group known as the Groupe Islamique Arméé. Shortly thereafter, that same group seized an airplane belonging to Air France at an airport in Algiers, demanding the release of two leaders of the Islamic Salvation Front. Then, in 1995, a gas cylinder exploded in the Saint Michel–metro station, marking the launch of a series of terrorist attacks on French soil that would kill twelve people and wound 173. Islamic terrorism was making itself known in France and, in keeping with its historical pattern, the French government was, again, swift to respond with strong antiterrorist legislation, which expanded certain terrorism-related provisions of French criminal law.

When the noise subsided and calm was restored, domestic affairs would impact the prevailing mood in France so that individual liberties and abuse of power were again an emergent concern. In 2000, after a number of scandals involving high-ranking politicians, President Jacques Chirac established a Commission de réflexion sur la justice,—which was chaired by Pierre Truch, the president of the Cour de Cassation. This commission—and the legislation it inspired—resulted from the desire to bring French law—into conformity with the ECHR. Its reforms, thus, further impacted the institution of garde à vue by allowing custodial legal advice at the outset of detention, requiring the police to inform the suspect of his or her right to remain silent and requiring the police to advise the suspect of the crime of which he or she is suspected. The power to detain witnesses in police custody was also removed. The star of individual liberties was once again in the ascendant.
Then came September 11, 2001. The reverberations of the explosions in New York would push the pendulum of public concern back toward issues related to security, where it has largely remained. In 2001, with France already experiencing rising crime figures, the shock of the September 11 attacks heightened public concern about crime and terrorism. Thus, in November of 2001, a controversial piece of legislation was passed known as the *loi relative à la sécurité quotidienne*, which enhanced police powers for the purposes of targeting a broad range of crime, including terrorism.

This law would not, however, mark the apogee of this trend in French law. The appetite for greater security measures was unabated and the French political climate became increasingly dominated by national security concerns. The government, in response, focused on augmenting the country's national security apparatus. Then interior minister Nicolas Sarkozy pushed forward numerous pieces of legislation that increased police power. This movement to strengthen police powers resulted in the 2003 *loi pour la sécurité intérieure*, which set out new offenses related to prostitution, begging, and threatening or hostile gatherings, but also repealed the recently enacted requirement that a suspect in detention be informed of his or her right to remain silent. Most recently, in 2006, the French government passed the *loi relative à la lutte contre le terrorism et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers*, which further augmented the police powers of detention and was designed to specifically address concerns related to terrorism.

Thus, a cursory overview of recent French history reveals frequent and intense confrontations with a wide variety of terrorist organizations. It also reveals France's search for an acceptable means of combating the terrorist phenomenon. The first decades were
characterized by the use of a special court with military members and special rules. The last few have been characterized by augmentations of the existing tools available in ordinary French criminal law. A significant aspect of France's recent legislative initiatives has been the enhancement of the regime of law governing detention of terrorist suspects and modifications of criminal law with respect to the nature of detention in terrorist cases.

**Terrorism Under French Criminal Law**

The French definition of *terrorism*, enacted in 1986, is extremely broad. Article 421-1 of the French penal code defines *terrorism* as the commission of certain specified crimes when acting intentionally as part of an individual or collective enterprise having for its goal the disruption of public order by intimidation or terror. These crimes include physical attacks against the life or physical integrity of a person, as well as theft or destruction of property. Crimes like production or possession of explosives and certain weapons are also included under the definition of terrorism. The definition, however, also includes certain acts not normally associated with terrorism, such as certain *infractions en matière informatique* (information technology crimes). An example of the latter would be the possession of falsified identity documents by an individual participating in an organization intending to disrupt public order by intimidation or terror.

As previously noted, legislation in 1996 also made it an act of terror under French criminal law to participate in a group formed with the intent to commit a terrorist act, so long as there are indications of preparation for such an act characterized by material facts. Thus, with an already broad definition of conspiracy in place, the
notion of conspiring to commit a terrorist offense became a part of French criminal law. Shapiro and Suzan noted that this notion of conspiracy to commit terrorism as a separate crime allowed investigating magistrates to “link suppression with prevention to ensure that terrorist actions never materialize.” This stands in contrast to normal French law, which requires an infraction before a judicial investigation may begin.

All terrorist cases in France are handled by specialized organs within the French government, and all cases related to terrorism are centralized in the Trial Court of Paris, where a small section of prosecutors and investigating magistrates focus exclusively on matters related to terrorism. Such cases are now handled by the Central Antiterrorist Service (SCLAT) (also referred to as the 14th Antiterrorist Section) in the Cour d'Appel of Paris. The SCLAT is composed of five prosecuting magistrates and four investigative judges. Parmentier noted that this group has responsibility for terrorism cases throughout France and, thus, can demand to examine any matter considered sufficiently sensitive to be judged on a national level. Thus, the same basic paradigm exists for the investigation of terrorist cases as exists in ordinary criminal matters, but the judicial apparatus that will engage in the matter is a specialized one and—as will be demonstrated—one that operates with far greater investigative powers at its disposal.

French Law of Detention

Detaining a person for interrogation is a critical aspect of the French criminal process, as it isolates the suspect so that he or she may be probed for information while preventing the suspect from
communicating with others, such as accomplices to the suspected crime. There are three principal means of detention in France of detaining individuals who have not yet been convicted of a crime. They are

(1) the identity check procedure known as the contrôlè d'identité,
(2) the period of police control known as garde à vue, and
(3) the pretrial period of detention known as détention provisoire.

On the one hand, the contrôlè d'identité allows for an individual to be briefly detained for limited purposes, but it can be effected for a wide variety of reasons. Garde à vue, on the other hand, allows French authorities to arrest suspects and hold them without charge for a prolonged period of time (normally two days) while police gather evidence to determine whether further investigation or legal action is warranted. Détention provisoire, thereafter, allows for detention of an individual prior to trial. The result is a formidable regime of detention that provides French authorities with an effective instrument of counterterrorism.

**Contrôlè d'Identité**

The ability to stop an individual and briefly detain that person for purposes of checking his or her identity is known as the contrôlè d'identité.

Contemporary French criminal law states that every person found on French territory must possess a form of identification. The judicial police and their agents may stop and verify the identity of any person (a) of whom there are one or more reasons to suspect of committing or attempting to commit an infraction, (b) who is preparing to commit a crime or délit(c) who seems able to furnish information useful to an investigation into a crime or délit or (d) who are the object of
investigation of a judicial authority. In the event that a person cannot or will not verify his or her identity, that person may be detained and brought under police control for purposes of verification. If the person persists in refusing to verify his or her identity, photographs and digital fingerprints can be taken for purposes of verification. The person may not be detained any longer than is strictly necessary for purposes of learning his or her identity and may not be detained longer than four hours.

The contrôle d'identité power was originally granted to police by the ordonnance du 2 Novembre 1945, which gave police the authority to verify the status of foreigners in France. The law of June 10, 1983, formally codified this means of detention and created in the Code de Procédure Pénale, for the first time, a chapter on contrôles d'identité. The newly codified law fixed the time limit for such detention to four hours but expanded the scope of the police power by permitting judicial police to stop anyone (not merely foreigners) for the reasons now set forth in article 78-3 of the Code de Procédure Pénale. Thus, what was once a means of verifying the status of foreigners in France was transformed into a general crime prevention tool of general applicability. This represents a considerable development in this form of detention, as it introduced a new, albeit limited, means of detaining individuals in France—including domestic citizens—for the purpose of acquiring information.

A subsequent modification to the law in 1986 enhanced that ability even further by providing that a person may be stopped and his or her identity verified to prevent a breach of public order, notably, to the security of persons and goods. The amendment allowing for a person to be stopped for reasons of public order was specifically
designed to eliminate the need for suspicion of some immediate threat to public safety. Thus,

rather than suspecting a specific crime or an immediate act, French police need only believe that there is a potential breach of public order. The result is that French law does not require individualized suspicion of a crime or immediate danger in order to stop and briefly detain people on French soil. So long as there is a belief of a potential breach of public order, persons in France can be stopped and placed under the *contrôle d'identité*.  

One sees in the French system a distinction from its U.S. and British counterparts in both the power granted to police and the rationale for the stop. The normal ability to stop a person under those other systems previously analyzed is somewhat more limited. U.S. police may, under normal circumstances, only briefly stop those reasonably suspected of a crime and search persons who might pose a danger to the officer. Although this power is quite broad, it still requires some particularized suspicion of criminal activity. Likewise, under PACE, police in the United Kingdom may briefly stop and perform a limited search if there are grounds for suspecting the person has stolen or prohibited articles. The French system, however, allows for someone to be stopped — absent particularized suspicion — and briefly detained by police, or, in certain circumstances, brought back to the police station for purposes of identification.

**Garde à Vue**  
The French legal institution of *garde à vue* entails the temporary detention, surveillance, and interrogation of a suspect at a police station or with the *gendarmerie*. The power to detain someone for investigative purposes was much greater prior to 1958, as there was no law regulating police custody at that time. During that era, both suspects and witnesses could be placed in police custody — though
witnesses could only be detained long enough to give a statement.  

792 It was only with the enactment of the Code de Procédure Pénale, which replaced the older Code d'Instruction Criminelle, that a legal basis was given to this police practice. 793 Since then, in contrast to the United States, the French power to hold witnesses has suffered a degree of erosion. Legislation passed in 1993 removed the power to detain witnesses in enquêtes preliminaries, 794 though until 2000, witnesses could still be put into police custody for other types of investigations (enquêtes flagrantes and instruction). Today, witnesses can still be detained by force but only for up to four hours in order to take a statement. 795 This is because the true subject of modern garde à vue is not the witness to a crime, but the suspect. The contemporary French Code of Criminal Procedure, thus, states that an officer of the judicial police may, for purposes of an investigation, place any person in garde à vue where there is one or more reasons to suspect that he or she has committed or attempted to commit an offense. 796 Mere witnesses to an offense, however, can only be detained long enough for a statement to be taken by the investigating officers. 797

The question of who a suspect is for purposes of garde à vue has been the subject of much legislative attention. A law of June 15, 2000, previously defined a suspect as one who has “indications that allows for the presumption that he or she committed or attempted to commit an offense.” 798 On March 4, 2002, that definition was modified so that a police officer need only have “one or several plausible reasons to suspect that he or she committed or attempted to commit an offense.” 799 This definition is more subjective and, thus, more expansive than its predecessor. 800
Normally, a person cannot be kept under garde à vue more than twenty-four hours. That period of time, however, can be prolonged in ordinary cases for an additional twenty-four hours with the permission of the procureur de la République. Thus, in certain circumstances, the normal length of detention for someone suspected of a crime may be extended to forty-eight hours.

Rights During Police Detention

All persons placed under garde à vue are immediately informed by an officer or agent of the judicial police of the nature of the crime for which they are being investigated, as well as their right to notification of their placement in garde à vue, their right to be examined by a doctor, and their right to consult with an attorney. These rights, discussed more fully in the following pages, constitute the principal rights of a suspect under this form of detention, but they are subject to a variety of exceptions and limitations.

Right to Inform Another of One's Status

All persons in garde à vue have the right to inform, via telephone, a person with whom they live, a parent, a brother, a sister, or an employer of the fact that they are in police custody. This right is not absolute and can be disregarded if the judicial officer decides to do so to for necessities of the investigation. Should the judicial officer decide to deprive a suspect of this right, he or she must immediately refer the matter to the procureur de la République, who determines whether the right of notification may be disregarded. French law enforcement can, therefore, hold a person and significantly limit the person's ability to inform another of the fact that he or she is detained. In the event the procureur decides to disregard this right of notification, the suspect can basically be held incommunicado.
Right to Be Inspected by a Physician

All persons in garde à vue have the right to be examined by either a doctor designated by the procureur de la République or an officer of the judicial police. 806 In the event that their period of confinement is prolonged, they may demand to be examined a second time. 807 The procureur or the judicial officer may also, at any time, designate a doctor to examine the suspect confined. 808 In addition, in the absence of a request to be examined (by the suspect, procureur, or police officer), a member of the suspect's family may request an examination to be conducted by either a doctor designated by the procureur de la République or an officer of the judicial police. 809

Right to Counsel

All persons in garde à vue have, at the very beginning of the process, the right to consult with an attorney. 810 If there is not a way to contact a chosen lawyer at that time, then he or she may request to be provided one by the bâtonnier. 811 The attorney provided will be informed of the nature of the charges against the suspect and may consult with the suspect in conditions guaranteeing confidentiality. The lawyer, however, is not allowed to review the police files, attend the investigation, watch the interrogation, or tell anyone about the interview so long as the suspect is in custody. 812 In addition, the attorney may only consult with the suspect for thirty minutes. 813 If the garde à vue is prolonged, then the suspect may again, at the outset of the extended period, request to consult with an attorney.

Under prior legislative schemes, the French Code of Criminal Procedure contained specific time periods that triggered a suspect's right to consult with an attorney. For instance, the Act of 1 March 1993 stated that a suspect had a right to see a lawyer after twenty
hours of detention. This was amended by the Act of 15 June 2000, which gave the suspect the right to see an attorney within an hour, then again after twenty hours, then again after thirty-six hours. This was modified again in 2004 to the current paradigm, which allows, in normal cases, for an attorney to see the suspect at the very beginning of the period of detention and then again, in cases of prolongation, after the twenty-fourth hour of detention. This strengthening of the right to consult an attorney in the 2004 legislation, however, did not apply to cases involving suspected terrorism.

**Right to Be Inspected by a Physician**

The right to remain silent technically exists under French criminal law insofar as suspects are not required to answer questions posed by law enforcement personnel. Only suspects appearing before an investigative judge, however, are informed of this right—meaning that suspects who are placed under garde à vue are not. Exercise of this right can also lead to adverse inferences being drawn at trial:

> The law prescribes that the judges and jurors ask themselves, when deliberating upon their verdict, “what impression the means of defense made upon their reason.” If an accused does not respond, or responds partially or implausibly, to incriminating evidence, the effect upon the minds of the judges and jurors is very likely to be adverse to the accused. Where the legal culture encourages responses to officials and where responses are thus expected, it is not difficult for courts to draw adverse inferences from the silence of accused persons, or more particularly the failure to respond to official questioning. The legal culture in France would not support a rule, as in some common law jurisdictions, prohibiting comment by a judge or a prosecutor to a jury on the failure of an accused to answer questions from the police or to give evidence. Certainly at hearings in
France it is not uncommon to hear the presiding judge inform an accused who is silent on prevaricating under interrogation that the court will draw its own conclusion from such behavior. 818

Thus, in contrast to the phalanx of rights granted the accused in the United States to shield him or her from police power, the rights of the French detainee are comparatively limited. In further contrast to the United States, where the right to a lawyer is sacrosanct and the invocation of the desire for a lawyer ends the interview, or to the British system, which allows for limited continued interrogation and a brief delay in access to counsel, the French system merely allows one to consult with an attorney prior to the interrogation—and only for thirty minutes. A suspect may access a lawyer thereafter, but only at specific points. The lawyer does not attend the interview, notice of a desire to speak with an attorney does not end the interview, and the attorney is even bound to keep the fact of the investigation confidential so long as the suspect is in custody. Further, although a technical right to silence exists, the suspect does not have to be informed of it.

It is here in the domain of police detention and the rights afforded to a suspect that one sees the greatest contrast with the U.S. and British systems. French police may detain a person so long as there are reasons to suspect a possible violation of the law—and for the express purpose of gathering information. There is no requirement for a warrant, no need for a pretext, and no requirement that the person be a danger of some sort or a flight risk. It is a detention of a suspect for the purpose of carrying out an interrogation—and it may last up to forty-eight hours. In comparison to its Anglo and American counterparts, therefore, the French law of garde à vue is an intimidating and potent legal device, even in its ordinary application. It is clearly designed
to give police the most power to elicit information while minimizing legal protections available to the accused. It is, further, a mechanism that is well utilized. The use of garde à vue is already frequent and is becoming even more so. The number of incidents wherein suspects were subject to garde à vue in 2004 was 472,064. Of that number, 386,080 were over twenty-four hours, demonstrating that the prolongation of the duration of detention is also frequent.

Arrest and Comparution Forcée

Other means of detaining suspects available to French law enforcement authorities are the powers of arrest and what is known as comparution forcée. Where there has been a crime or a délit that is both flagrant and punishable by imprisonment, French law allows that any person may apprehend the offender and bring him to the nearest police officer. Otherwise, a person may only be arrested on a warrant from either the investigative judge or the presiding judge of the Chambre de l'instruction. French authorities may also detain individuals through the process of comparution forcée (literally, “forced attendance”). Pursuant to their powers of forced attendance, authorities in France have the power to have suspects detained and brought before them via the force of a legal instrument known as a mandat d'amener. The mandat d'amener is given to police, who then must bring the person before the authority that issued it. This can be issued against any person suspected of having committed an offense. This allows the procureur or investigative judge to have anyone suspected of having taken part in a flagrant crime to be brought immediately before him or her to face questions.

In cases involving a crime that is flagrant, if the investigative judge has not already assumed control of the case, the procureur may
issue a *mandat d'amener* for any person who is suspected of having participated in the offense.  

In cases where there has been a formal decision to bring a case to trial (*mis en accusation*), an order of *prise de corps* is issued that orders the detention of any accused not already in custody.  

Such an order can also be issued against an accused who violates the conditions of his or her bail.  

An order of *prise de corps* can remain effective until such time as the court has reached a final decision.

**Détention Provisoire**

The legal device of *détention provisoire* was actually known as *détention préventive* before it was renamed by legislation passed in 1970. In spite of the implication of its former name, this means of detention is distinguishable from actual preventive detention in that it has always been considered to be the detention of a suspect prior to trial rather than the indeterminate detention of someone considered dangerous. Its new name, therefore, was an apt redesignation. In spite of its name change, the essence of the device has remained the same—the detention of a suspect under investigation pending trial.

Prior to the 1958 Code of Penal Procedure, French law allowed detention in cases where it was necessitated by “frequent exigencies of public policy or the quest for the truth.” The 1958 Code of Penal Procedure formalized this rule of law, stating that “preventative detention is an exceptional measure.” Nonetheless, the law of that time still allowed a rather sweeping power of detention in which any suspect facing a term of imprisonment could be placed in detention. That period of detention could not ordinarily exceed a period of two months, but it could be extended for an additional two months if the *procureur de la République* requested an extension from an
examining judge. There was no limit to the number of extensions that could be granted.

Not all suspects were, however, doomed to such a fate. For instance, those suspected of only petty offenses could not be placed in detention. In cases where the maximum penalty was less than two years and the suspect was domiciled in France, the suspect could not be detained for longer than five days after his or her first appearance before the examining judge. Likewise, the 1958 Code of Penal Procedure mandated that suspects be released from detention when the suspect was domiciled in (or had a de facto residence in) France and had never been convicted of a crime or a délit correctionel for which the penalty was imprisonment for a term exceeding three months. Those not entitled to mandatory release could still request release but were not entitled to it.

The current law in France reaffirms that a person under investigation is presumed innocent, but that, in exceptional cases, for the necessity of the investigation or for reasons of security, a person can be placed in détention provisoire. Legal reforms in 2000 largely allocated the power to order such detention to the juge des libertés et de la detention. This kind of detention is limited to a person being investigated for a crime or a délit correctionel for which the penalty is three years' imprisonment or more. Further, such detention cannot be ordered unless it is shown that lesser measures (such as contrôle judiciaire) would be insufficient for the attainment of one of the following objectives: to preserve evidence; to prevent the influencing of witnesses; to prevent confederation between the person under investigation and coconspirators or accomplices; to protect the person under investigation; to guarantee the presence of the person for
judicial proceedings; to stop an infraction or prevent its recurrence; and to stop exceptional and persistent threats to public order provoked by the gravity of the infraction, the circumstances of its commission, or the importance of the prejudice caused by the offense. The judge will issue the order for detention after an adversarial hearing in which he or she hears the submissions of the prosecutor, the observations of the person under investigation, and (if applicable) the accused's lawyer.

For cases involving délits correctionels, the period of detention may not exceed four months if the person is only being investigated for a crime that carries a maximum penalty of five years and has not been previously convicted and sentenced to over a year in prison. In all other cases, the period of detention may be prolonged by the juge des libertés et de la détention after an adversarial hearing (débat contradictoire) for an additional four months. The period can still be prolonged thereafter, though the total length of detention should not normally exceed one year. In all cases, the law states that the duration of détention provisoire may not exceed a reasonable time. What is considered reasonable depends on the seriousness of the crime and the complexity of the investigation.

Prior to legislation passed in 2000, there was no limit on the period of détention provisoire for cases considered crimes. Under current law, for cases involving crimes, a person may not ordinarily be kept in détention provisoire for more than one year, though that period may be prolonged for six months by the juge des libertés et de la détention after an adversarial hearing (débat contradictoire). This period of detention may be prolonged again but may not exceed two years if the maximum penalty faced by the person being investigated is less than
twenty years’ imprisonment. Otherwise, the period of detention may be extended to three years—and four if the offense took place outside of French territory. 853 In cases of both délits correctionels and crimes, the period of detention can be extended even further in certain cases.

In is important to emphasize that détention provisoire is a power of the juge des libertés et la detention and is linked to the conduct of the judicial investigation. Thus, suspects are not merely warehoused during this period. While in détention provisoire, suspects are interrogated and an active investigation into their suspected crime takes place outside their cell walls. Investigators are actively gathering evidence while the suspect is kept under lock and key. 854 This makes détention provisoire a powerful investigative device, as it allows for law enforcement to detain the suspect for far longer periods than police may in garde à vue and carry on an active investigation without risk of spoliation of evidence. In addition, while a person may generally receive visits and communicate with the outside world while in détention provisoire, a suspect may be denied communication with anyone other than an attorney for a period of ten days. This period can be renewed for an additional ten days. 855

In the area of interrogation, however, the investigative powers of the state during détention provisoire become rather limited. Once an investigation is opened, the investigating judge will question the suspect but will first advise the suspect of his or her right to remain silent and that he or she has a right to have his or her attorney present. 856 Thus, détention provisoire enables the investigative judge to detain a person for a longer period of time pending trial—but in circumstances in which the detainee has greater rights.
Counterterrorism Enhancements in the French Law of Detention

Contrôle d'Identité
As previously discussed, the contrôle d'identité was augmented in 1986 by allowing that a person may be stopped and his or her identity verified to prevent a breach of public order, notably, to the security of persons and goods.  

857 This was specifically designed to eliminate the need for suspicion of some immediate threat to public safety and, instead, allow police to briefly detain an individual with only suspicion of a potential breach of public order.  

858 Although this broadening of police power occurred during a period of time when the French government was specifically concerned with terrorism and its effects,  

859 still –no special provision exists for contrôle d'identité in cases of terrorism. The length of contrôle d'identité and reasons for effecting a stop under its auspices have not been enhanced for terrorism cases, and no special set of rules applies in such matters. Thus, while this is certainly a police power that can be effectively employed for counterterrorism purposes, there is no true augmentation for counterterrorism purposes in the regime of law governing the contrôle d'identité.

Garde à Vue
A review of garde à vue, however, reveals wide derogation from the general rule. The 1986 antiterrorist legislation expanded garde à vue for individuals suspected of terrorist crimes, allowing for an additional forty-eight-hour extension of detention on top of the ordinary forty-eight-hour period that a suspect could already be held without charge.  

860 Thereafter, the law of March 9, 2004, enlarged
the range of exceptions for garde à vue and allowed for prolonged detention for a larger group of offenses. Currently, according to article 706-88 of the French Code of Criminal Procedure, the length of garde à vue can be extended for two periods of twenty-four hours each in cases of particularly severe crimes, such as terrorism, torture, and narcotrafficking, after the initial maximum period of police detention has been exhausted. 861 There now exists, therefore, a category of diverse crimes—including terrorism—for which an exception to the forty-eight-hour limit exists and for which the period of garde à vue can be extended for an additional forty-eight-hour period.

Although the “exceptional” category of offenses was broadened so that terrorism was no longer the unique trigger for such prolonged detention,

the specter of terrorism would still prompt French legislators to expand the length of police detention for terrorist suspects beyond the ranks of other crimes and again grant it its own special status. The legislation of 2006 (Loi relative à la lutte contre terrorism et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers) further augmented the police powers of detention by allowing for another additional forty-eight-hour period of detention in specific terrorism cases. 862 Under current French law, therefore, if the preliminary investigation reveals a serious risk of an imminent act of terrorism on French soil or elsewhere, or if the investigation reveals that that the necessities of international cooperation make it imperative, the juge des libertès can prolong the period of garde à vue in terrorist cases for an additional twenty-four hours. This twenty-four-hour period can be extended once. Thus, two decades after the initial forty-eight-hour extension of garde à vue in terrorism cases, the current regime of French law allows for a terrorist suspect to be held in garde à vue for a period of up to 144 hours (six days). 863
Rights During Police Custody

Another aspect of garde à vue that is exceptional insofar as terrorism is concerned is the manner in which a suspect is afforded his or her right to counsel. As previously noted, the right to consult with an attorney during garde à vue is a recent innovation that was introduced into the French criminal process in 1993. 864 In normal cases, an individual in garde à vue has a right to consult with an attorney at the very beginning of the period of detention and then again, in cases of prolongation, after the twenty-fourth hour of detention. 865 In cases of terrorism and narcotrafficking, however, the individual may not consult with an attorney until the seventy-second hour (after the second prolongation of detention.) 866 Thus, terrorism suspects will not be afforded the same rights as ordinary suspects in this regard for at least three days.

It is also worth noting a certain change that does not apply specifically to terrorism, but which has been effected in recent national security legislation. The 2003 loi pour la sécurité intérieure had a much broader impact than crimes involving terrorism, setting out new offenses related to prostitution, begging, and threatening or hostile gatherings. 867 The most significant aspect of this law vis-à-vis detention, however, is that it repealed the requirement that a suspect be informed of his or her right to remain silent. 868 Hodgson elaborated on the effect of this reform:

In the vast majority of cases, this means that there is no requirement to inform the suspect of her right to remain silent during the investigation against her. In the small minority of cases (less than 5 percent) where suspects are investigated under the instruction procedure, they will be informed of their right to silence once brought before the juge d'instruction, but only after having been
France

detained and interrogated by the police for up to 48 hours, or four days in very serious cases. 869

Accordingly, the right to remain silent under French law exists, but suspects will not, in the majority of cases, be notified of it. The obvious implication of this is that suspects will be more likely to speak to investigators when questioned and provide information about criminal activity.

Détention Provisoire
As noted, legislation passed in 2000 actually curbed detention in remand in France by imposing limits on the amount of time a person could be detained prior to trial. 870 French authorities still, however, have broad latitude to hold suspects in terrorism cases. Although, under current law, for cases involving crimes, a person may not ordinarily be kept in détention provisoire for more than one year, and that period may be prolonged for six months by the juge des libertés et de la détention after an adversarial hearing (débat contradictoire). 871 This period of detention may be prolonged again but may not exceed two years if the maximum penalty faced by the person being investigated is less than twenty years' imprisonment. Otherwise, if the maximum penalty faced by the person being investigated is twenty years' imprisonment or more, the period of détention provisoire may be extended to three years. The delay may then be extended to four years if the offense took place outside of French territory, as well as for certain enumerated crimes, including narcotrafficking and terrorism. 872

Thus, as with garde à vue, expanded governmental powers exist for détention provisoire in terrorism cases—but along with a host of other crimes that are deemed significant. Unlike garde à vue, however, the period of time a suspect may remain in détention provisoire undergoing investigation is startling. A suspect may remain in French
detention for years while investigators work to unearth evidence of an offense. It is, therefore, arguably the most potent (and most alarming) feature of the French detention regime.

**Vigipirate**

Lastly, one cannot ignore the French national security legislation called “Vigipirate.” This legislation, which was conceived during the wave of left-wing terrorism in the 1970s, allows the French government to mobilize law enforcement, customs, intelligence agencies, and—if required—the military in order to better respond to threats to national security and provide security for critical infrastructure. It also increases the ability of law enforcement agents to search for evidence related to terrorism. As W. Jason Fisher explained,

Vigipirate allows authorities to conduct bag and body searches and limited forms of inquiry at designated public places, and to extend such search power to private security firms and national rail service employees. The Vigipirate plan also grants the procureur de la République the power to authorize the judicial police—the law enforcement division tasked with assisting the judiciary—to search vehicles in public areas where no criminal offense is being perpetrated, so long as such searches are tied to an investigation relating to terrorism. Moreover, under Vigipirate, the judicial police may search a vehicle in a public area without authorization from the procureur de la République if “plausible grounds” exist to suspect persons inside the vehicle of attempting, having attempted, or having already carried out a criminal offense.

French authorities also possess enhanced abilities to conduct searches in times of heightened risk. This, of course, may lead
to evidence that can trigger the robust detention provisions at the disposal of French law enforcement. Together with the investigative detention regime detailed in this chapter, it creates a formidable counterterrorism tool.

The Use of Detention in Counterterrorism

The French laws of detention have found direct application in counterterrorism operations and have been used to great effect. The ability to easily detain and freely interrogate terrorist suspects has had the dual effect of bringing terrorists to justice and supplying useful intelligence for the continuing struggle against other terrorists. An example of the use of their detention regime is Operation Chrysanthemum, which was the French government's response to the abduction of three consular officials in Algeria. Over a period of two days, 110 people in France were questioned and eighty-seven were taken into custody. This operation, which only resulted in the incarceration of three people, was denounced by some as an overaggressive reach by the French government. However, the interior minister at the time, Charles Pasqua, regarded the interrogations as sending a message to extremists that the French government was aggressively seeking to suppress the activity of Islamic terrorists in France.

Another example of the use of French detention laws in a counterterrorism effort is the operation against the Chalabi network, a critical support cell for Algerian fighters. In the effort to cripple this group, French law enforcement arrested ninety-three people, released fifteen, and held the remaining seventy-eight for trial. The impact of this effort was the dismantling of the Chalabi network in a very short time.
that such arrests were possible due to the French laws that allow authorities to arrest suspects and hold them at their disposition without charge while evidence is gathered.  

The ability to arrest and detain individuals not only assisted in the targeting of those individuals but also informed French law enforcement's understanding of the threat they faced, and it allowed French authorities to “connect the dots” and understand the relationship between various terrorist cells operating on their soil and abroad.  

In this regard, arresting a large number of people, in view of the magistrates, makes it possible to carry out corroborated interrogations to maintain knowledge of perpetually evolving networks. Thus, for example, the arrests in 1998 permitted authorities to prevent the attacks planned on the Football World Cup, one of which was intended for State de France, the new and highly visible stadium built for the World Cup Final.

French laws of detention, therefore, have played an important role in their counterterrorism effort, allowing for the targeting and prosecution of specific terrorist organizations, as well as allowing for the gathering of intelligence vital to stopping future attacks.

**Implications on International Human Rights Law**

Unlike the United States and the United Kingdom, which require the enactment of legislation in order to incorporate international law, France has a “monist” constitutional system under which conventions like the ICCPR and the ECHR are automatically enforceable in domestic courts. Nonetheless, the incorporation of the ECHR has not served to displace the French regime of investigative detention. As noted, the ECtHR has never articulated an exact limit on the
acceptable length of pre-charge detention, nor has it elaborated an exhaustive list of grounds for which such detention is permissible. The practice of investigative detention, therefore, is not foreclosed by the ECHR or its jurisprudence.

Likewise, neither the ECHR nor its jurisprudence disallows the drawing of an adverse inference from a suspect's silence. Commentators note, “It is clear, therefore, that the Court does not consider that the drawing of inferences from an accused's silence is in itself incompatible with article 6, as long as judicial safeguards operate to ensure fairness.” Nonetheless, Hodgson has noted that France's criminal procedure is the frequent subject of condemnation by the ECtHR for various reasons, including, but not limited to, the length of detention pending trial and inadequate legal aid. For instance, in Tomasi v. France, the ECtHR considered the case of a terrorist suspect accused of involvement in an attack linked to the Corsican National Liberation Front, which led to the death of a French soldier. The suspect's pretrial detention lasted for five years and seven months. In finding such a delay violative of the ECHR, the court noted that, not only had the reasons for denying requests for release largely lost their relevance and importance as time went by, but also the French authorities had failed to handle the proceedings expeditiously. Specifically, the court found that there were two instances of unjustified delay during the preliminary investigation—one for fourteen months and another for twenty-three months. The ECtHR articulated its approach as follows:

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices;
the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings. 891

Thus, in finding that France had violated article 5(3) of the ECHR, the ECtHR has held—while specifically looking at the French system—that mere suspicion is not enough to continue holding a person beyond an initial arrest. Further, even when continued detention is valid, national authorities must proceed expeditiously with the criminal proceedings. 892 “Consequently, Article 5(3) requires that there must be a ‘special diligence’ in bringing the case to trial if the accused is detained. A detained person is entitled to have the case given priority and conducted with particular expedition.” 893

The impact of the Tomasi case was the institution of reforms in France, such as the introduction of the juge des libertés et de la détention to decide issues of detention during investigation. 894 As previously noted, prior to legislation passed in 2000, there was no limit on the period of détention provisoire for cases considered crimes. 895 After the Tomasi case, reforms were instituted so that, for cases involving crimes, a person may not ordinarily be kept in détention provisoire for more than one year, though that period may be prolonged for six months by the juge des libertés et de la détention after an adversarial hearing (débat contradictoire). 896 This period of detention may be prolonged again but may not exceed two years if the maximum penalty faced by the person being investigated is less than twenty years’ imprisonment. Otherwise, the period of detention may be
extended to three years—and four if the offense took place outside of French territory. 897

Another key case involving the French system was brought by a Moroccan/Dutch national named Ahmed Selmouni, who was arrested on drug charges and held in custody on the outskirts of Paris for four days. 898 During his period of garde à vue, Selmouni was physically abused and eventually had to be hospitalized. 899 During the course of his detention, he was severely beaten, forced to run along a corridor with police officers on either side tripping him, was invited to suck a police officer's penis, was urinated upon, and was threatened with a syringe. 900 The ECtHR unanimously held that this constituted torture, making France only the second country in Europe (the first was Turkey) to be so condemned for torture. 901 Thus, it is not only the length of detention that has aroused the ire of the ECtHR, but the conduct of police during those periods of detention.

France does take action in response to decisions (and condemnation) of the ECtHR—and such condemnation has been frequent. 902 Those actions have served to accommodate the provisions of the ECHR to an extent, but, as seen from the analysis in this chapter, France retains an impressively potent investigative detention regime. The extent of the pretrial detention power in such a regime is likely to produce continued conflict with the ECHR. As Hodgson noted,

It is this pre-trial state of the criminal process that we see most clearly the tension between the demands of conformity with the principles and guarantees of the ECHR and the desire to retain a broadly inquisitorial structure which has at its centre the ideal of the judicially supervised investigation. 903
Conclusion

French legislation has consistently recognized the need for special rules to combat the phenomenon of terrorism, even as its domestic criminal courts took the lead in the fight. In that struggle, the law of detention has occupied a significant place and has been continuously enhanced to form a powerful weapon for law enforcement. Suspects can be detained, held, and interrogated for prolonged periods of time without being charged, without access to an attorney, and without being advised of any eventual right to access an attorney. The laws governing detention in France contain exceptional rules allowing for greater governmental power in the pursuit of terrorist suspects, the cumulative effect of which is a potent counterterrorism tool.

Although garde à vue stands as the only variety of detention for which a “counterterrorism exception” exists, a discernable trend toward enhancement of detention powers is evident in France. These enhancements were motivated by concerns over terrorism—a fact evident from the review of French events at the time, as well as by the express mention of terrorism in the enacted laws. The strengthening of these three distinct yet interrelated forms of detention creates an overall effect that is significant in the aggregate, creating a rather formidable detention regime. The effect can be a long and seamless period of detention. Consider Bron McKillop's description of the detention process in a French homicide case:

The prosecutor, having been notified of the garde à vue had come to an end and that the suspect was being brought to his office at the court house (cite judiciare) requested, by a requisitoire introductif, that the investigating judge on duty that week (also with an office in the courthouse) investigate the “serious presumptions” of pre-meditated
homicide against the suspect and issue a warrant for his detention. The suspect was accordingly taken directly before the investigating judge for a “first appearance interrogation” (interrogatoire de première comparution). Also present at this interrogation were an assigned lawyer (avocat) representing the suspect and a recording clerk (greffier). The gendarmes, who had been involved in the garde à vue and who had escorted the suspect to the courthouse, were excluded from the interrogation. The investigating judge first confirmed the identity of the suspect. He then informed him that he was being charged (inculpe) with the offenses specified by the gendarmerie. He also advised him that he was free not to make any statement.

The defendant's statement, in a form agreed upon between the defendant and the investigating judge, was typed up by the greffier and signed by the defendant, the investigating judge and the greffier. The defendant was then taken to the local gaol where he remained, under an order of the investigating judge for his “provisional detention”, renewed after the first twelve months, until the hearing of the case more than 21 months later.  

In such a case, the initial stop that triggered the twenty-one-month period of detention prior to trial could have been effected merely because a policeman suspected a potential breach of public order. This emphasizes not only the length one may be detained prior to trial in France but also the ease with which such lengthy detentions can be initiated. Had McKillop's example been a terrorism case, rather than a homicide case, the periods of detention could have been far longer. Nonetheless, and in spite of the profound procedural dissimilarities, the regime of counterterrorism law in France reflects
the same basic elements found in the U.K.'s investigative detention regime: the ability to stop and arrest a terrorist suspect based on minimal criteria, the ability to hold a terrorist suspect for a prolonged period of time without charge, and diminished protections for terrorist suspects during their period of detention.

Interestingly, the British government has taken a hard look at ways of incorporating elements of the French system into its own. Part of the allure to the British is the role that magistrates play and the significant powers of investigative detention concomitant to the French paradigm. An article in *The Economist* noted that

> some British officials have been looking with envy at civil-law countries like France, where the criminal-justice system allows detention for months, even years, after a suspect has been formally “placed under investigation”, but not yet charged. Police can also continue to interrogate suspects during that time.”

A 2007 report on the subject for the Home Office, however, noted the following:

> There are significant cultural and constitutional differences between the French and English criminal justice systems, but one is not necessarily more effective than the other. A fundamental conclusion of this study is that if we were to try and emulate the magistrate system here, we would need to import the system in its entirety rather than borrow and graft certain elements on to our [criminal justice system]. This would require fundamental changes to our adversarial, common law tradition.

The same is true of importing such methods to the United States, making use of French criminal procedure as a model problematic. As
with the United Kingdom, this seeming incompatibility is cause for both regret and relief. Such significant government power to detain is not necessarily desirable in all societies. Some feel that incorporating such power would be deleterious to legal traditions that center on the freedom of the individual. 908 There is, further, room for concern when examining the French experience. Exceptions made for purposes of counterterrorism were soon adopted for other crimes, such as drug trafficking, —thus normalizing the exception to a degree. This could be seen as proof that, once the decision is made to erode rights to a small degree, the torrent soon opens to encompass a greater range of freedom than was originally anticipated.

**Table 1. Comparative analysis of investigative detention powers.**

<table>
<thead>
<tr>
<th></th>
<th>United States</th>
<th>United Kingdom</th>
<th>France</th>
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</thead>
<tbody>
<tr>
<td>Ability to stop and</td>
<td>Need reasonable suspicion of criminal activity</td>
<td>Need reasonable grounds for believing suspect has stolen or prohibited articles</td>
<td>Need one or more reasons to suspect criminal activity, the ability to furnish useful information, or potential breach of public order</td>
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<tr>
<td>search ordinary suspect</td>
<td></td>
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<tr>
<td>Ability to stop and</td>
<td>Need reasonable suspicion of criminal activity</td>
<td>Need reasonable suspicion suspect is a terrorist</td>
<td>If suspect cannot verify identity, he or she may be brought back to station to have identity verified</td>
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<tr>
<td>search terrorist suspect</td>
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<tr>
<td>Other special abilities to stop and search</td>
<td>Suspcionless searches authorized in &quot;critical zones&quot; and where &quot;special needs&quot; apply</td>
<td>With written authorization, can stop and search vehicles or pedestrians without suspicion in specified places for up to 30 hours</td>
<td>Vigipirate searches of bodies and private vehicles without need for approval of procureur</td>
</tr>
<tr>
<td>Ability to arrest</td>
<td>Need probable cause of a crime</td>
<td>Need reasonable suspicion suspect is in the process</td>
<td>Need one or several plausible reasons to suspect</td>
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<td>without warrant</td>
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<tr>
<td><strong>France</strong></td>
<td><strong>of committing an offense, is about to commit an offense; or has committed an offense, that he or she committed or attempted to commit an offense</strong></td>
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<td>-----------------</td>
<td>--------------------------------------------------------------------------------------------------</td>
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<tr>
<td>Maximum period of pre-charge detention in ordinary cases</td>
<td>48 hours, –but must proceed to magistrate without unnecessary delay Normally 48 hours, extendable up to 96 hours (4 days) 48 hours</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maximum period of pre-charge detention in terrorism cases</td>
<td>48 hours, –but must proceed to magistrate without unnecessary delay Extendable up to 28 days 144 hours (6 days)</td>
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<tr>
<td>Maximum period of detention in remand in ordinary cases</td>
<td>70 days, but can be extended or prolonged 182 days, but prosecution may apply for an extension Normally 1 year</td>
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<tr>
<td>Maximum period of detention in remand in terrorism cases</td>
<td>70 days, but can be extended or prolonged 182 days, but prosecution may apply for an extension 4 years</td>
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<td>Other alternative forms of detention</td>
<td>Material witness statute Control orders None</td>
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<tr>
<td>Right to remain silent</td>
<td>Exists with few exceptions Exists, but adverse inferences can be drawn from silence Exists, but suspect need not be informed of it</td>
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<td>Right to counsel</td>
<td>Exists and is absolute Exists, but in cases of serious arrestable offenses can be delayed for 36 hours Exists, but limited to brief and intermittent consultation</td>
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<tr>
<td>Detention rights in terrorism cases</td>
<td>Unchanged Advice of counsel can be subject to monitoring and can be delayed for 48 hours Right to counsel can be delayed for 72 hours</td>
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