The Constitutional Dimensions of Surveillance Policy:
A Study of France, the UK, and the US

by

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Il est quelquefois nécessaire de changer certaines lois. Mais le cas est rare, et, lorsqu’il arrive, il n’y faut toucher que d’une main tremblante...

Sometimes it is necessary to change certain laws. But such cases are rare, and when they do occur, they should be approached with trembling hands...

— Montesquieu, *Persian Letters*
Abstract

The threat of transnational terrorism is more salient today than at any time in recent history, and it presents particular challenges for the maintenance of the rule of law and constitutional ways of life in Western democracies. This paper develops a critical lens, which is attuned to the interaction between constitutional texts and principles and the institutions responsible for turning such principles into political action, to examine the responses of three constitutional democracies to major instances of transnational terrorism. Specifically, it looks at the enactment and enforcement of new government surveillance policies in France, the UK, and the US during the post-9/11 era. We then offer some concluding remarks on what this lens contributes to our understanding of the risks presented when adopting national security related policy changes after periods of national emergency, and how to assess such reforms.
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Introduction

The threat of transnational terrorism is more salient today than at any time in recent history. Western democracies have experienced a proliferation of indiscriminate attacks on their civilian populations by both terrorist organizations and radicalized individuals. The events of September 11th are the clearest example of such an attack in the United States. Yet other nations have experienced similar moments of collective trauma – from the “7/7” bombing in the United Kingdom to the Paris attacks of November 2015. Such attacks have spurred a radical reconsideration within many Western democracies regarding the government’s role in the provision of safety and security. Indeed, not only do such instances of terrorism cause immediate emergency responses — often characterized by temporarily heightened security measures — but they also catalyze longer-term discussions about the proper balance between citizens’ rights and their security.

In particular, many nations have responded to such attacks by undertaking processes of policy formulation and reformulation in which they have sought to reconstitute their domestic security architectures. Such reforms have typically granted governments and intelligence agencies greater authority to monitor the everyday activities of their citizens, and in so doing, have altered the contours of the public and private spheres in these nations. In the United States, the USA PATRIOT Act (2001) was passed soon after the attacks of September 11th and significantly broadened the authority of existing institutions – such as the Foreign Intelligence Surveillance Court (FISA) – to enable surveillance outside of the traditional public law regime (See
PATRIOT Act, Section 215). While the PATRIOT Act has been ridiculed by both civil libertarians and – after revelations regarding the actions of the National Security Agency (NSA) by Edward Snowden – the international community, far less attention has been paid to similar bills passed in other Western democracies. In the UK, the Regulation of Investigatory Powers Act (2000) governs a wide range of government surveillance and has (since 2001) been updated and altered in response to subsequent threats. In France, the government has recently passed new surveillance legislation in response to a series of terror attacks and after extensive debate regarding the constitutionality of doing so.

Western democracies are responding to the threat of terrorism in new and often innovative ways. In doing so, they are faced with the challenge of protecting the rights and security of their citizens. Indeed, the very objective of such terrorist attacks, as many observes have noted, may be to impose precisely this trade-off — to disrupt daily life, inspire fear, and require societies to forgo many of the freedoms they previously took for granted. For this reason, it is important to critically assess the various approaches that different societies have taken in combating terrorism. This study is focused particularly, as reflected above, on the enactment and enforcement of new surveillance regimes in response to major terror incidents. Such statutes are controversial precisely because they attempt to balance citizens’ privacy — and all its

1 See, for example, the Wireless Telegraphy Act (2006) and the Counter-Terrorism Act (2008).
3 The two aren’t necessarily in conflict, although most observers seem to assume this is the case. My point is simply that acts of terror typically force policy makers to make trade-offs.
concomitants, such as dignity, freedom, and citizenship — with their security, and that of the community as a whole.\footnote{For a discussion of the concomitants of privacy see Cohen (2013) and Post (2001).}

In discussing the above mentioned policy changes, there has been an exhaustive focus within both the public and academic spheres on either the importance of privacy or the necessity of security. Yet few have examined the underlying character of different societies’ responses to acts of terror and the factors that influence the manner in which they enact and enforce new surveillance policies. Indeed, most scholarship has gravitated towards either a civil libertarian-rights centrum or a security conscious zeal.\footnote{A third variant, which questions the privacy vs security paradigm itself, is proposed by Vermeule and Posner (2006).} Both perspectives neglect the fact that the enactment and enforcement of such statutes is deeply influenced by the national experiences and institutions of the countries in which they are adopted. Rather than invoking a perspective that perceives all nations as facing identical problems and forging solutions in equivalent contexts, it is necessary to dig deeper into the factors that structure such experiences and guide policy responses. In doing so, we will not only be more sufficiently equipped to understand what is at stake, broadly speaking, as countries respond to the threat posed by terrorism, but also what nations may learn from one another’s experiences. For the very nature in which a polity articulates debates about privacy and security, in which it goes about formulating policy responses, and the fashion in which such policies are enforced, is embedded within its national context. By looking at the factors that structure different nations’ experiences with addressing terrorism — and the new surveillance policies they often provoke — we will be better situated to assess the
quality of their responses, understand the trade-offs they face, and to propose innovative solutions and effective policies.

There are many factors that may be viewed as shaping policy formulation and implementation in this context. Some nations are more exposed to populations prone to perpetrating acts of terror. Therefore, the stringency of new policy measures could be proportional to the likelihood of an attack. It could also be that policies reflect electoral considerations and that polities with certain electoral structures or demographics favor specific policy outcomes. Based on a belief that such perspectives provide an inadequate, and only partially illustrative, model for understanding this phenomenon (for reasons I expand upon below), I propose an alternative explanation based on the development of the surveillance regimes in these different societies with a specific emphasis on how such development has been mediated by their respective constitutional dynamics. Specifically, there are three constitutional dynamics that I would like to focus on in particular — one, the distribution of institutional authority (design); two, the repertoires of action embraced by different institutions; and three, the patterns of both formal and informal constitutional change that have occurred in these different polities. It is my contention that to best understand how nations grapple with many of the complex questions prompted by terrorism, as well as structure their responses to it, it is necessary to look at how their constitutional and institutional development (which are themselves closely related) have structured their experiences (See Annex 1).

**Theoretical Overview**
The main claim presented in this paper is that we can best understand and explain polities’ responses to terrorism — such as the formulation of new surveillance policies — in relation to their constitutional texts and principles and the development of the institutions responsible for turning such texts and principles into political action. The three polities examined in this study are France, the United Kingdom, and the US. My primary concern is trying to understand the policy debates that have prevailed in these three countries, in part spurred by their respective experiences with addressing terrorism, regarding the use of government surveillance. To address the character that such debates have taken in each country, I will rely in large part on patterns of statutory enactment, examples in which such statutes have been challenged or overturned, and the constitutional issues that have been invoked by different institutions in both of these contexts.

It is important here to make the distinction between acts of domestic and transnational terror. Although such categories are becoming less clear over time, there still exists a distinct brand of transnational terror, principally associated with Islamic fundamentalism, that has become a strong source of consternation in many Western constitutional democracies. There are both practical and theoretical justifications for the decision to focus primarily on this strand of terrorism. The clearest reason for doing so is that it is this form that has provoked the most controversial government responses and spurred nations to increase their domestic and international surveillance capabilities. Furthermore, on a theoretical level transnational terrorism poses a unique threat to principles of constitutionalism.\(^6\) In the case of purely domestic terrorism —

\(^6\) By constitutionalism I refer to the practice of collectively committing to be bound the terms of a constitutional document and the manner in which it is interpreted by relevant actors.
such as that of the IRA in the United Kingdom — government action is limited by a desire to maintain popular support. Yet there may be fewer political constraints on when combating its transnational counterpart (Haurbach in Crenshaw 2010, 184). Furthermore, there is a greater risk of implementing privacy curtailing policies in the case of this brand of terrorism. Indeed, the “nothing to hide” fallacy, identified by Solove (2011), in which individuals neglect the broader implications of privacy infringements because they themselves have no illegal activity to conceal, is likely to be more pervasive when surveillance is perceived as targeting ‘them’ instead of ‘us’. Lastly, because transnational terrorism often forces a blurring of traditional legal distinctions between foreign and domestic actors, it presents especially difficult challenges for sustaining such distinctions in the law. Thus, this study will focus primarily on instance of transnational terror and the unique threat it poses for the maintenance of the rule of law in constitutional societies.\(^7\)

While the timeline of this study primarily encompasses events arising after September 11th, 2001, it will also be important to highlight aspects of the constitutional development of the three societies under consideration prior to this crisis moment. There are three constitutional components — design, repertoire endowment, and patterns of change — that I’ve highlighted as meriting particular attention (See Annex 1). As a preliminary matter, it is essential to take into account patterns of constitutional design — by which I refer to the institutional structures, understood quite broadly — of these different nations. It will then be helpful to look at the repertoires that constitutions give to the institutions they engender. Lastly, it is necessary to consider

\(^7\) This study was inspired in particular by the work of Finn (1991).
processes of constitutional change. One example of constitutional change has been the introduction of the supranational institutions of the EU into the process of policy-making in Britain and France, which becomes important, for example, in the context of decisions made by the European Court of Justice (CJEU) or European Court of Human Rights (ECHR) (See Pt 4, Ch 3 and 4).

An additional methodological question involves the criteria governing case study selection. On this front, it will be helpful to reference the methodological outline highlighted by Hirschl (2006), although this inquiry differs in a few important respects (which I explain below) from the studies of comparative constitutionalism that he has in mind. Following his rubric, this study aims at “generating thick concepts and thinking tools through multi-faceted descriptions” (126). Specifically, I intend to emphasize “the broad similarity of constitutional challenges and functions across relatively open, rule of law polities”, and in doing so, to understand what “various manifestations of and solutions to roughly analogous constitutional challenges” (namely terror attacks) tell us about key political concepts — such as the articulation and protection of social rights and the influence of institutions in structuring political outcomes in relation to the formulation of surveillance policies (Hirschl, 129). Based on the above methodological commitment, country selection proceeded from two main criteria — the presence of the phenomenon under question (instances of transnational terror and the subsequent enactment of surveillance policy) and a strong and institutionalized commitment to constitutional forms of governance.
To satisfy the first criteria, the set of countries available for examination was limited, with a few exceptions, to countries in North America and Western Europe. To reiterate, the two criteria that acted as guiding principles in case study selection were a commitment to constitutional governance and active engagement in debates over the proper use of government surveillance in response to the threat of terrorism. This aligns with a “most similar cases” logic that will best equip me to investigate how the different constitutional and institutional dynamics — such as design and development, repertoires, and patterns of change — have structured different nations’ experiences in this policy area (Hirschl, 134). Stated more clearly, because many of the factors that are central to this study — such as a commitment to the rule of law or upholding civil liberties — are present in all of the countries under consideration, I will be better able to isolate the impact of cross-national institutional differences. In this sense, the case studies will provide the opportunity for both hypothesis confirmation and refutation without the interference of additional variables. For example, by looking at two European nations, France and the UK, in which the institutions responsible for constitutional review have significantly different levels of authority, we can discern whether such review plays a role in shaping national discourse over such legislation. There are a few countries, such as Spain and Canada, that perhaps suit both criteria but

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8 Exceptions to this would include countries such as South Africa, India, as well as a number of Latin American nations (See Carlo and Dawn (2011)). However, these nations — possibly due to differences of development — have not engaged in the same debates regarding high-tech government surveillance as have those under consideration.

9 To be sure, certain factors may be more and less important in given case studies. However, the absence of a factor will itself enable us to draw important conclusions.
would prove redundant based on their institutional similarities to those included. The final list of cases includes France, the United Kingdom, and the US.

**Structural Overview**

The order of the paper is as follows. Sections One and Two will establish a theoretical framework for understanding the role that constitutional and institutional dynamics have played in mediating different nations’ experiences with terrorism, broadly speaking, and with the enactment and enforcement of government surveillance policy in particular. Section One will develop a deeper theoretical framework for understanding the constitutional phenomenon at work in each respective polity. This will include looking at the three constitutional components highlighted above — namely, design, the endowment of repertoires, and patterns of change — and the manner in which they have been institutionalized in each society. The process of institutionalization will be especially important, and will be the primary focus of the subsequent section. Section Two will highlight theories regarding the relationship between institutions and political action. Specifically, it will look at how the shape of institutions mediates the formation and implementation of surveillance policy. There are two intersecting, but not entirely overlapping institutional phenomenon that concern us here — one, the development of the institutions responsible for applying the constitution (such as parliament or a constitutional court), and two, the institutions...

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10 As initially conceived, this study aimed to highlight Germany’s experience of dealing with the enactment, enforcement, and reform of surveillance policy. Because of constraints on time, this section had to be cut. Germany would be a welcome addition to this study based on its unique institutional framework and robust culture of constitutionalism. However, it hasn’t had the same experiences of dealing with terror attacks as the three polities that did make it into the study, and for this reason its exclusion is perhaps merited.
of the surveillance state. There is overlap because the development of the institutions of the surveillance state, in each country, is itself mediated both by aspects of their constitutions and broader principles of institutional development. Thus, in Section Two, I will invoke scholarship surrounding the process of institutional development to understand the importance that such institutions have played in mediating the experiences of these countries.\textsuperscript{11} The overarching argument of these first two chapters is that the development of institutions (both constructive and of the surveillance state) in specific national contexts plays an important role in structuring subsequent debates about government surveillance policy (See Annex 1).

Sections Three through Five will contain the case studies for the aforementioned countries. These case studies will set out the key constitutional components of each society, the manner in which they’ve affected institutional development, and the other aspects of institutional development that have influenced the formulation of surveillance policy. It may be the case that in some nations constitutional elements have had more or less of an impact, or have perhaps been impactful in different ways. This doesn’t refute the main investigatory line of this paper, but rather contributes in its ultimate aim, namely understanding the origins of similarities and differences in cross-national experience. Each case study will then examine the most important statutory developments to date in each respective country and the judicial, parliamentary, and institutional dialogues that have accompanied these enactments. In the case studies of the two European countries, it will be important, at times, to look at the influence that supranational institutions — such as the Court of

\textsuperscript{11} This will include, for example, the works of Hall and Taylor (1996), Orren and Skowronek (2004), and Pierson (2004).
Justice of the European Union (CJEU) — have had on national decision making. However, a focus on these effects will be limited primarily to judicial opinions and will take place within the respective case studies.  

12 Lastly, I will conclude this study by offering some policy prescriptions for the three polities under consideration, as well as some general principles for addressing policy performance during periods of crisis.

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12 I take this approach, rather than incorporating an additional section of the actions of the CJEU because I'm primarily interested in national perspective on the phenomena of government surveillance. While the “Europeanization” of individual nation's legal regimes will certainly influence the force of a nationally focused perspective, I still believe the national unit is the most interesting and important unit of analysis in this context.
Chapter One
The Constitutional Dimensions of Surveillance Policy

Introduction —

The main claim guiding this paper is that a constitutionalist lens will uncover patterns in the enactment and enforcement of surveillance policy in the polities under consideration. By this I mean that by looking at how constitutions structure the institutions responsible for maintaining the rule of law and interpreting social rights within a polity, we will be better situated to understand the character of different societies’ policy responses in the face of emergency situations, such as terror attacks. In this section I offer a preliminary discussion of the value to be gained from adopting a constitutionalist lens in viewing the phenomenon under consideration. I then put forth and explore three constitutional components that can be viewed as contributing to cross-national divergences in the enactment and enforcement of surveillance policy. However, because institutions themselves play an important role in the manner in which constitutional texts are transformed into political action, it will also be important to consider the development of the institutions involved in constitutional construction (which we take up in Ch 2). The point of these first two chapters is to present a theoretical foundation, based on the interconnectedness of constitutional and institutional elements, from which we will be better equipped to examine the experiences of the three polities under consideration with generating policy changes during periods of domestic emergency (See Annex 1).
Pt 1 — Explaining The Constitutional Dimensions of Surveillance Policy

The perspective I offer here can be distinguished from alternative theories that perceive the enactment and enforcement of surveillance statutes as products of, among other possibilities, the ideological composition of the legislative branch, cross-national privacy cultures, or spontaneous responses to emergency situations. Not only do such explanations give us an inadequate sense of the experiences of different polities, but they belie the factors that have structured such experiences. For example, a narrow focus on the character of privacy rights, whether property based (as in the US context) or grounded in notions of telecommunications and personal privacy (as is in the European context), neglects the patterns through which such rights have been constructed over time.\(^{13}\) As highlighted above, in this section I will focus primarily on three main constitutional components — design, the endowment of repertoires, and processes of change (both formal and informal). The concept of constitutionalism suggests that by submitting to a constitution polities are committing to be governed by certain principles or rules that find expression in a document(s) but are no means limited to it.\(^{14}\) Such principles greatly shape a polity’s subsequent development, and as we shall see, influence the debates they have about pressing issues. In this chapter, I will offer a brief account of the impact of constitutionalism on the functioning of contemporary political societies, expand upon the different dimensions of the three constitutional components that I’ve highlighted above, and suggest some preliminary conjectures regarding the influence that these dimensions have had in the enactment

\(^{13}\) See, for example, Whitman (2004) and Post (2001)

\(^{14}\) Such principles can be viewed as either universalistic, that is applying to all constitutional societies, or particularistic, as pertaining exclusively to the polity at hand. I’m concerned here primarily with particularistic values that are specific to the experience of a given polity.
and enforcement of contemporary surveillance policies.

At this point it is necessary to expand upon the function that constitutions play in influencing contemporary political decision-making. While much of the political science literature has focused on the role played by constitutional courts in translating constitutional documents into political action, this narrow view of constitutionalism has been criticized for neglecting the broader political importance and functionality of constitutions (See Whittington (1999) and Breslin (2009)). Indeed, this view ignores, to a significant extent, the manner in which constitutions structure institutions, shape a country’s public character, and mediate processes of political change. It fails to take into consideration the broader significance of constitutionalism, or how, in the clever words of Beau Breslin, constitutions take us from “words to worlds” (2009). It will be important to explain in more detail how exactly this process happens and the shape it takes in the context of different polities.

Constitutions set forth broad aspirational principles for the polities in which they exist. The Preamble of the US Constitution, for examples, speaks of promoting “the general welfare” and forming “a more perfect union”. In France, “valuer constitutionnel” has been given to a variety of documents, including the Declaration of the Rights of Man and Citizen, that collectively form the cannon of French constitutionalism (Stone Sweet, 66-69) Such first principles needn’t be limited to those contained at the outset of formal written constitutions (which some modern

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15 While the Preamble to the US Constitution has been interpreted as having fairly limited legal significance (See Jacobson v Massachusetts (1905)), this doesn’t suffice to say it doesn’t have a broader political meaning. In fact, its very salience in political life perhaps demonstrates the limits of a purely juridic understandings of constitutionalism.
constitutional democracies don’t have), rather they can also embody elements resonating from the unique moments in which the polity was founded or the processes of transformation that brought them into existence.\textsuperscript{16} Such principles greatly shape the politics of the societies in which they exist — from informing the process of institutional creation to shaping the way citizens understand themselves and their relation to the state. It is this interaction between politics and text that will be important to elucidate in the context of each society. For it is my contention that one of the main nexus around which policy formation, enactment, and enforcement occurs.

Constitutions adopt unique institutional structures (designs) that shape the ultimate character of political discourse within a polity, and, in an interesting manner, the process through which they themselves are constructed overtime. As Whittington (1999) carefully points out, “The constitution penetrates politics, shaping it from the inside out and altering the outcomes. Along the way the constitution is also made subject to politics” (1). In a sense then, the process of constitutional construction is contrapuntal and can happen at many institutional levels.\textsuperscript{17} The level most often associated with constitutional scholarship is, of course, that of constitutional court. However, other institutions can partake in the process of constitutional construction.\textsuperscript{18}

The constitutional design of institutions in different polities plays a critical role in the ultimate manner in which those institutions function and interact. Indeed,

\textsuperscript{16} On the importance of these latter two elements see Breslin (2009), especially Chs 1 and 2.

\textsuperscript{17} I borrow the concept of contrapuntal phenomenon from the literary criticism of Edward Said (1993). It is used here to describe the fact that constitutional constructions and processes of institutional development can be viewed both as independent factors contributing to distinctive national approaches in this policy area and also intertwined facets developing in relation to one another. In music contrapuntal refers to a piece with two or more independent melodic lines.

\textsuperscript{18} The phrase constitutional construction is borrowed from Whittington (1999) and is, in his own words, “a method for elaborating constitutional meaning in the political realm” (1). It can be contrasted with the principle of interpretation which typically refers, in a more limited sense, to constitutional law and judicial doctrine.
Constitutions typically distribute different authorities and competencies in a conscious manner. I’m interested in the distribution of institutional authority on two levels — one, the influence of institutional structure (such as the existence of a parliamentary or presidential systems, or other patterns of institutional authority) in mediating outcomes, and two, the role of institutions that are responsible for constitutional construction.\footnote{See pg 25 for a definition of constitutional construction} Constitutions not only create the institutional structure through which a polity is governed, but they influence the subsequent character and development of these institutions themselves. Thus, on a primary level, I’m interested in the position of different institutional actors (within their system’s broader structure) and how their roles, vis-a-vis one another, has influenced the enactment and enforcement of surveillance policy. On a secondary level, I will look at the influence of the institutions responsible for constitutional construction (whether they be judicial or legislative bodies) in balancing social rights and creating institutional dialogues in relation to the issue of government surveillance. It will be important in this context to look at how the development of these institutions — whether in the case (just to name a few) of the Conseil Constitutionnel in France, the Foreign Intelligence Surveillance Court in the US, or the European Court of Human Rights — has itself influenced outcomes. Because it is my contention that understanding the patterns through which rights are constructed and applied is perhaps as important as the content of those rights themselves, this focus on institutions will be essential.

The second constitutional dimension on which I will focus is the repertoires endowed upon the “constructive institutions” (described above) to interpret
constitutional principles and perform their institutional roles. Not only do constitutions endow institutions with the ability to formally exercise constitutional review, but by locating constructive authority in certain institutional loci they encourage the formation of specific patterns of interaction (or repertoires). For example, in France, one of the main constructive actors — the Conseil Constitutionnel — is formally located within Parliament and therefore plays more of a direct dialogic role than many of its counterparts in other polities (See Annex 2). Relatedly, the European Court of Human Rights (ECtHR), which operates beyond the immediate confines of the British polity, functions as a distant yet oftentimes impactful arbiter of constitutional meaning within the UK (See Annex 3). The point here is that the institutions of construction in each polity have unique repertoires through which they influence the terms on which constitutional principles are understood and effectuated. These repertoires are artifacts of constitutions themselves (that is, how documents structure institutional authority) but also the practices such institutions inherit and develop overtime (See Ch 2). Thus, in each case study we will look at the core repertoires of the relevant institutions of construction and the manner in which they have influenced the enactment and enforcement of new surveillance policies.

The third dimension that is needed to understand the behavior of the different constructive institutions in each of these polities is the formal and informal processes through which they have changed over time. Change is a critical dimension of both constitutional and institutional development. Indeed, if one were to look at the either of these things statically, without regard to their operation overtime, you would have only a partial picture of their practical significance in influencing contemporary
political phenomenon. Shifts in institutions’ constructive roles can arise from the implementation of formal processes of constitutional reform (which is within the scope of Ch 1), as well as from informal processes of institutional change through which institutions (such as the Conseil Constitutionnel) come to take on new roles (See Ch 2). For this reason, in each case study we will look at both formal and informal elements of change that have influenced the constructive institutions in each polity.

It is my contention that by exploring the constitutional fundamentals that are mediating different nations’ responses to terrorism — and their subsequent construction and enforcement of surveillance policies — we will be better equipped to understand the character of such responses. This approach differs from those who would focus on the stale security-privacy dichotomy, the level of threat faced in each respective country, or the influence of electoral politics. This study is meant as an explanatory alternative to these paradigmatic explanations, and as such seeks to reveal deeper dynamics at work in this policy area. By adopting a comparativist lens, we aim to isolate the factors at work in each national context and, by doing so, draw some conclusions about what constitutional and institutional aspects are most important in anticipating future developments. We will now turn to a broader theoretical consideration of the role played by institutions, more broadly, in structuring government surveillance policies.
Chapter Two
The Institutional Dimensions of Surveillance Policy

Introduction —

In the previous section, we underscored the extent to which the constitutions of different polities are responsible for influencing the character of their institutions. Specifically, we laid out three explicit ways in which this occurs — namely, through constitutions’ distribution of institutional authority (design), their encouragement of unique institutional repertoires, and their mediation of institutional change. To state once again, constitutions imbue institutions with both the political values and the substantive authority through which they operate. However, to stop here would be to neglect half of the picture, for as Whittington (1999) intimates, institutions themselves play an important role in the construction of constitutional and political meaning. That is, stated more precisely, the only way that constitutional principles are actualized and understood is through the mediation of political institutions. Thus, it is important to introduce into this discussion a theoretical consideration of the role played by institutions in the process of constitutional construction, as well as a lexicon regarding the very development of institutions themselves. Because this is a comparative study, discussing differences in the constructive role of the institutions of the various polities under consideration will elucidate the contours of their respective debates over government surveillance. Furthermore, this institutionalist lexicon will contribute not only to our understanding of the relationship between constitutional and institutional phenomenon but also the broader process through which the institutions of the surveillance state have developed cross-nationally.
Institutions are especially compelling subjects for study because they are historical repositories of previous action, choice, and memory. The process of constitutional construction involves particular governmental institutions determining constitutional meaning so as to guide governmental practice (Whittington, 6). As such, the role played by institutions is critical for determining the ultimate manner in which constitutional principles become political realities (See Annex 1). For example, in the process of forming new statutes, legislators tacitly, and sometimes even overtly, assent to a specific understanding of the constitutional principles involved in governing a respective policy area. The strength of these legislative constructions will differ from polity to polity — based on the roles of other institutional actors, as well as the prospects for dialogue to occur between different institutions. For especially contentious debates involving civil liberties, it is likely that the public will interpret the vote of a parliamentarian as reflecting their outlook on the prevailing constitutional question, and that legislators will therefore be more likely to view their vote similarly. Nevertheless, the point here is that constitutional construction can happen at the level of legislatures, which an overly juridic perspective tends to neglect. It also, of course, happens at the level of formal interpretive bodies — which come in legislative, executive, and judicial forms.²⁰ Such institutions are formally responsible for offering interpretations of constitutional meaning and engaging in dialogues with other institutions about proposed actions. These constructive institutions themselves come in

²⁰ On the first two, see for example the Conseil Constitutionnel, in France, and the Foreign Intelligence Surveillance Court, in the US.
various forms in the countries under consideration, and as a result, it will be essential to examine how their underlying structure has influenced decision-making processes in the context of new government surveillance policies.

The first component that will be important to highlight in the case studies are the institutions involved in construction in each polity and the manner in which their development has influenced the types of constructions that have arisen overtime (See Pts 2, Ch 3,4,5). In contrast to the discussion of institutional structure in the previous chapter, in which the emphasis was on the formal distribution of authority engendered by constitutions, I’m concerned here with the independent institutional dynamics exhibited by constructive institutions. Indeed, the point here is that while constitutions influence the character of constructive institutions (See Ch 1), constructive institutions themselves exhibit independent dynamics of development (See Pt 2 below) that, in turn, have profound effects on the how constitutions are interpreted and construed over time (See Annex 1). On this front, I will focus on the development of the main institutions that have been involved in making determinations on issues of government surveillance, as well as the issues of privacy and security that often accompany them. This will include legislative committees, legislatures as a whole, and formal institutions entrusted with constitutional review. Of course, certain institutions will have far more influence in constructing constitutional meaning because of their mandates and the broader structure of the nation’s institutional architecture.21 Thus, it will be important to look at how broader institutional structures have influenced individual institution’s constructive roles. For example, the existence of the FISA Court in the US context has

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21 For example, the Joint Committee on Human Rights, in Britain’s Parliament plays a fairly forceful role based on its mandate to ensure that new laws adhere to the ECHR.
made the Supreme Court of the United States less willing to play a forceful constructive role in the context of surveillance policy (See Ch 5). In the UK, there have been numerous dialogues between the European Court of Human Rights, Parliament, and domestic juridic bodies about the types of policies that align with both European and domestic constitutional commitments (See Ch 4). Because it is my contention that institutions have played an important, and under appreciated, role in influencing the ultimate construction and functioning of surveillance policies, I will aim to look at the ramifications of these two factors — institutional structure and superstructure — in each case study.

A second institutional aspect worth consideration is the independent development of the repertoires of the institutions involved in putting forth constitutional constructions. As with the example in the previous paragraph, we are concerned here with the development of specific repertories beyond those formally engendered by constitutional documents. That is, while a constitution may enable an institution to take a certain range of actions (perform certain repertoires), it will likely develop others, beyond those formally granted to it, through which it will act in a meaningful way. For example, in the case studies examined below (See Ch 3,4, and 5) I highlight the process through which patterns of deference, dialogue, and secrecy have become entrenched aspects of the institutional character of the constructive institutions in the different polities under consideration. Furthermore, repertories of action formed during previous moments of crisis can become persistent elements in the overall behavior of a given polity (Rossiter 1948). Indeed, moments of emergency are incredibly important for influencing the subsequent path upon which constitutional
societies develop. For as Walter Murphy (2007) describes, “The most dramatic crises for constitutional interpretation and constitutional maintenance arise when leaders perceive or imagine grave threats to national security” (494). In such moments it is likely that institutions will emerge to provide solutions through the application of new templates to new problems, or that the institutions themselves, having proven inadequate to addressing an underlying threat, will themselves be reshaped and reformulated (See Ch 5 below, especially discussion of FISC). These patterns of repertoire formation aren’t constitutionally determined, but rather have emerged as independent dynamics of the institutions under consideration (See Annex 1).

Lastly, it is also important to look at the broader manner in which the institutions of the surveillance state have developed in each respective polity (See Pts 3, Ch 3,4,5). The process of institutional creation and change in time influences subsequent processes of decision-making (Steinmo et al. 1992, Pierson 2004). By invoking a broader institutionalist lens on the development of regimes of surveillance we will be better situated to understand the context in which contemporary decisions take place. Not only do institutions directly tasked with constitutional construction contribute to the creation of political meaning, but broader institutional structures can reveal patterns of historical development that do so as well. It has been the unique contribution of the field of American Political Development to reassert the centrality of institutions in the study of politics (Orren and Skowronek 2004). Indeed, Orren and Skowronek (2004) expand upon the unique role played by institutions:
On the one hand, institutions register order; they are important mechanisms through which individuals coordinate their actions and expectations. On the other hand, institutions are subject to change and more than that, because of their often highly formalized operations, their creation, transformation, and situation with respect to other features of polities can be readily followed and documented. (79)

Looking at the development of the institutions of the surveillance state in each polity will enable us to both better understand the “contextual determinants of political choice” in relation to the formulation of new surveillance policies and the influence of previous debates over issues of privacy and security on contemporary choice-patterns (Orren and Skowronek 2004, 80). The challenges currently facing all of the countries examined in this study are fairly similar. Thus, we can determine how the institutional configurations created to handle them differ, and how such differences have influenced the trajectory of policy development.

Pt 2 — Independent Institutional Dynamics: Drift, Layering, and Grating

Both the constructive institutions and surveillance regimes in each country exhibit independent dynamics of development that will help us to better comprehend these ongoing processes of constitutional construction. Indeed, institutions are created to serve particular purposes and, as is especially the case with security institutions, their mandate often reflects constitutional bargains struck at particular moments in time. Yet as new issues emerge institutions are often reformulated to serve new functions, a
process Mahoney and Thelen (2010) refer to as “drift”. By looking at patterns of institutional creation and change we can uncover these processes (See Pts 2 and 3, Ch 3,4,5). To understand how current institutional formations reflect previous constitutional constructions it will be helpful, once again, to have a lexicon through which we can further our institutional analysis. This lexicon will enable us to parse out a range of dynamics — such as when an institution developed to serve one purpose ends up playing another, when two compete to serve similar roles, and when extant institutions pose obstacles to reform. Institutions constitutional constructions develop contrapuntally in time. As such, the dynamics highlighted here will contribute to our understanding of the complimentary melody in this complex tune. There are three institutional dynamics that are especially important — drift, layering, and grating. As stated above, the concept of drift entails an institution adopting new competencies or ceasing to execute its initial core function (See Mahoney and Thelen 2010). One example of drift is the refashioning the so called “FISA Wall” that created a strict separation between surveillance collected through the FISA Court system, which pertains exclusively to “agents of a foreign power”, and surveillance collected for domestic purposes. While “The Wall” was substantially altered by the PATRIOT Act (2001), many observers suggest that the Foreign Intelligence Surveillance Act (1978) had come to play a drastically different role even before 9/11 than its creators initially intended (See Kris in Wittes 2009, 217-251). Layering, as Mahoney (2010) tells us, is “a discontinuous mode of change in which an entity (institution, system, population) is altered through the introduction of new properties or features” (18). This dynamic can

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22 See footnote 12 above
involve the introduction of institutions to play new roles without the corresponding reform of related bodies. The creation of a system of extrajudicial warrants for certain “emergency” situations when there already exists a regular mechanism for judicial enforcement and oversight would be one example of layering (See discussion of FISC, Ch 5). Lastly, grating, as discussed above, involves the competition of institutions with similar mandates but differing identities over the ultimate shape that a set of policies takes (See discussion of ECtHR and domestic juridic bodies, Ch 4).

These three dynamics will help in our discussion of the independent development of the institutions of construction in the three polities under consideration. It bears repeating, not only do constitutions imbue institutions with both the political values and substantive authority through which they operate, but these institutions themselves exhibit independent dynamics of development through which constitutional principles are ultimately constructed. Thus, each case study will examine the manner in which the above dynamics have played out in each polity. They will then look at the development of the surveillance apparatus, interpreted to include both agencies responsible for both enforcement and authorization, in the polity under consideration and what it reveals about past constitutional constructions and the contemporary situation facing policy makers.

One of the most profound effects of terror attacks has been to force Western democracies to adapt previous institutions to contemporary realities. In some polities past choices will resonate more than others. Yet it is also possible that institutions’ development in response to such attacks will divert from previous experience. Thus, we will utilize the same lexicon of institutional dynamic (used to discuss the institutions
of construction) s to highlight the development of the institutions of the surveillance state in each polity. While terror attacks are often perceived as emergency events that launch polities onto new tracks of policy formation and institutional development, the purpose of this section has been to suggest that are distinct aspects of both continuity and change that arise in polities’ actual responses to such events.\textsuperscript{23}

Each of the three polities under consideration has faced emergency situations in the past, whether relating directly to terrorism or other internal and external threats, that have forced them to strike constitutional bargains. Such bargains could be as broad as setting forth the extent of a given institution’s authority during times of emergency or more narrowly tailored to issues of government surveillance. The point is that during emergencies specific constructions are institutionalized to reflect the constitutional commitments of a polity. For example, Article 16 of the French Constitution allows the President of the Republic to unilaterally declare a state of emergency when an event interrupts “the regular function of public constitutional powers”. This article was not utilized after recent attacks in Paris (November, 2015) because the required legal threat threshold wasn’t surpassed. Instead, the French Parliament voted unanimously for a law that granted the government a wide range of emergency powers (Severson 2015). France has used this type of rushed emergency power in at least two previous occasions — in response to rioting in 2005 and a militant independence movement in 1984 (Severson 2015). The use of these powers on previous occasions has engendered standards for what their use should entail, as well as the practical set of restrictions that should be placed upon them. Yet the most recent law had a unique provision — which

\textsuperscript{23} This contrasts with the view put forth by Posner and Vermeule (2006) who suggest that constitutional societies can withstand emergency situations without confronting long-term institutional consequences.
wasn’t present in previous emergency legislation — that greatly expanded the government’s surveillance authority.\textsuperscript{24}

In response, opponents of the ongoing (at the time of writing) state of emergency have invoked the previous moments in which emergency legislation was enacted to contest the validity of such expanded surveillance powers. Proponents of more expansive counter-terror efforts — such as Prime Minister Manuel Valls — have called for Parliament to pass an amendment to the Constitution that would allow for unilateral declarations of emergency powers in more situations, and, as a consequence, more expansive surveillance authority. While I will certainly expand upon the different institutional dialogues that are at play in this example in the French case study (See Ch 3), I simply aim here to emphasize the point that both opponents and proponents of current legal developments articulate their positions in relation to previous constitutional bargains over emergency powers and surveillance authority. As we will see in the case studies below, this pattern, in which current policy dilemmas are often viewed in the light of previous constitutional bargains, is common and poses an interesting set of dilemmas for confronting contemporary developments.

**PT 3 — Alternative Perspectives on Policy Outcomes**

In outlining my argument, it is important to present some alternative explanations of the forces that may be at work when a polity decides to adopt a certain statutory regime to enable government surveillance. These explanations will help to

\textsuperscript{24} Loi n° 2015-1501 (Nov 2015) regarding the state of emergency >

http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031500831&fastPos=1&fastReqId=1076961330&categorieLien=id&oldAction=rechTexte
clarify the distinct features of my argument and assess the strength of its explanatory power. While I won’t consider every possible alternative theory, I will highlight those that I believe are particularly important. Before delving into these theories, we must present one note of caution. In any study that examines the factors that contribute to policy outcomes, there is bound to be some relation between such factors themselves. For example, cultural values could affect the process and trajectory of institutions’ development. However, in cases of such overlap, it is essential to look at the extent of the relevant factor’s influence and its independence from other variables. On this front, I’ve aimed to narrow the lens of focus as much as possible.

One plausible explanation for the passage of counter-terror surveillance statutes is that they are driven chiefly by electoral considerations and legislative incentives in different nations. Based on such a view, cross-national differences are tied either to the differing perspectives of the electorates of different countries, or to the role played by parties as instruments or directors of public preferences. An investigation pursuing this line of inquiry would look at patterns of electoral contestation, public support for surveillance proposals, and evidence of party contestation over this issue in legislative debates. While electoral and legislative factors certainly contribute to patterns of statutory enactment and enforcement, they aren’t the main determinants of cross-national differences on this issue. On a theoretical level, models focused exclusively on electoral contestation fail to consider the institutional confines within which such contestation takes place. Indeed, it may be that the very character of electoral contestation is guided by institutional, or more broadly constitutional, factors. More concretely, this explanation is incongruent to the phenomenon under consideration.
Specifically, counter-terror surveillance policies are often enacted unanimously (i.e. without political contestation); they are often responses to emergencies and therefore not subject to debate during an election cycle, and the patterns of their enforcement is as consequential as their content. As I will show in each case study, the introduction of time as the main variable to explain patterns of institutional development and change is crucial towards understanding cross-national differences.

Another model situates cross-national differences primarily in relation to alternative perspectives on privacy. There are a group of scholars, particularly associated with the study of privacy law, that have focused on how different nations understand the concept of privacy. A nation’s understanding of social rights can arise from formal constitutional guarantees — such as the Fourth Amendment (in the American context) or Article 8 (in the case of the ECHR) — or broader cultural experiences. A classic articulation of this view comes from James Whitman (2004), who suggests that Europeans and Americans have two distinctly different views of what privacy entails.25 The former, he argues, understand privacy as connected to broader concepts of human dignity, while the latter view it in relation to notions of individual liberty. Yet arguments based on the notion that there exist distinct “cultures of privacy” that determine debates over surveillance policy, are, as a general matter, too broad to inform us about the details of cross-national differences. As a preliminary matter, these arguments neglect the fact that patterns of interpretation vary substantially from country to country. Thus, while the guarantees may ostensibly be the same, patterns of enforcement are likely to diverge. An additional reason why culturally based

25 For additional articulations of this perspective see Post (2001) and Bingami (2007).
arguments are inadequate is that they don’t anticipate deviations during times of emergency. During such periods, patterns of institutional interaction and learning from past periods of crisis will likely be far more powerful determinants of government action than the character of legal guarantees. All in all, culturally based arguments give us a broad sense of different nations’ understandings of what is at stake in debates over government surveillance. However, they do little to explain how such differences translate into patterns of political action and inaction.

The final alternative argument that I would like to highlight focuses on international political forces. Generally speaking, such arguments emphasize the role of international political factors in causing nations to adopt their positions on surveillance. While these arguments could take numerous forms, I will focus on a few specific iterations. One possible argument would be to suggest that some nations surveil less because they are free-riding on security provided by their more intrusive counterparts (See Kindleberger (1981)). However, this is a spurious argument because it depends on the assumption that different nations’ intelligence agencies are freely sharing information, which as a recent case has demonstrated, is not the case (See Maximillian Schrems v. Data Protection Commission, 2015 E.C.J). Moreover, there are fairly stringent restrictions on cross-national data sharing within the EU. An alternative proposition is that nations adopt more stringent regimes out of a desire to project international strength in the face of the threat of terrorism. In this situation, we would expect more stringent statutes in nations that are traditionally more involved on the international stage. This could certainly be the case to some extent, for more powerful nations often want to project strength, especially in response to surreptitious
attacks on their homeland. Yet this theory too fails to parse the nuances of patterns of statutory enactment and change over time. Furthermore, it belies similarities and differences between nations’ experiences. Indeed, to understand the reality of different polities privacy protections, it is necessary to look at both the enactment and enforcement of statutory regimes, which is itself a product of constitutional and institutional phenomenon.

The purpose of this section has been to highlight some, but by no means all, of the alternative theories that could be given to explain different nations’ approaches to government surveillance policy. The inadequacy of all of these alternative models is that they fail to contemplate “politics in time”, to borrow a phrase from Pierson (2004), or the manner in which political phenomenon develop over time, often in self-reinforcing ways. In contrast to these alternatives, my model situates processes of enactment and enforcement within the broader sphere of constitutional and institutional creation and development. Furthermore, I’ve highlighted essential dynamics that will help to bolster, in the respective case studies, the salience of this avenue of examination.

It is to the case studies that I now turn
Case Study Overview

The next three sections will provide case studies that look at how three polities — France, the United Kingdom, and the United States — have approached the task of policy formation in relation to counter-terrorism in the contemporary era. Specifically, as mentioned already, we are particularly interested with the enactment and implementation of surveillance policies. In line with the framework laid out in Chapters One and Two, each case study will be attuned to three elements in particular — the institutions of construction that are involved in policy formation in each polity (whether purely juridic in character or not), the institutional repertoires that have prevailed throughout the history of the polity, and the historical characteristics of each nation’s surveillance regime. Each case study will then look at contemporary developments tounderscore how these constitutional dynamics have influenced concrete processes of policy enactment and reform. The three aforementioned elements deserve a preliminary discussion here.

The first consideration of each case study will be the development of constructive institutions — such as constitutional courts, quasi-judical bodies, and legislative committees — in each polity and their role in structuring the policy-making process. In describing the character of these developmental processes, the case studies will aim to emphasize key cross-national differences that emerge, as well as to relay how such institutional differences have translated into policy divergences in the context under consideration. They will demonstrate — through reference to the actual actions
of constructive institutions, as well as example and counter-example — how institutional structure and formation has affected political action in a meaningful way. In relation to the former, this will entail looking at actual instances in which constructive institutions have either been involved or spurned involvement in patterns of policy enactment and enforcement. It will require cross-national comparisons that will, as borrowed earlier from Hirschl (2006), help us understand “various manifestations of and solutions to roughly analogous constitutional challenges”(129). On this front, there are both stronger and weaker claims that can be made about institutional structure. In their stronger form, such arguments would suggest that certain structures favor or even pre-determine outcomes; in its weaker, it underscores that they perhaps close off some scenarios but leave a range of others open. The case studies rely on a mixture of both strong and weak-form arguments to highlight the extent of cross-national differences in the enactment and enforcement of such surveillance policy.

Each study will then look at the dominant institutional repertoires that have developed in each polity overtime, as well as those that have influenced ongoing debates over surveillance policy. The purpose here is to underscore broader constitutional elements, beyond the institutional construction of constitutional meaning, that have produced cross-national policy divergences. An example of this would be the existence of constitutionalized emergency institutions — such as a “state of emergency” — and the use of such institutions throughout a polity’s history. Another

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26 Quoted above, see Chapter 1
27 The one element, however, that does not garner attention is constitutionalized privacy guarantees — such as Article 10 of the German Basic Law or the Fourth Amendment to the US Constitution (On this front see Whitman (2004) or Post (2001). The purpose here is to emphasize constitutional practice (constitutionalism in time), rather than looking at guarantees as abstract, static items. The broader constitutional elements of concern here are, as with the institutions of construction, not static in nature.
example would be patterns of institutional interaction and competency that have developed over time — for example, the emergence of legislative or executive responsibility on a given issue. Lastly, the case studies will incorporate analysis about the development of the surveillance regime of each respective polity. This will entail looking at the timing of their development vis-a-vis that of the regulatory architecture created to govern them. In instances where a bureaucratic apparatus charged with surveillance authority developed prior to government regulation it is more likely that patterns of policy reform will be more resistant to change.28

The purpose of this section has been to provide a brief overview of the questions addressed and modes of analysis utilized in each case study. In doing so, it offers a restatement of the prevailing lens adopted in this paper. As stated earlier, this study is aimed at “generating thick concepts and thinking tools through multi-faceted descriptions”(126).29 As such, the purpose is to highlight a far too neglected aspect of political experience that has contributed to cross-national policy divergences. This isn’t to say that there aren’t other elements that have contributed as well, but rather that those under consideration have been more influential than suggested by the weight given to them in scholarly and popular discourses.

28 This is the situation in the cases of US and the UK, but not in France. We will demonstrate how exactly this has influenced contemporary reform efforts.
29 Quotes above, see Chapter 1
Chapter Three

France

We now turn our attention to France and the manner in which they have approached the enactment of new surveillance authorities. In contrast to the other polities considered in this study, France is a relative late comer in terms of formalizing the legal framework used to govern its intelligence agencies. For this reason, it has found itself in a unique position to forge new solutions to new problems, rather than adapting previous regimes to suit contemporary realities. Yet the acceleration of this process of institutionalization in response to a series of terror attacks in 2015 presents the possibility that new powers will be put into place hastily and without sufficient contemplation of the tradeoffs they entail.

The unique constitutional and institutional structure of has played an effective role in maintaining the rule of law even in the face of national emergency. As we discuss in more detail below, the Conseil Constitutionnel, which is the main institution entrusted with constructive responsibility in France, has come to facilitate dialogue between Parliament and the president and to bring enhanced scrutiny to surveillance bills that were both contentious and passed in periods of significant institutional strain (See Annex 2). The Conseil’s ability to take on this role is a product both of its position as an institution of construction, as well as the repertoires it has developed overtime. The experience of France suggests that fostering institutions that enable dialogue between juridic and political actors can contribute to preservation of transparency, accountability, and the rule of law.

Pt 1 — French Constitutionalism: “Legislative Politics by Another Name”
The concept of French constitutionalism could, understandably, strike the casual observer as a contradiction in terms. Indeed, the political culture of France has long been characterized by political scientists as vacillating between intermittent periods of strong presidentialism and parliamentarianism. France is not a nation typically associated with the concept of constitutionalism, in which individuals bear rights claims against the state, nor is it known for having an authoritative constitutional court. However, as we shall see, a unique form of French constitutionalism — which can be reconciled with the orthodox depiction of a bipolar French political culture — has slowly arisen since the 1970s. It is the story of this undercurrent in French political life that is essential to understanding current constitutional debates occurring within France regarding the legitimacy of different surveillance regimes and emergency powers.

The Conseil Constitutionnel is the primary institution in France responsible for constitutional construction. As such, it is often responsible for reconciling parliamentary action with constitutional commitments. The Conseil has a unique set of repertoires, through which it interacts with Parliament and the president, that distinguish it from similar constructive institutions in other polities. The Conseil’s position as an institution of construction within the broader French constitutional system can be characterized as that of a quasi-judicial bargainer. That is, although it is formally a judicial body, the Conseil often engages in a dialogue with Parliament to determine the ultimate character of legislation. The Conseil has two primary repertoires

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30 The Conseil d’Etat advises the executive branch on the constitutionality of legislation prior to their promulgation in parliament. However, it’s the Conseil that is most involved in actually ruling on issues of constitutionality.
— one direct and the other indirect — through which it affects the passage of legislation. The first repertoire, “corrective revision”, involves the Conseil overturning, in part or in whole, a piece of legislation on constitutional grounds. After the Conseil makes a determination, Parliament then moves to adapt a statute to withstand constitutional scrutiny. However, it has not been unheard of for Parliament in exigent circumstances to refer a bill, once overturned, back to the Conseil with only small changes, and for it to be subsequently upheld. Thus, corrective revision allows for a two-way dialogue in which the Conseil can assert its voice by overturning a statute in part and Parliament can also maintain its importance by referring only a minimally altered statute back to Conseil. The second repertoire, “auto-limitation”, arises indirectly through the Conseil’s effect on parliamentarians. Specifically, in anticipation of the possibility of Conseil censure, parliamentarians limit the range of measures that they’re willing to support.\textsuperscript{31} Both of these repertoires cannot be divorced from the broader position of the Conseil within the French polity. For example, the process of “corrective revision” should not be interpreted as identical to seemingly similar repertoires — such as judicial review — in other polities. Indeed, as we discuss below, “corrective revision” is more legislative and dialogic in character than processes such as judicial review.

To understand the effect of the Conseil’s repertoires, broadly speaking, as well as in the context of surveillance policy, it is important to keep in mind its broader position as an institution of construction. The overarching argument presented here is that the Conseil has, as a result of its position as an institution of construction and the

\textsuperscript{31} I’m greatly indebted to Stone Sweet (1990) for the articulating these two key functions played by the Conseil.
development of its repertoires, influenced the trajectory of legislative responses to terrorism in a more meaningful way than similarly situated constructive institutions in other polities. We look at the example of the introduction, revision, and enactment of government surveillance policy as an example of this claim.

Pt 2 — The Conseil and Its Constructive Role: Institutional Background

We will now discuss the Conseil’s development as an institution in French political life. This brief historical background helps to elucidate the unique position of the Conseil as an institution of construction, as well as the role of its repertoires in affecting legislative decision-making in the context of counter-terror policy. Because of its historical development at the juncture of two discordant strains of French constitutional life, the Conseil has been particularly well positioned to spur effective dialogue about the constitutionality of proposed government surveillance policies. This suggests that there is something to be learned from the Conseil, and the French experience more broadly, in terms of enhancing institutional safeguards and maintaining limited government during periods of emergency when legislative bodies are often susceptible to putting illiberal, inadequately debated statutes into place.

The Conseil Constitutionnel is distinct from formal constitutional courts — such as the Supreme Court of the United States and the Federal Constitutional Court in Germany — in a number of important ways. The Conseil is composed of a mixture of both professional politicians and legal scholars, but is importantly not dominated by career judges like its foreign counterparts. The Conseil is composed of nine members who serve non-renewable terms, as well as former Presidents of the Republic who have
opted to sit as members. Three members are appointed to the Conseil every three years, one by the President of the Republic, the President of the National assembly, and the Senate, respectively. Cases are decided according to majority rule.

The Conseil’s primary area of responsibility is reviewing parliamentary legislation before its promulgation (so called ex-ante review) rather than after it has entered into law (ex-post review). Thus, as Parliament drafts legislation it can be referred to the Conseil — on the recommendation of the president, prime minister or 60 members of either the Senate or National Assembly — for review. If the Conseil decides that a law is unconstitutional, in part or whole, it is then sent back to Parliament for reconsideration and reformulation. In this way, one can see why one of the leading theorist on French constitutionalism, Alec Stone Sweet, has described French judicial politics as “legislative politics by another name” (Stone Sweet 9). Indeed, the role played by the Conseil is often one of arbitrating between executive and legislative desires and affecting legislation around the margin rather than invalidating legislation wholesale. However, the Conseil’s role has taken on different forms throughout France’s history, and we must grapple with its past to fully comprehend its current role in French political life.

The development of the Conseil Constitutionnel should be understood in relation to the prevailing dialectic of French political life — namely, that between parliamentarianism and presidentialism — rather than as a distinct phenomenon in and of itself. A tradition of parliamentarianism pervaded the constitutional texts and

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32 This has changed slightly in March 2010 with decisions involving a “question prioritaire de constitutionnalité” (or QPC) which allows the Conseil to consider a ex-post question of constitutionality upon the petition of an individual. However, because this makes up such a small percentage of the Conseil’s work and is less relevant in the area of law considered here, it doesn’t change the overarching picture offered above.
practices of the First, Second, Third, and Fourth French Republics, and under this tradition constitutionalism was perceived as part and parcel of majoritarian rule (Stone Sweet 27). Yet there is an additional tradition in French political life — associated with the likes of Bonaparte and de Gaulle — in which “parliament is viewed as a source of instability whose work, in modern parlance — must be ‘rationalized’ — brought under the centralized management of the executive” (Stone Sweet 30). During the Fifth Republic the actions of the Conseil have, in various moments, reflected both of these traditions. In fact, the Conseil has become responsible for reconciling these seemingly discordant traditions. Simply put, it has come to be the primary intermediary between executive and legislative branches and, as such, has placed practical limits on the extent to which either can dominate political life. This unique position has, as we shall see, facilitated the Conseil’s ability to get involved in issues of privacy and security in a manner in which constitutional bodies in other nations have been less successful.

The creation of the Fifth Republic with the adoption of the Constitution of 1958 represented a repudiation of the parliamentary dominance of French political life. Of particular importance to this study, the 1958 Constitution embraced a distinction between “la loi”, statutes passed through parliamentary means, and “le reglement”, executive acts adopted by the President of the Republic. Not only was the domain of “la loi” defined procedurally as those acts adopted via the legislative process, but it was also substantively limited to certain areas of competency laid out in Article 34 of the new constitution. The role of the Conseil in this new system was exclusively to “police the frontiers of the domains of la loi”, namely to limit Parliament to those actions contemplated in Article 34 (Stone Sweet 47). When viewed in relation to other formal
constitutional bodies, the Conseil’s domain of responsibility, as originally intended, was fairly narrow in scope. Furthermore, in practice, between 1958 and 1970 it essentially acted as a prop for the executive, and in the limited instances in which it acted, worked to tame parliamentary power. However, two moments in the 1970s catalyzed an important shift in the Conseil’s role — a decision in 1971 that ruled a law involving the abolition of certain leftist political groups to be unconstitutional, and a 1974 constitutional amendment that expanded the referral powers of parliamentarians. These two developments greatly broadened the Conseil’s involvement in French politics and led to greater politicization of judicial decision-making. Moreover, they enabled legislators to challenge the prerogatives of the executive on constitutional grounds.

The newfound position of the Conseil was made clear by a 1981 Conseil decision that thwarted the plans of the Socialist Mitterrand government to nationalize a number of domestic industries. In overturning the government’s law, the Conseil not only asserted practical restraints on executive authority, but it also engaged in a process of gradual constitutionalization, in which it began to declare that certain constitutional texts — such as the Declaration of Rights and Man and of Citizen (1789) and the Preamble to the 1948 Constitution — contained principles that couldn’t be violated as a matter of constitutional practice. Thus, it is in this moment that the contemporary position of the Conseil began to solidify. Stone Sweet (1990) refers to this role as one of “judicializing” the legislative process. However, because this term remains fairly

33 Decision n 71-44 and Article 54 of the French Constitution (1958).
ambiguous and perhaps fails to explain the precise nuances of the Conseil’s institutional development, it deserves some explanation.

In point of fact, it isn’t too difficult to articulate the Conseil’s contemporary institutional position because it represents an amalgam of the different layers of its historical development (Pt 2, Ch 2 above). The Conseil was created as an institution with limited responsibility. Indeed, at the time of the creation of the Fifth Republic, politicians were extremely skeptical of the practice of constitutional review and what it implied for the democratic process. This skepticism still resonates in the Conseil’s contemporary ambivalence to play an activist role in French political life. Nonetheless, the greater politicization of the Conseil’s role, as well as its constitutionalization of new principles and rights, has engendered a second layer to its institutional identity, in which it has come to play a more substantial role in enforcing constitutional rights and overturning parliamentary action.\(^34\) Based on these two layers, the Conseil today is in a unique position where it both facilitates dialogue between the executive and legislative branches and expands the extent of constitutional debate within the legislative process (Stone Sweet 7).

Pt 3 — The Development of the French Surveillance Architecture

The development of a national security strategy and architecture in France is a fairly new phenomenon. In contrast to nations, such as the United States and the UK, that operate under national security systems created in the wake of WWII, France has

\(^{34}\) A side effect of this increased interaction between the Conseil, Parliament, and the government has been that the Conseil has become a cite of increased political influence and contestation.
redeveloped its national security system over the past ten to fifteen years.\textsuperscript{35} This reform is due in large part to a dismantling of the previous national security architecture, in the 1990s, that existed during the Cold War, and the subsequent emergence of new types of threats in the past two decades (See White Papers of 2008 and 2013). Philippe Hayez, a former Deputy Director of the French foreign intelligence agency the Directorate-General for External Security (DGSE), describes the prevailing sentiment that has long persisted in France — “Intelligence policy was obviously too sensitive to be accounted for and managed as a public policy and thus better left untouched” (2010, 476). This attitude, he believes, explains why “after the attacks of 11 September 2001 (9/11), despite sharing a priority on counterterrorism, neither structural change nor increase in means was made in the French Intelligence Community (IC), contrary to what the United States and most of the other European countries experienced” (2010, 476). Yet, as even Hayez acknowledges, this dominant current in France has begun to change in the last decade in response to the public’s increased perception that their safety is threatened.

In 2008 then President Sarkozy presented a “White Paper on Defense and National Security” that was a major signpost of a shifting policy orientation in France. The White Paper outlined the many priorities of the French intelligence community, and highlighted the “acceleration of information exchanges” and the threat of “jihadism-inspired terrorism” as major challenges with which they would be concerned. Yet in comparison to the US and UK, French policy still remained vague on the precise responsibility of the agencies tasked with domestic and foreign

\textsuperscript{35}The National Security Act of 1947, although amended overtime, is responsible for the creation of the US’s modern security architecture.
intelligence collection. Still, the desire for a new statutory regime was certainly present in 2008, and the urgency of new legislation and oversight became even more palpable in the wake of a series of devastating terror attacks beginning in January 2015. Indeed, the government enacted two statutes in 2015 to centralize and modernize their intelligence gathering architecture. The novelty of these new policies in France is reflected in a statement made by the Minister of the Interior Bernard Cazeneuve during a debate in the National Assembly over the Draft Intelligence Bill in 2015 — “France is clearly lagging behind other major democracies. It is also paradoxical that that intelligence activities, while essential to national sovereignty and the protection of our citizens, are still lacking a comprehensive and coherent legal framework” (2015, 2). As this statement makes clear, France is further behind many other Western democracies in terms of defining the parameters of its surveillance regime, and, in this sense, has approached the problem from a unique position.

Instead of adapting previous institutions and statutory regimes, French policy makers have been afforded the flexibility to adapt to contemporary development in a piecemeal and innovative fashion.\textsuperscript{36} As we shall see, this has greatly influenced the process of constitutional construction that has emerged in France and the manner in which issues of privacy and security have been construed. It is worth noting here that the invocation of French flexibility on surveillance issues isn’t to suggest that their policies have been better or worse than those of the other nations examined in this study. In fact, it could certainly be argued that in having the flexibility of not working from previous templates, policy makers in France are faced with a different set of

\textsuperscript{36} This is in stark contrast to the situation in the US, in which policy makers have, for the most part, adapted previous regimes to suit contemporary realities.
challenge — such as increased uncertainty during moments of emergency (See Pt 4 below). However, it isn’t the aim here to establish that one nation’s approach has been better than another’s. Rather, it is our purpose to highlight the unique characteristics of the environments in which these regimes have been created in an effort to understand the underlying factors that contribute to one outcome or another. We will now turn to concrete examples of how the above mentioned constitutional dynamics have come to play an important role in current debates over the enactment of new surveillance policies in France.

PT 4 — Searching for Solutions: The Constructive Role of the Conseil in a Time of Crisis

The constructive role of the Conseil was put to the test after a series of devastating terror attacks that took place in Paris in January 2015. Indeed, since those attacks policymakers have moved with great haste to pass legislation to update the nation’s intelligence and surveillance architecture. The Conseil’s position as a constructive institution was important in determining the ultimate shape that this legislation took, for not only did it engage in “constructive revision” of the statute initially passed by Parliament, but there are also examples from parliamentary debate to suggest that the prospect of Conseil censure influenced the manner in which issues of constitutionality were expressed and reconciled (“auto limitation”). It is important to note that of all the polities examined in this study, France is the only one in which a juridic body, such as the Conseil, is involved in the legislative process in such a direct

37 It isn’t our purpose to favor, for example, the prescriptions argued for by Ackerman (2006) or Posner and Vermeule (2006).
way. As such, it plays a uniquely dialogic role in the formation of new legislation, especially when it involves contentious civil liberties issues. We will now turn to the specifics of the two surveillance bills that were passed in France in 2015 and the Conseil’s role in guaranteeing that the government’s new surveillance regime was ultimately implemented with transparency and democratic accountability.

The French Intelligence Bill was introduced by the French Council of Ministers on March 19, 2015 just over two months after attacks that killed 12 in Paris.\textsuperscript{38} The self-proclaimed aim of the bill was to “define a specific legal framework allowing intelligence services to use access to information technology”.\textsuperscript{39} The legislation, which was eventually adopted in July 2015, formalized the procedures of the French intelligence services and offered greater oversight over their operation. It provides that authorization of surveillance for the defense of the “public interest”, and “in compliance with the principle of proportionality” can be issued by the Prime Minister with an accompanying opinion from a newly created Commission for Oversight of Intelligence Gathering Techniques (CNCTR). The more controversial components of the bill allow for the use of data driven internet traffic analysis (sometimes called “black boxes”) that anonymously analyze communication data from telecommunications companies (art. L. 851-3), and a provision that allows for “international surveillance”, or the bulk collection of data (art. L 854-1).\textsuperscript{40} Despite its controversy, the French Intelligence Bill should be interpreted as an honest effort to

\textsuperscript{38} See Law n° 2015-912 on Intelligence
\textsuperscript{39} Ibid.,
\textsuperscript{40} Art L 854-1 was similar, in some sense, to Sec 702 of the Foreign Intelligence Surveillance Act (702), which allows for the acquisition of foreign intelligence communications data of non-U.S. persons located outside the U.S.
update the legal regime governing authorization and oversight of surveillance into one comprehensive bill. Furthermore, unlike similar bills enacted during periods of national emergency — such as the USA PATRIOT Act (2001) — the French Bill underwent a process of revision and adaptation that increased transparency and engendered substantive debate over issues of constitutionality.

The constructive role of the Conseil can be perceived, first and foremost, in the process of “auto limitation” that occurred throughout Parliamentary debates over the new statute. Specifically, Parliament limited itself in at least two important ways in deciding to pass this new statute. First, in accordance with Article 34, which compels Parliament to “determine the rules concerning civic rights and fundamental guarantees granted to citizens”, they engaged in an exhaustive debate regarding the range of civil liberties that were engaged by the proposed statute. This included MPs arguing both that the preservation of public order was a freedom worth safeguarding, and as such that this statute was constitutionally required, as well as others suggesting that the privacy of personal data is constitutionally protected, and therefore the statute goes too far.\(^4\)The point, however, is that because they faced the necessity of justifying themselves to the Conseil (as well as satisfying Article 34), MPs engaged in substantive and robust debate about the constitutional issues at hand. Second, there was extensive debate about issues of process and oversight of the initiation of new surveillance warrants. Specifically, there were a group of MPs that argued that a regime of ministerial and administrative authorization (i.e. without judicial oversight) wouldn’t pass constitutional muster (see Article 66). Due to this concern, Parliament included in

\(^{4}\) See comments of Mssrs. Éric Ciotti and Laurence Dumont, French National Assembly Debate (2015)
the bill a provision to allow for the Conseil d’Etat (an administrative court) to review the work of the executive.\footnote{See referral by President of the Senate to the Conseil Constitutionnel. This provision was ultimately overturned by the Conseil who said their had to be democratic control over what could and could not be authorized!} In comparison, the passage of similar emergency statutes in other polities, such as the PATRIOT Act in the US, the debate and process of legislative formation in the context of the French Intelligence Bill was robust and incorporated diverse opinions about the best way of reconciling proposals for a new surveillance architecture with existing constitutional commitments.

The Conseil also utilized its second repertoire, “corrective revision”, to influence the ultimate character of the Intelligence Bill. Before looking at the specific nature of the Conseil’s challenge to the proposed bill, it is worth while to stop and take note of its distinct position in comparison to juridic bodies in other polities. First, there is no other polity examined in this study in which a part of a statute could be overturned on constitutional grounds before its promulgation. The practical effect of the Conseil’s “corrective revision” process, which is of especial relevance for the passage of emergency legislation, is that it is less likely that policies become entrenched during the time between their passage and ultimate review.\footnote{It has been argued that the entrenchment of emergency powers is one of the more pernicious aspects of legislating in response to terrorism. However, as argued, here, the Conseil’s institutional position functions to negate this risk.} As such, the Conseil acts as both a speed bump for impulsive legislating and a buffer against negative policy entrenchment. Second, the Conseil’s institutional position, at the nexus of parliamentary and juridic decision-making, tempers the tendency to show extreme deference to parliamentary decision-making on issues of national security, which is often the case of juridic bodies in other polities. Instead, the Conseil is viewed, and indeed views itself, as part and parcel of the legislative process, while still retaining
counter-majoritarian capabilities. Now that we have a better grasp of the Conseil’s repertoire of “corrective revision” and what distinguishes it from the repertoires of similar institutions in other polities, we can now turn to its role in influencing the ultimate character of the Intelligence Bill.

The Conseil Constitutionnel reviewed the Intelligence Bill before its promulgation and found that two important provisions failed to pass constitutional muster.\textsuperscript{44} First, it found that a provision allowing for the circumvention of the CNCTR (the administrative review body) in situations of “absolute emergency” was unconstitutional (art L. 821-5). Second, it ruled a provision allowing for international surveillance (art 854-1) was unconstitutional because it failed to “specify the rules applicable to the fundamental guarantees afforded to citizens in relation to the exercise of their public freedoms” (DC 713, 2015). With both of these changes, we see clear examples of the Conseil’s “constructive revision” process at work. Indeed, not only did it force Parliament to reconsider both of these portions of the proposed legislation but it brought greater public scrutiny to the attendant provisions and the dangers of their implementation. The Intelligence Bill was subsequently promulgated in July of 2015 without the offending provisions.\textsuperscript{45} Despite the complaints of various French civil liberties groups, such as “La Quadrature du Net” regarding the bill’s remaining deficiencies even after the action of the Conseil, from a comparative perspective this episode represents a remarkable examples of principles of constitutionalism acting as binding constraints even during a period of emergency. To put things in perspective,

\textsuperscript{44} See 713 DC (2015), Conseil Constitutionnel.
\textsuperscript{45} See Law n° 2015-912 on Intelligence
when the Intelligence Bill was enacted in France, both the US and the UK had provisions in place that mirrored the foreign intelligence provision that was overturned (art L. 854-1) by the Conseil. Nonetheless, the Conseil resisted allowing such authority even after a major domestic terror attack.

After the passage of the Intelligence Bill in July of 2015, the Committee on National Defense and Armed Forces put forth a new statute to enable the collection of international electronic communications. The form of the statute suggests that the Conseil’s “corrective revisions” had positive effects in terms of increasing transparency and dialogue about reconciling this new set of governmental powers with constitutional commitments. Indeed, the law that was eventually adopted defined in far more detail the legal framework for monitoring international communications, as well as the details for the authorizing, implementing, and controlling of such surveillance. One important provision of the new bill provided that any domestic communications inadvertently collected would be immediately destroyed (Article 1, Law n° 2015-1556). The dialogue between the Conseil and Parliament also importantly prolonged the time that could elapse between the period of public fear that was undoubtedly pervading after the January 2015 attacks and the adaptation of a new public law regime. While it is difficult to establish causality between the actions of the Conseil and the ultimate shape that government surveillance policy took, the more important point here is to elucidate the ameliorative effects of the unique structure for constitutional construction in France. Indeed, in the end, the Conseil’s decision to overturn portions of the July Intelligence

46 Section 702 of FISA is the equivalent provision in US law and Section 8(4) of RIPA in the UK.
47 In French, the “Commission de la défense nationale et des forces armées”, “Overseas” in most surveillance legislation is considered to entail that at least one side of the communication originates outside of the national territory.
bill led to a greater discussion of privacy and security, as well as practical changes to
the proposed intelligence regime. This pattern of back and forth is fairly unique to the
French constitutional system and is truly reflective of the fact that in France judicial
politics are “legislative politics by another name” (1990: 9).

This isn’t to say that the French system is completely perfect, far from it. Indeed, unanticipated events were to unfold in France in a macabre and stunning way. The Foreign Intelligence Bill was referred to the Conseil Constitutionnel on November 12, 2015, one day before the deadliest terror attacks in contemporary French history, in which 130 people we killed. While it is possible that the attacks influenced the Conseil’s subsequent decision to uphold the bill, the law itself was constructed prior to the attacks and therefore escaped the possible “ratchet” — in which greater power is entrusted to authorities — often associated with such incidents. Although we can only speculate, there are some signs that the attacks did effect the eventual ruling of the Conseil. Indeed, the Conseil backtracked slightly from its earlier constitutional interpretation, which invoked “fundamental guarantees afforded to citizens”, in favor of the narrower interpretation explored earlier in the report of the Committee on Defense. There are multiple ways to interpret this change. Indeed, it could be possible that the Conseil truly believed the changes demonstrated by the new bill were substantive enough to merit their assent. However, as explained above, it is necessary to keep in mind the broader position of the Conseil in French political life (See Pt 2, Ch 3). Its members are primarily politicians, not judges, and of the constructive

48 It didn’t release its final ruling until after the attacks on November 26.
49 See, specifically, at 15 DC 722 (2015)
institutions examined in this paper it is perhaps the least insulated from political influence. Thus, its about-face can, and should, be viewed as at least partially a product of the political sentiment that prevailed after the November attacks. Nonetheless, this does not detract from the important role that it played, as described above, in this policy area. Indeed, the Conseil’s politicization, while possibly engendering its eventual acquiescence, was an asset in the overall scheme of policy construction and enactment.

The last wrinkle in the process of policy enactment that has taken place in France has been the use of the “state of emergency” as a policy tool to respond to threats during periods of emergency. Because this paper isn’t primarily concerned with the development and implementation of this legal phenomenon in French history, we will touch on it only briefly. However, since it has played an influential role in the general constitutional dynamic present in France it merits some attention. The state of emergency is a unique artifact of French law that allows for broad grants of police power to civil authorities (Severson 2015). It can be initiated by the President of the Republic and last up to twelve days, unless extended through a regular act of Parliament. Before the attack of November 13 2015, the only time it had previously been used to grant police the power over the entire country was during the Algerian War of Independence in the early 1960s. The state of emergency is a fairly controversial aspect of French law, and its use since the attacks of November 2015 — during which time over 3,300 warranties searches have taken place — has been widely criticized. It is important to ask, as a number of scholars including Rossiter (1948) and Ackerman (2006) have, how the existence of this alternative legal regime has contributed to the

50 See Law n° 55-385 of 3 April 1955
broader functioning of the French legal system during this period. Because these developments are still ongoing, we offer only preliminary conclusions about the effects of the state of emergency on the government’s surveillance policy.

Of direct importance to the policy area under consideration, the state of emergency enacted by Parliament on November 21 2015 allows for an expansion of the state’s electronic search authority. Specifically, it enables the government to access and copy any electronic information encountered during police raids carried out under the state of emergency. This would, on its face, expand the state’s surveillance authority far beyond that contemplated by the Intelligence Bill of July 2015. However, the Conseil Constitutionnel found this provision to be unconstitutional and an explicit violation of citizens’ rights under the 1789 Declaration of the Rights of Man.51 Thus, rather than providing the government with absolute, unchecked authority, the state of emergency has, as this decision demonstrates, been subject to legitimate constitutional controls. Furthermore, there is an argument to be made that because the state of emergency enables the government to take definitive action in a moment of crisis, France has avoided the passage of a broad and weakly scrutinized emergency statute. This is certainly the case in the surveillance context, as the French government has yet to enlarge their powers further than contemplated in the acts of July and November 2015 through regular legislation. However, it remains to be seen whether the state of emergency will be constitutionalized as a formal part of French law, as has been proposed by President Hollande. If this were to happen, France would risk falling into, to borrow a phrase from Rossiter (1948), a state of constitutional dictatorship. In this

51 See DC 53 (2016)
case, the limited advantages promoted by the state of emergency, in terms of preventing a ratcheting of executive authority and a general acquiescence of parliamentary oversight, would be mitigated by the risk of aggrandizement of executive authority.\textsuperscript{52}

**Conclusion —**

The French experience with the formulation and enactment of surveillance policy reflects the importance that constitutional dimensions have played in influencing outcomes in this policy area. The Conseil Constitutionnel has developed as a unique constructive institution in French political life that is situated so as to facilitate dialogue between Parliament and the executive branch. As we’ve suggested above, this is a function of both the history of French constitutionalism and its development as an institution. Unlike in other polities where constructive institutions have been unwilling to enter the debate over national security issues, the Conseil’s institutional position enabled it to get involved in a meaningful way. The result of this was a debate that was more conscious of the constitutional commitments of French society and an enactment process that was far less reactionary in character. The politicization of the Conseil’s work certainly poses risks as well — such as their delegitimation as a “constitutional” body that is responsible to constitutional principles. Nonetheless, their role in the debate over government surveillance demonstrates that French constitutionalism is alive and well.

\textsuperscript{52} This is a tradeoff that Ackerman (2006) seems reluctant to contemplate.
Chapter Four
The UK

In the next section we examine an ongoing debate in the UK over the use of government surveillance. In contrast to France, Britain has experienced a long process of policy enactment, enforcement, and reform that has involved a multitude of institutional actors putting forth their perspectives (which we term “constructions”) about what is permissible under the parameters of British constitutionalism. In keeping with the main argument of this paper, it is more important to look at the ‘who’ — the institutions responsible for determining the character of rights guarantees and distributions of power — as it is to look at the ‘what’ — the precise content of such guarantees or the relative level of authority granted to institutions in different polities.

Since the passage of the Human Rights Act (HRA) in 1998, Britain has undergone a transformation that has led a broader array of institutions to become involved in the process of influencing the ultimate character of British constitutionalism (Kavanagh 2009). Specifically, the Act gave the European Court of Human Rights and domestic juridic bodies within the UK far greater authority to contest parliamentary legislation that conflicts with rights contained in the European Convention on Human Rights. Furthermore, it has influenced the process through which Parliament itself develops and implements legislation (See Pt 1, below). The changes precipitated by the HRA have led to greater transparency and debate in the context of government surveillance policy. Specifically, we look at two debates in this

53 By British constitutionalism, I refer here to the commitment within the UK to be bound by certain documents and principles in the execution of political action, as well as the manner in which these commitments are interpreted by institutional actors overtime (See Ch 1 above).
policy area — one involving the proper process for authorizing government surveillance and the second the proper structure for the collection of metadata — to highlight this point. The British case study suggests that the development of ‘weak-form’ review — in which juridic actors are empowered to challenge but not necessarily overturn legislation — can have positive effects on the dynamics surrounding the enactment and enforcement of surveillance and other types of emergency legislation.

Pt 1 — The New Character of Constitutionalism in the UK

British constitutionalism has oft been noted for its paradoxical character — despite having no formally entrenched constitution, Britain is credited with creating two of the main facets of modern constitutionalism, namely separation of powers and the use of a formal bill of rights (Bellamy 2011, 86-87). The UK has historically relied on Parliament as its primary constitutional agent, as having the responsibility to deliberate about what is constitutionally required and promulgating the law in adherence to such principles. Indeed, parliamentary sovereignty is one of the most distinctive features of British constitutionalism. In contrast to American constitutionalism, in which rights are enshrined in a written bill of rights and are constructed primarily by judicial actors, Britain has relied for most of its history on the Parliament as the main institution responsible for defining and safeguarding citizens’ rights.54 For this reason, many observers have referred to the British system as one of “political constitutionalism”, or one in which political dialogue, discourse, and contestation play the predominant role in determining the ultimate character of

54 Prior to the passage of the Human Rights Act (1998), domestic juridic bodies were unable to formally challenge parliamentary legislation on the basis of a rights violation but could exclusively review individual cases.
constitutional life (Griffith 1979). Political constitutionalism, in contrast to legal constitutionalism, prioritizes the democratic process as the most legitimate and effective means for the realization of collective and individual rights within a polity.

Yet since the passage of the Human Rights Act in 1998 there has been a sea change in British constitutionalism, as new institutions have begun to compete with the ‘traditional’ political bodies as legitimate claimants on constitutional meaning.\(^{55}\) Specifically, the Human Rights Act (1998), which formally commits the UK to upholding the rights contained in the European Convention on Human Rights (ECHR), has endowed the European Court of Human Rights (ECtHR) and British juridic bodies with the responsibility of reconciling parliamentary statutes with relevant rights guarantees.\(^{56}\) In addition, it has directly influenced domestic democratic debate by committing parliamentarians to certify that new legislation is compatible with the ECHR.\(^{57}\) Thus, the overall effect of the Human Rights Act has been to expand the domestic rights discourse within the UK, as well as to lessen the political bodies’ monopoly over constitutional constructions.

While Parliament has traditionally been the primary institution responsible for constitutional construction in the UK, new institutions — such as the ECHR and domestic juridic bodies in the UK — have become increasingly salient constructive actors in their own right since the passage of the Human Rights Ac (See Annex 3).\(^{58}\)

\(^{55}\) The shift in British constitutionalism represented by the Human Rights Act shouldn’t be underestimated. Indeed, one observer characterized it as a “quantum leap into a new legal culture of fundamental rights and freedoms” (Sir William Wade quoted in Kavanagh (2009. 1).

\(^{56}\) See Section 3 and 4 of the Human Rights Act (1998)

\(^{57}\) See Section 19 of the Human Rights Act (1998)

\(^{58}\) Here I use “domestic juridic bodies” to refer to the UK House of Lords (UKHL), before 2009, and the Supreme Court of the UK, after 2009.
The Human Rights Act has also had a profound effect on the underlying repertoires used by Parliament to construct constitutional meaning. We will look at each of these two shifts in turn and then examine the manner in which they have influenced the passage of counter-terror legislation, and specifically new statutes involving government surveillance.

The first set of constructive institutions consists of Parliament and certain essential committees within it, such as the Joint Committee on Human Rights (JCHR). Parliament plays a dual constructive role in the UK context. First and foremost, it is responsible for passing legislation that is responsive to the wants and needs of UK citizens, and as such still remains the main agenda-setter within the British system. Although the Human Rights Act has perhaps diminished the exclusively political nature of British constitutionalism, this shouldn’t lead us to neglect that Parliament still remains the most critical actor in terms of defining the ultimate terms of legislation. Second, Parliament, with the help of the JCHR, is responsible for certifying that legislation is “compatible” with Convention rights under the Human Rights Act.59 For this reason, Parliament itself plays an important constructive role in determining the nature of Britain’s commitments under the ECHR. Parliament’s ability to play this constructive role on the front-end, as legislation is being passed, should also be understood as endowing it with the ability to negotiate with other institutions for constructive control. Thus, by stating that they believe a statute to be “compatible” with the ECHR, Parliament can assert its view that that courts should show deference on a given issue.

The second set of constructive institutions consists of the European Court of Human Rights (ECtHR) and domestic British juridic bodies. Because the ECtHR’s newfound position in the British constitutional system is its most critical feature, I will spend less time commenting on its internal composition than I did in the case of France’s Conseil Constitutionnel. Nevertheless, it’s worthwhile highlighting some of its basic institutional characteristics. The European Court of Human Rights (ECtHR) is an international court established by the European Convention on Human Rights that is responsible for hearing applications from individuals residing in member states regarding their government’s abrogation of Convention rights. Under the ECHR, individuals are entitled to domestic remedies when the Court rules in their favor. Yet the Convention formally influences member states only in cases in which they have been directly involved, and, even in such cases, they typically have some latitude in the manner in which they implement adverse rulings.

Parliament has two repertoires through which it conducts its constitutional role — one, “legislative agenda setting”, through which it passes legislation compatible to the wants and needs of UK citizens; and two, “certifying compatibility”, through which it debates and ensures legislations’ adherence to both domestic and European principles of constitutionalism. Since the passage of the Human Rights Act, the repertories of Parliament and the ECHR have become increasingly complementary and dialogic in character (more on this below). They are complementary because both institutions are responsible for interpreting a statute’s compatibility with the ECHR. Yet they also often function in a dialogic manner — each institution can offer a different perspective on

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60 As highlighted below, Parliament has a dual constructive role, as an “agenda-setter” and as an “enforcer of compatibility”. See Annex 3.
what the Convention requires, and then move to reconcile their positions (See Annex 3).

It is helpful to think of the ECtHR’s main repertoires as twofold — one, “juridic agenda setting”, through which it hears case law from all member states and makes determinations about the meaning of the rights contained within the European Convention on Human Rights writ large; and two, acting as a “final recourse on incompatibility”, through which it hears final challenges from UK citizens on issues involving Convention rights. Domestic juridic bodies within the UK act as a “primary recourse on incompatibility”, through which they are the first institution tasked with hearing challenges of alleged violations of Convention rights.

The Human Rights Act precipitated a significant shift in the ECtHR and domestic juridic bodies’ constructive influence on UK law and legislative processes. It has brought about a substantial deepening of the UK’s commitment to the rights contained in the ECHR. First, the breadth of the UK’s commitment increased — domestic juridic bodies were now granted the responsibility of reconciling domestic legislation with rights contained in the European Convention on Human Rights. The effect of this institutional change was that the UK government was now no longer responsible only to the rulings to which it was a party, but rather could now be influenced by the entire cannon of European Human Rights jurisprudence. Second, the depth of the UK’s commitment increased — domestic juridic bodies were now able

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61 This is necessarily a post-HRA perspective of the respective institutions’ repertories.  
62 See Section 2 of the Human Rights Act (1998). In R (Ullah) v Special Adjudicator [2004] UKHL, the House of Lords ruled that “the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less.”
to interpret laws so as to comply with the ECHR and deem “incompatible” those which present especially flagrant violations of it.\textsuperscript{63} In both of these changes, one is able to perceive that the British constitutional system has begun to incorporate, far more than in the past, a discourse that prioritizes the protection of individual rights.

The introduction and passage of the Human Rights Act in 1998 has brought about unprecedented changes to the British constitutional system. As highlighted above, it has introduced a rights discourse that was previously foreign to the British system and endowed new institutional actors with the authority to challenge the exclusive constructive control of the political institutions. An observer of these trends could understandably speculate whether they have led to greater convergence between the UK and the rest of Europe in terms of the structure and shape of their legal approaches to specific issues. In the rest of this section, we will look at how the changing landscape of British constitutionalism has affected the adoption of surveillance policy in the UK, and whether there have been salient instances in which new constructive institutions have played an important role in defining the ultimate shape of legislative outcomes. In instances in which the UK has resisted movement towards the rest of Europe on such issues, we will be forced to ask what this reveals about the Britain’s new constitutionalism.

\textbf{PT 2 — The HRA and the Changing Landscape of Constitutional Construction in the UK}

\textsuperscript{63} See Sections 3 and 4 of the Human Rights Act (1998).
We will now look in more depth at the ways in which the passage of the Human Rights Act has influenced the constitutional landscape within the UK and the institutions that are involved in the process of constitutional construction. The purpose of this section is to explore how this changing landscape has led to different patterns of institutional interaction that have, in turn, affected the processes through which government surveillance policies have been enacted and operationalized.

As highlighted above, one consequence of the Human Rights Act was to alter Parliament’s constructive role in the passage of legislation. Indeed, under Section 19 of the Act, Parliament is required to issue a statement to accompany each piece of legislation certifying that it adheres to the rights contained in the Convention. For this reason, the Human Rights Act provides for a certain level of pre-legislative scrutiny to make sure that acts of Parliament adhere to Convention rights. Furthermore, the Joint Committee on Human Rights (JCHR) is tasked with scrutinizing bills before their passage on the same grounds, and is often perceived as having an important impact on the eventual form that legislation takes — as one observer has noted, “It is widely accepted that scrutiny of the JCHR significantly influences the preparation and content of legislation” (Kavanagh 2009, 13). While it is difficult to prove concretely that pre-legislative scrutiny of this sort has definitively narrowed the range of legislative actions available to parliamentarians, it is my suggestion that the Human Rights Act has had such an effect and brought more transparency to the government’s enactment and enforcement of new surveillance policies.\(^\text{64}\) Furthermore, the fact that issues of constitutionality and the precise purpose of legislation arise in a rigorous way during

\(^{64}\) Pre-legislative scrutiny is a robust feature of British parliamentarianism, generally speaking, and has come to play an important role in shaping debates over updating the current surveillance authorization regime.
parliamentary debate means that outside actors aren’t emboldened to construct their own meaning of what was intended by a given statute.65

A far more palpable effect of the Human Rights Act has been to enhance the constructive authority of a range of juridic bodies, both within the UK and at the European level. Indeed, the shift in the role of the courts within the UK has been profound — as one observer notes, “there has been a ‘constitutional shift’ from a completely hands-off judicial approach to a hands-on approach” — and they have come to play an especially important role in debates over counter-terror efforts (Kavanagh 2011). Juridic bodies in the UK have historically shown substantial deference to the executive surrounding issues of national security and war.66 Yet since the passage of the Human Rights Act they have come to play a much more active role in the review of national security policy. The key signpost of this broad institutional shift was a case heard by the House of Lords in which it held that the detention and deportation of foreign nationals without trial was incompatible with the European Convention on Human Rights (Belmarsh Case (2004)).67 After Belmarsh, juridic bodies in the UK have taken on a more active role in reviewing a wide range of national security related policies. As we show below, this has certainly been the case in the context of government surveillance and contrasts with the general deference that US courts have shown when considering similar issues.68

65 The importance of this aspect of the Human Rights act, and the UK’s constructive culture more broadly, shouldn’t be neglected. Indeed, as we shall see in the case of the US, the locus of constructive authority plays crucial role in the ultimate manner in which statutes are effectuated
66 See, for example, Liversidge v Anderson (1941) [UKHL], in which the House of Lords deferred to the determination of the executive in relation to a scheme of warrantless detention.
67 See the Belmarsh Case, or more formally A v Secretary of State for the Home Department (2004) [UKHL]
68 Compare, for example, R (Davis and Watson) v Secretary of State for the Home Department (2015) [UKHL] and Obama v Klayman (2014) [DCCA]
The European Court of Human Rights (ECtHR) has also been empowered as a constructive actor since the passage of the Human Rights Act. Indeed, under the Act the UK commits not only to revising statutes in cases to which it is itself a party but also to upholding the broader set of principles contained in the European Convention on Human Rights (ECHR) and the ECtHR’s interpretation of them.69 While the ECHR was passed in 1953, it hasn’t come to play a salient role in the UK until recently, that is, until institutions were empowered with the authority to enforce and apply the principles contained in it.

The Human Rights Act has brought about an important divergence between the UK and the US in terms of the constructive institutions that are empowered to act in the context of national security issues. This institutional divergence has had a profound effect on the ultimate manner in which policies have been debated, enacted, and enforced. Indeed, instead of juridic actors showing substantial deference to political bodies when reviewing national security issues, Britain has witnessed increased dialogue between political and juridic institutions about what is constitutionally required (See discussion of Belmarsh above). As we discuss in more detail below, this has had important effects not only on the types of policies that are enacted but also the processes through which they are enforced. In the US, for example, the absence of judicial determinations about the scope of surveillance legislation gave actors within the executive branch exclusive constructive authority over their ultimate meaning (See Ch 5).70 While the UK hasn’t accrued a spotless record on the enforcement (or

69 Before the Human Rights Act, the UK was bound to abide only to ECHR rulings to which it was a party (See Article 46 ECHR).
70 See, for example, Yoo (2002)
interpretation) of its surveillance authorities, the existence of some juridic discussion of governmental authority in this context had limiting effect on what the government was capable of doing.\footnote{While the GCHQ’s Tempora program allowed for the upstream collection of large amounts of internet communications and metadata, the UK never had a program of warrantless surveillance comparable to the TSP that circumvented the “peace time” authorization procedure.}

The contemporary system of British constitutionalism is one in which constructive authority is distributed to an array of actors who generally play both complementary and dialogic roles in determining the ultimate manner in which legislation is enacted and enforced. As we shall discuss below, the changing landscape within the UK has played an important role in the context of government surveillance policy. Indeed, the Human Rights Act has had at least two concrete effects in this policy area — juridic actors have become less deferential to the political bodies on issues of national security, and pre-legislative scrutiny is more robust today than in the past. We will now look at the historical development of surveillance policy in the UK and how contemporary reform efforts have been mediated by the range of constructive actors that we’ve highlighted heretofore.

**PT 3 — The Development of the Modern British Surveillance Architecture**

In contrast to the situation in France, the UK has a long and robust history of dealing with issues of government surveillance and has undergone multiple rounds of policy formation and reformation in which statutes have been enacted and subsequently replaced. Indeed, a framework for the interception of communications was first created with the passage of the Interception of Communications Act (IoCA) in 1985. Because
this study is oriented primarily towards contemporary developments, we will not delve in great detail into the development of the IoCA, rather we mention it only insofar as to demonstrate the prolonged engagement in the UK over issues of government surveillance. The statute most relevant for laying the foundation for our discussion is the Regulation of Investigatory Powers Act (RIPA) which was passed in 2000. RIPA forms the bedrock of the modern surveillance architecture in the UK, and it’s from its provisions that contemporary debates over privacy and security have arisen. In this section we will highlight how patterns of contestation over the terms of RIPA — its constitutionality, the necessity of reform, and actual reform processes — have been mediated by the overarching character of the British constitutionalism. Specifically, the process of policy formation and reformation in the context of government surveillance has transpired in a uniquely dialogic manner in the UK — in which legislators have played an oversized role, in comparison to the experiences of other polities, in scrutinizing the constitutionality of the prevailing regime and juridic entities have routinely intervened in a meaningful and complementary manner.

The Regulation of Investigatory Powers Act (2000) was enacted with the primary intention of modernizing the existing architecture within the UK for authorizing intelligence agencies to conduct domestic and foreign intelligence surveillance. It engenders a detailed framework through which the range of investigatory operations performed by the intelligence agencies is facilitated. In setting out this detailed framework, Parliament desired not only to modernize the nation’s surveillance architecture but also, as then Home Secretary Jack Straw made explicit, to guarantee that “the intrusive powers of the state are compatible with the Human Rights
Act 1998” (Straw in BBW). The three elements of RIPA that are significant for our purposes are those sections governing domestic interception, international interception, and the interception of communications data. As we explore below (See Pt 4), these three components have experienced the most scrutiny and have, each in different ways, been subject to distinct reform efforts.

Section 8(1) of RIPA governs the “targeted” interception of domestic communications and allows the intelligence agencies to gather the content of communications in a restricted set of circumstances upon the authorization of the Home Secretary.\(^7^2\) Section 8(4) allows for the “bulk” interception of foreign communications, defined as communications sent or received outside the UK, from Communication Services Providers (ISC Memo: 39). Once an intelligence agency, such as the Government Communications Headquarters (GCHQ), collects such communications in bulk, they are then restricted in the types of “selectors” (such as a name, address, or word) they can use to search within it.\(^7^3\) Lastly, communications data (also known as metadata), such as a phone number or email address, can be intercepted and examined quite broadly under the 8(4) collection orders. The adequacy of each of these categories and their concomitant oversight mechanisms have been the main subject of reform efforts within the UK.

Pt 4 — Realizing Review: The Impact of New Constructive Actors in the UK

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\(^7^2\) Interceptions are allowed for the purposes of national security, preventing or detecting serious crime, safeguarding the economic well-being of the UK, or in compliance with a mutual assistance treaty (See Section 5(3) RIPA).

\(^7^3\) Indeed, GCHQ needs ministerial authorization to utilize specific search terms to comb through the content of communications they’ve collected under 8(4) warrants.
We will now look at the constructive roles that the political and juridic bodies in the UK have come into play in a concrete manner. While the main influence of the institutions of construction in France came during the process of policy enactment, the UK’s institutions have played an important role in the enactment, enforcement, and reform of surveillance policy in the post-9/11 era. In contrast to the US, the UK didn’t respond to the increased threat of terrorism by allowing for the warrantless surveillance of the content of citizens’ communications. As we discuss below, it is our contention that this is due in large part to the way in which the different constructive actors within the UK have come to interact. Yet it is important not to overstate the level of transparency that was achieved in the UK. The Snowden revelations uncovered that GCHQ (the signals intelligence agency in the UK) had been collecting large amounts of email communications content and metadata directly from underwater fiberoptic cables unbeknownst to UK citizens. Nonetheless, the framework under which this occurred required the issuance of ministerial warrants from a secretary of state and, as we discuss below, had been legitimated by a ruling of the ECtHR. Thus, while the UK could have certainly done better on some fronts, the constructive role of the ECtHR, domestic juridic bodies, and even Parliament itself greatly increased transparency and dialogue around government surveillance policy.

74 See the Terrorist Surveillance Program (TSP), Chapter 5, pt 4.
75 This program was called Tempora and was similar to the PRISM program operating in the US. See Chapter 5 for information on the latter program.
76 On the former point see RIPA Section 8(4), and on the latter Liberty v UK (2008). Furthermore, the ECtHR agreed to hear a case on exactly this issue — Liberty v GCHQ (2016) — which hasn’t been ruled on at the time of publication. Yet the justiciability of these issues in the British context suggests a level of transparency and accountability not present in the US context (See, for example, Clapper v Amnesty International (2013))
The overarching argument we present about the UK’s experience in dealing with issues of government surveillance centers around the uniquely dialogic process that has been maintained between political and juridic entities. To better understand this process, we will look at two processes of policy enactment, contestation, and reform that have taken place in the UK. Moreover, within these areas we will discuss how the prevailing institutions of construction utilized their repertories to increase transparency and institutional dialogue. The first area we highlight involves a debate over the authorization process for domestic and foreign surveillance. Since at least as long as the passage of RIPA in 2000, there has been a lingering conflict within the UK about the proper process of authorizing and overseeing telecommunications surveillance. Unlike the US, the UK allows such authorization to occur without formal judicial oversight. Indeed, as highlighted above, government ministers are entrusted with the exclusive authority to initiate surveillance of both domestic and foreign communications.

The debate over the powers of authorization has engaged both political and juridic entities in an ongoing process of institutional dialogue. In the end, statutory alterations have been elusive in this area mainly because the status-quo is perceived as according with the broader principles of British constitutionalism.\footnote{Which, of course, includes the Human Rights Act (1998)} The second area we will highlight surrounds the gathering and retention of communications data (or metadata) by security agencies, as well as the forced retention of such information by communications providers. This debate has similarly engaged a range of political and juridic actors in an ongoing dialogue regarding the best statutory basis for upholding
Britain’s constitutional commitments. However, in contrast to the discourse surrounding the powers of authorization, this debate has led to a process of policy reformation that has realigned the underlying statutory framework.

The constructive role of the ECtHR has been especially important in the context of a debate over the proper process for the authorization of surveillance warrants. During this debate the ECtHR acted as a “final recourse on incompatibility” (one of its two repertories) for petitioners who believed that a previous authorization regime within the UK lacked proper foreseeability as to the range of actions that could be undertaken by the government. Furthermore, this action by the ECtHR initiated Parliament to utilize one of its repertories, namely “legislative agenda setting”, in which it contemplated the constitutionality of the existing regime given the decision reached by the ECtHR. All in all, while the existing regime was eventually kept in place, the dialogue that took place between Parliament and the ECtHR through their respective use of repertoires led, as we discuss below, to greater transparency surrounding the process through which the government authorizes surveillance. It is dialogue such as this that contributed to the prevention of a warrantless system being used in the UK such as that which was adopted in the US.

The debate over surveillance authorizations in the UK has centered around the question of how the government can best fulfill it constitutional commitments while also safeguarding citizens’ security. One of the primary catalysts of debate over the

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78 Foreseeability is a technical legal term used here to refer to the ability of someone to anticipate in advance how a statute is going be enforced once it has been passed. This requires a reasonable level of coherence between the statute’s language and ultimate purpose.

79 Because Liberty (2008) clearly sets a base level standard for the type of authorization procedures and statutory clarity that is required in the surveillance context, it would be difficult for the government to go and claim that they were, in fact, empowered to commence new surveillance without any formal oversight process and in contravention of statutory guidelines. In contrast, see Yoo (2002).
RIPA authorization framework was a case heard by the ECtHR, *Liberty and Others v UK* (2008). The case centered around the question of whether an old authorization framework, under the Interception of Communications Act (1985) provided proper safeguards for the protection of citizens’ privacy rights as guaranteed by Article 8 of the European Convention on Human Rights. The ECtHR ruled that the statutory regime did, in fact, violate Article 8 by not providing sufficient clarity as to the scope of the government’s interception authority nor the process through which communications were selected, examined, stored, and destroyed (See *Liberty and Others v UK*, at 69). Because the statutory regime in question in *Liberty* had already been replaced at the time of the ECtHR’s ruling (namely by RIPA), the decision didn’t formally jeopardize the government’s surveillance regime. However, the ruling caused political bodies within the UK — such as the ISC and the JCHR — to question whether the RIPA regime did indeed size up to the standards put forth in RIPA.

The *Liberty* decision inspired political dialogue about the adequacy of the prevailing statutory regime as well as the existence of alternatives to it. Indeed, irrespective of the fact that they were under no formal obligation to do so, political entities within the UK began to consider whether the extant regime best realized their domestic constitutional commitments. For example, a JCHR report at the time challenged the government on exactly this front:

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80 The case itself dealt with interceptions that had taken place far prior to the case’s hearing. Indeed, by the time the case was heard a new framework, RIPA, has replaced the Interception of Communications Act.

81 This is an example of the ECtHR using its “final recourse of incompatibility” repertoire.
We therefore consider this to be a case in which full implementation of the judgment of the Court requires the Government to consider general measures which go beyond the repeal of the statutory regime that was in force at the time…We urge the government to give serious consideration of the ways in which it could amend the system for supervising the interception of communications to provide for greater safeguards for individual rights. (27, Report JCHR)

The JCHR, in an example of a parliamentary body utilizing its “certifying compatibility” repertoire, challenged the government to reconsider whether it couldn’t go above and beyond RIPA to better safeguard citizens’ rights. In the end, the government declined to take immediate action on this front, namely by, as some have called for, requiring judicial oversight over such authorizations.82

Nonetheless, this back and forth — between juridic and political entities — spurred an important debate about the most sufficient means of overseeing surveillance authorizations, one that continues in the UK to this day. While other polities, such as the US, have opted for judicial control over such powers, the UK has maintained the constitutional significance of political (or ministerial) authorization. As an ISC report suggests, there are certain benefits to be had under such a system — “While both ministers and judges can assess legal compliance, ministers can apply an additional test in terms of the diplomatic and political context and the wider public

82. This was due in part to a closely following ruling by the ECtHR in Kennedy v UK (2010) which affirmed the adequacy of the RIPA regime. Furthermore, in recently proposed Draft Investigatory Powers Bill (2015), the government has proposed to change the authorization process so that judges would review all warrant requests before they are signed off by a secretary of state.
interest...Furthermore, judges are not held accountable, or asked to justify their decisions to parliament and the public as ministers are” (ISC Memo 7). Indeed, while some perceive ministerial authorization to provide less robust rights protections, it may better accord with the broader principles of British constitutionalism.\textsuperscript{83} While reform didn’t ultimately occur in the context of the authorization of telecommunications interceptions, the debate and dialogue enriched the public discourse surrounding the commitments of British constitutionalism, as well as the system that best aligns with such commitments.\textsuperscript{84}

The second area of controversy that has emerged in the UK involves the collection of communications data (or metadata) by government intelligence agencies. In this context, Parliament’s repertoire of “certifying compatibility” and a domestic juridic body’s repertoire of acting as a “secondary recourse on compatibility” were put into action. The various institutional constructions that occurred over the issue of the government’s retention of communications data resulted in an extensive debate in the UK about the types of privacy violations at stake in relation to the retention of telecommunications data, as well as the level of transparency and oversight necessary to lawfully implement such a regime.

We will now describe the manner in which this debate proceeded to better understand the ways in which the constructive roles of institutions in the UK have been brought to bear in a positive manner. The process of authorizing the collection of communications metadata in the UK under the RIPA regime has been fairly minimal

\textsuperscript{83} Furthermore, as will be explored in the US case, judicial authorization can be feckless in its own ways
\textsuperscript{84} This debate is very much alive today, as is made clear by the draft Investigatory Powers Bill (2015) which proposes to have a judge consent prior to all ministerial authorizations.
and is subject almost exclusively to internal agency scrutiny. However, in part due to revelations by former NSA contractor Edward Snowden, as well as additional intervening events, the UK has been engaged in an ongoing reform process aimed at better clarifying the government’s ability to collect, store, and sift through communications data. As with the debate over authorization procedures, the process of policy reform in the context of communications data was also spurred by a judicial opinion. In 2014, the European Court of Justice (ECJ) invalidated the European Data Retention Directive (2006/24/EC), which required providers of communications services providers to retain the data of their customers for a certain period of time. Because the ruling overturned a pan-European law, it didn’t formally necessitate that member states respond in-kind by altering their approach to collecting such information. However, in response to this decision Prime Minister Cameron introduced a reform bill to clarify any confusion the telecommunications providers might have after the ECJ’s ruling. The new bill, the Data Retention and Investigatory Powers Bill (DRIPA) — which was passed as “emergency” legislation — gives

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85 Indeed, as the Guardian has reported, GCHQ’s “TEMPORA” program enabled them to collect vast amounts of data directly from fiber optic cables and search them to identify important trends. The USA’s National Surveillance Agency (NSA) had a similar system operating under the code name “PRISM.”

86 Interestingly, the Data Retention Directive were adopted primarily in response to the bombings in London on July 7 2005.

87 It is important to note here once again that the government wasn’t compelled to engage in a reform effort but opted to do so nonetheless. While there decision to do so can be perceived as motivated out of selfishness, the fact that such a process of judicial ruling and political response can occur in a system without formal judicial review reinforces the effectiveness of political constitutionalism.

88 The Data Retention and Investigatory Powers Bill

> http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06934
domestic authorities the power to compel telecommunications providers to retain communications, a power previously endowed by the EU Data Retention Directive.\textsuperscript{89}

This rushed legislation led to a wave of domestic criticisms in the UK. The main critique made against the new law was that it neglected to take into account the actual reasons why the ECJ had overturned the Data Directive, namely that the indiscriminate collection and retention of metadata didn’t comport to European Union law. The new law was eventually challenged by members of the House of Commons in front of the High Court of Justice in England (EWHC). The EWHC, in an example of its “primary recourse of compatibility” repertoire, overturned the law on the basis that it didn’t provide “clear and precise rules for access to and use of communications data” and access to such data wasn’t “made dependent on a prior review by a court or an independent administrative body” (2015 EWHC 2092, at 114). As such, it didn’t accord with the UK’s commitments under the Human Rights Acts. The result of this ruling was that the government was given a limited window to come up with replacement legislation before being forced to forsake the powers included in DRIPA.

The debate of communications data surveillance in the UK reinforces some of the broader trends that we’ve highlighted regarding the character of British constitutionalism. Indeed, during the various iterations of dialogue between the courts and the political bodies, the latter were given a fairly wide latitude to come up with mechanisms that accorded with their view of the constitutional requirements of British law. Yet at the same time different juridic bodies — whether in the case of the ECJ or

\textsuperscript{89} By “emergency legislation” we mean that it was subject to limited debate within Parliament before being considered for an up-down vote.

the High Court of England — were introduced as more salient actors in shaping
domestic debate over this issue

**Conclusion —**

This discussion of the enactment and reform of government surveillance policy
in the UK is revealing for those seeking to understand the changing nature of British
Constitutionalism. For more than three-hundred years Britain has relied on Parliament
to determine the range of rights that would be guaranteed to citizens. Yet since the
passage of the Human Rights Act in 1998, a range of juridic actors have been
empowered to challenge legislation based on its adherence to certain rights guarantees.
Despite criticism that the Human Rights Act has created a deleterious “constitutional
shift”, to borrow a phrase from Kavanagh (2011), in the UK, the reality is that a subtler
transition has occurred where political and juridic entities often operate in dialogue
with one another. In certain areas, such as that involving the authorization of
surveillance warrants, the courts have played a relatively hands off role and left it to
political bodies to develop their own understanding of what is constitutionally required.
In others, such as the interception and retention of communications data, they have, to
a limited extent, rebuffed political bodies while allowing them fairly wide latitude to
develop alternative frameworks. It’s not our goal to pronounce whether the British
system is in some sense “good” or “bad”, rather it is instead to point out its distinct
advantages and disadvantages. The advantages of this dialogic approach is that it has
allowed for substantive and transparent debate to happen within Parliament about what
the government should do to safeguard the security and privacy of its citizens while
maintaining the polity’s broader constitutional commitments. In comparison to the US, the level of constitutional discourse has been far more robust in the UK. However, one disadvantage of the process of reform in the UK has been a tendency to adapt piecemeal reforms without overhauling the underlying regime in operation. The effect of this has been to create an overly complex layering of statutes that risks compromising transparency and the public’s trust in their government.

However, there is an ongoing effort to address the main disadvantage highlighted above. Indeed, the government recently introduced a new bill — the Regulation of Investigatory Powers Act (2015) — that aims at overhauling the entire surveillance regime within the UK, including those powers overturned by the High Court in 2015. Indeed, one observer has called the bill the “largest overhaul of laws governing electronic surveillance in 15 years” (Severson 2016). It includes a provision for the judicial authorization of surveillance warrants that would bring the UK’s system far more in line with that of its American counterparts. While this consolidation would generally be beneficial, by reducing the unnecessary complexity of the UK’s system, the danger of the proposed provision for judicial authorization is that it could counteract the positive effects achieved under a system of political constitutionalism where the political bodies are highly scrutinized.
Chapter Five
The US

Introduction —

In the next section we examine the manner in which the enactment, enforcement, and reform of surveillance policy has played out in the US. The US provides an interesting case study on the dangers posed by endowing exclusive control over the terms of constitutional meaning to a narrow group of institutional actors. As such, it demonstrates that irrespective of formal rights guarantees or institutional safeguards, constructive institutions have the ability to make such safeguards entirely ineffective by declining to act, interpreting them narrowly, or circumventing typical avenues of institutional dialogue.

In the 1960s and 70s the US experienced a vibrant debate about the government’s ability to conduct surveillance on its citizens. Indeed, in response to the limited restrictions that existed on the actions of the intelligence agencies at the time, Congress and the Supreme Court moved to bolster oversight over such activities. In a landmark case, United States v United States District Court (1972), the Supreme Court ruled that the warrant requirement of the Fourth Amendment requires intelligence agencies to obtain a warrant in cases involving the domestic surveillance of domestic threats. The precedent at the time was quite clear — domestic surveillance of any kind requires a warrant. However, the passage of the Foreign Intelligence Surveillance Act in 1978 created an alternative institutional structure for authorizing the surveillance of “agents of a foreign power” operating within the US. At the time of its creation, the FISA regime was intended to have only a limited range of surveillance activities under
its auspices. However, since the events of September 11th, a process of institutional drift has occurred through which the Foreign Intelligence Surveillance Court has come to legitimate new surveillance programs with very little scrutiny from outside actors. Furthermore, because the legal bases for such programs were tenuous in character, there existence was not known to the public at large. To achieve greater transparency and more effective rule of law, the US should contemplate reducing the scope of the FISA regime’s control over surveillance issues and bringing a broader array of constructive actors to bear in this policy area.

Pt 1 — Prerogative Politics and the War on Terrorism

Discussions of presidential power have always figured prominently in American constitutionalism. This has to do in part with the fact that the US Constitution doesn’t state with precision the character of “executive power”, but rather lays out a set of fairly broad principles about when the president is empowered to act.\(^\text{90}\) Throughout American history, the most controversial debates about constraints on presidential power have taken place during times of war, in which the power of the president is bolstered under the guise of their role as Commander in Chief.\(^\text{91}\) Nonetheless, there has emerged — through the development of institutional practices and the establishment of legal precedents — limits even to to the unilateral actions that a President is empowered

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\(^{90}\) Take, for example, the Vestiture Clause (Article II, Sec 1, Cl 1) and the Commander in Chief Clause (Article II, Section 2, Clause 1). The proper limits and scope of the latter has been especially hotly contested during the so-called “War on Terror”.

\(^{91}\) See, for example, the Prize Cases (1863), Ex Parte Milligan (1866), or Youngstown Sheet and Tube Co v Sawyer (1952).
to take during periods of declared war. Yet since the attacks of September 2001, there has been a radical reconsideration of the president’s ability to take unilateral action in the face of national security threats. There has been, to borrow a phrase from Pious (2009), an expanded use of “prerogative power” — or the “the substitution of presidential fiat or unilateral action for statutory authorization and collaborative decision-making” (460). Arguments based on the notion of prerogative power have been used in the post-9/11 era to justify many of the nation’s key counter-terrorism programs — including wartime detention, torture, and government surveillance. Furthermore, if prerogative power was a new institutional repertoire being developed, legal rhetoric was most often the way in which it was effectuated (more on this below). Because we are interested primarily with issues of government surveillance, we will not focus on all of the policy areas that reflect this nascent strain in American constitutionalism. Yet it is essential to underscore this broad trend of the post-9/11 era so as to better understand the dynamics which have prevailed in debates over the enactment and reform of surveillance policy.

There are two sets of constructive institutions in the US context, which we term conventional and unconventional constructive agents (See Annex 4). The first set of constructive institutions (the “conventional” set) consist of Congress and the US Supreme Court (SCOTUS). Congress is tasked with “setting the legislative agenda” and determining the range of authorities, broadly speaking, that are to be granted to the intelligence agencies. Congress has played a central role in the post-9/11 era in terms

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92 The clearest, and most often cited, example of this would be the opinion of Justice Jackson in Youngstown Sheet & Tube Co v Sawyer, in which he laid out a tripartite distinction about limits placed on executive power during periods of war. However, the US hasn’t formally declared war Al-Qaeda, rather it has “authorized military force”, which would seem to suggest that the president isn’t even at the apogee of this,
of enacting and reforming government surveillance policy. The PATRIOT Act (2001) and the FISA Amendments Act (2008) are the two key pieces of legislation that were passed during this period to expand the government’s ability to initiate a range of new surveillance activities.\textsuperscript{93} Although Congress has, through the passage of legislation, set the broad agenda for surveillance in the post-9/11 era, its constructive role has been characterized by the delegation, rather than the positive assertion, of constitutional authority.

The Supreme Court has garnered the most attention of any the institutions considered in this study for its role in constructing the Constitution, and for good reason. Indeed, it has the longest historical tradition of any institution of its type and has come to play an important role in influencing a broad array of social and public policy issues. The Supreme Court is a body of nine judges empowered to overturn Congressional legislation that violates principles contained in the Constitution and Bill of Rights.\textsuperscript{94} However, it is essential to underscore that the Court has actually been remarkably quiescent when it comes to issues involving the so-called “War on Terror”, and has often deferred to executive decision-makers rather than rule definitively on the constitutional issues at stake.\textsuperscript{95} The consequences of such inaction has been remarkably important because it has allowed other entities — such as the Foreign Intelligence

\textsuperscript{93} The USA FREEDOM Act is the main reform bill of the post-9/11 era. This bill modified several provisions of the Patriot Act, namely those allowing for bulk records collection, while allowing for an array of other authorities to remain intact.

\textsuperscript{94} The Supreme Court’s power of judicial review, through which it can overturn Congressional actions and statutes that are unconstitutional, is only one among its many institutional responsibilities. Furthermore, as we show in the context of the “War on Terror”, the Court has important rules about the types of cases it hears which limits the extent of its influence in the political sphere.

\textsuperscript{95} This is certainly true in the context of government surveillance — see, for example, \textit{Clapper v Amnesty International} (2013). In the context of detention of enemy combatants the court has forged a less deferential but still fairly cautious approach to dealing with the executive — see for example \textit{Hamdi v Rumsfeld} (2004) and \textit{Hamdan v Rumsfeld} (2006).
Surveillance Court (FISC) and executive agencies’ legal teams — to put forth the dominant constructions regarding what is allowed under the law. In this context, the consequences of institutional inaction have been as consequential as prospective action.

The second set of constructive institutions (the “unconventional” set) consists of the Foreign Intelligence Surveillance Court (FISC) and the legal teams of the agencies of the executive branch. As mentioned above, the Foreign Intelligence Surveillance Court was created in 1978 to address what were then perceived as major weaknesses in the domestic surveillance architecture. The Court consists of a panel of 11 judges that are tasked with authorizing the surveillance of “agents of a foreign power” within the US. At the time of FISC’s creation, the nation was struggling through a series of intelligence controversies — such as the Watergate Scandal and the Church Committee hearings. It was in this atmosphere that Congress attempted to strike a balance with the intelligence agencies by passing a statute to give them the flexibility to effectively engage in domestic surveillance exclusively for foreign intelligence purposes. The passage of the Foreign Intelligence Surveillance Act (1978) resulted in the creation of an alternative system through which the intelligence agencies seek authorization for surveillance involving foreign intelligence and international terror investigations. Under this system, the Foreign Intelligence Surveillance Court (or FISC) hears cases presented by the intelligence agencies in camera, or “in secret”, and then decides to authorize surveillance in instances in which there is probable cause to

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96 See the Foreign Intelligence Surveillance Act (1978)
97 “Agent of a foreign power” includes “a group engaged in international terrorism or activities in preparation thereof.” (50 USC § 1801(a)(4)) Furthermore, US persons who “knowingly engage” in international terrorism are considered foreign agents, under the statute, and can be surveilled under the guise of FISA.
believe that the target, which can include both US citizens or foreign citizens operating within the US, is an agent of a foreign power.\textsuperscript{98} However, the decisions of the court itself aren’t made available to the public, nor are the means through which the intelligence agencies conduct their operations.

Since the attacks of 9/11, legal teams within the executive branch have come to play an incredibly important constructive role in the context of surveillance policy. Lawyers from the White House and the Department of Justice used the alternative institutional procedures set up under FISA to legitimate new surveillance procedures (See Pt 4 below). They submitted novel legal arguments to the FISC Court about the types of actions that they were empowered to take based on laws that had been passed by Congress. Yet because the Court operated in secret and without a system of adversarial review, the public was left in the dark about the powers that were being sanctioned by the FISC Court, as well as the underlying justifications for them.

The Supreme Court asserts its role through two primary repertoires — judicial review and institutional deference. The Court is empowered through “judicial review” to overturn legislative and executive actions that it perceives as violating the Constitution. However, in certain areas and contexts the Court, utilizing its repertoire of ‘institutional deference’, decides against hearing such challenges.\textsuperscript{99} It’s not necessary to touch extensively on the character of these repertoires because the Court has, in fact, played a minimal role in influencing the enactment and enforcement of government surveillance policy. However, I do discuss below the manner in which such

\textsuperscript{98} See Sec 105 (3)(a) Foreign Intelligence Surveillance Act of 1978

\textsuperscript{99} The Court can show deference in a number of ways — including its utilization of the “Ashwander” rules. In the context of this study, however, we are most interested in its deference in cases involving issues of national security.
deference has empowered other actors to construct the meaning of legislation and the extent of different institutions’ authority. Congress’ single repertoire is as a “legislative agenda setter”. It utilizes this repertoire to define the broad terms under which the intelligence agencies are empowered to authorize and conduct surveillance. However, as we discuss below, Congress has, in the post-9/11 era, favored broad-based delegations of surveillance-related powers to narrowly tailored statutes.

The FISA Court has two repertoires through which it has influenced the operation of the powers granted to the intelligence agencies to conduct surveillance. The first, “authorization authority”, enables it to oversee and limit the types of surveillance that can be conducted. In reality, the Court has approved the great majority of requests made to it by the intelligence agencies.\(^\text{100}\) Although, defenders of the executive branch would suggest that this belies the range of requests that weren’t sent for authorization for fear of denial (Clarke). The Court’s second repertoire is “regime transformation”. Through the use of this repertoire the Court has embraced a range of legal arguments put forth by the executive branch regarding authorities granted to it under Congressional statute (See Pt 4 below). As such, the FISA Court has often acted akin to a policy-maker, allowing for regimes to emerge under the guise of old powers (Savage 199). The main repertoire of the legal teams of the executive branch is as an “executive agenda setter”, through which appeals to the FISC Court to adopt its interpretations of the powers entitled to it as a matter of both statutory law and constitutional principle. The effect of these legal teams’ unchecked access to the FISC

\(^{100}\) Indeed, between 1979 and 2012 the Court approved 99.97 percent of the requests sent to it (Clarke)
Court has been the creation of “executive power precedents” that can later be used to justify the use of the FISA regime to serve an array of new functions (Savage, 44-47).

PT 2 — The Supreme Court, FISA, and a New Regime of Constitutional Construction

The importance of the Supreme Court in America’s constitutional system has been considered from a variety of perspectives. In an influential article from 1957, Robert Dahl offers a particularly incisive statement — “To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system”. In the article Dahl goes on to suggest that the Court should not be viewed, as is often the case, as “a shield and buckler for minorities against national majorities”, but rather should be understood as a “policy-making” institution whose decisions don’t typically deviate from those prevailing within the governing majority. While novel for its time, Dahl’s perspective misses out on a couple of crucial points. Indeed, as Caspar notes, “Dahl’s analysis is based on the premise that policy making is most fruitfully analyzed in terms of…winners and losers” (60). Yet this neglects the broader role the Court plays as a constructive institution within the American polity. Indeed, the most influential aspect of the Court as a political entity may in fact be that the way in which it constructs constitutional meaning greatly influences subsequent processes of public and political debate. For example, the Court’s decision in Katz v United States (1967), which ruled that individuals are protected in all areas in which they have a “reasonable expectation of privacy” significantly altered the manner in which policy makers and citizens have understood the very nature of privacy. The key point here is that the Court enters the political
process in an important manner by constructing constitutional meaning, by not only interpreting what the law means but also influencing the terms on which constitutional rights and grants of institutional authority are understood. In the realm of surveillance policy, however, the Court has, importantly acquiesced in its constructive role. The result of this has been to grant tremendous power to executive-branch lawyers and FISC judges to construct constitutional meaning — often with limited transparency and oversight — and, to borrow from one observer, to substitute legal debate for policy debate (Savage 38).

At the time of its passage, FISA represented an innovative solution to a difficult set of problems (See Pt 1 above). Yet over time, and for a variety of reasons (which we explore below), the framework set up by FISA has contributed to a prolonged process of institutional drift that has undermined the very basis for which the system was initially set up. To some degree, the possibility of this drift was built into the very system itself, in which, by design, there was little transparency to the legal arguments being put forth to justify many of the intelligence agencies’ activities. The system was a loaded-gun such that once emergency struck there was little stopping things from going off the rails. However, to take the air of inevitability behind this statement, it is also important to look at the unique confluence of factors that led to a systematic retooling of FISA intelligence architecture. One crucial factor, as mentioned above, that contributed to FISA’s institutional drift was the distinct position of the Bush Administration in the wake of 9/11 on the question of presidential prerogative. It is undeniable that the threat faced by the US immediately after 9/11 was significant. The Administration’s response in the face of this threat was to argue that they had
unrestricted authority to surveil a range of communications previous contemplated under FISA (See Yoo 2002). Yet because this parallel system of authorizations had been created under the guise of FISA, it was highly unlikely that the courts or congressional oversight bodies would contest such arguments. The range of people who knew about the Administration’s furtive legal justifications were few, and the conventional institutional mechanisms for oversight and transparency had been limited by FISA. Thus, the primary institutions that were left to forge distinct constructions regarding what was allowable under the law were contained within the executive branch — such as the Office of Legal Policy (Department of Justice) and the respective legal teams within the intelligence agencies.

The argument I present about the experience of the US in dealing with surveillance policy during the post-9/11, and indeed in all of the countries under consideration, stresses the importance that institutions have played in dictating the terms on which debates over such issues occur. In the US, the salience of institutional alignment and interaction has perhaps been the most significant in terms of dictating the trajectory in which policy has developed over time. While others have stressed the difference in privacy commitments between the US and Europe to explain differences in surveillance policy (See Bignami 2007 or Fura and Klamberg 2012), it is my suggestion that institutional dimensions — such as certain institution’s ability to construct the underlying meaning of legal protections or powers — has played a far more important role. In the next section, we highlight in more depth the key developments of the post-9/11 era in relation to the construction of the modern surveillance architecture in the US. We then, in the final section, look at how the
institutions involved in instituting these policies have catalyzed a complex process of institutional drift and subsequent partial reform.

**Pt 3 — The Contemporary Development of Surveillance Policy in the US**

Prior to the revelations of former NSA contractor Edward Snowden in 2013, the full scale and scope of the US’s surveillance architecture wasn’t fully known to the public. It would have taken careful attention to the guarded comments of congressional oversight committee members to have intimated even a portion of what was eventually revealed. Even in this case, no one could have anticipated the full character of the Administration’s often creative construction of the range of powers that had been granted to it. As stated above, this disparity between public perception and private fact can largely be attributed to a process through which an institutional structure put in place prior to 9/11 was captured by agents of the executive and utilized to serve new and unintended purposes. This section will lay out the trajectory of post-9/11 developments and the precise changes that were made to the FISA regime through Congressional action. The next section will then look at how the executive’s creative construction of these new powers led to the establishment of a slew of new surveillance programs, the justifications for which often aligned quite tenuously with the principles put forth in congressional statute.

Over a month after the attacks of September 11th, Congress passed the USA PATRIOT Act to bolster the intelligence agencies’ ability to anticipate and prevent further acts of terror. The PATRIOT Act is a complex bill with an array of different components. For our purposes, it's most important to focus on Section 215 of the Act.
This Section greatly expanded the range of records that could be collected under FISA’s authorization system, and it also lowered the standard necessary for collecting such information — such communications records could be collected so long as they were “relevant” to an investigation of foreign intelligence. Thus, the PATRIOT Act stretched FISA far beyond its initial boundaries, and, in doing so, granted the intelligence agencies far greater latitude to collect records relating to foreign intelligence and terrorism investigations.

Yet despite the extraordinary expansion of governmental authority contemplated by the PATRIOT Act, it also incorporated some practical restrictions on what the agencies could and could not do. For one, they still had to seek formal authorization from the Foreign Intelligence Surveillance Court to collect even the expanded set of records allowed by Section 215. In addition, under the statute they could only collect records that were “relevant to an authorized investigation”, which suggests that the extent of the collection, though expanded, would still remain limited. As we shall see below, because of an array of creative legal interpretations, the statute was utilized to justify the bulk collection of vast amount of data (“millions of records”) regarding Americans’ telephone and email conversations often without even the limited oversight created by FISA. ¹⁰¹

In 2008, Congress passed an additional law, the FISA Amendments Act, that greatly expanded the government’s ability to collect the content of communications with at least one of the recipients residing outside of the US. At the time of its passage, little was known about the existing system for collecting such communications, nor the

¹⁰¹ It is important to note that when we talk here about data we refer to broad information about an email or telephone call — such as the recipient, duration, or time — and not their content.
government’s justification for it. Yet because of the Snowden revelations, as well as the plethora of documents it brought into the public domain, we now know that the Act was passed primarily to solidify an existing system that had been in place with little oversight since 2001. The FISA Amendments Act (2008) formally amended FISA (1978) to allow for the intelligence agencies to collect the content of a wider range of communications under the guise of the Foreign Intelligence Surveillance Court. Specifically, the Act allows the NSA and FBI to collect the content of the communications of non-citizens “reasonably believed” to be outside of the US without individualized warrants from the FISA court (Savage 213). Indeed, although it wasn’t publicly known at the time of its enactment, it allows the government to apply for generalized warrants from the Foreign Intelligence Surveillance Court to acquire vast records — which often included those of Americans — from telecommunications companies, as well as to tap into fiberoptic cables carrying vast amounts of communications data. In both of these cases, the NSA is entrusted to use such information only to the extent contemplated by the law. As we describe below, the controversies surrounding the FISA Amendments Act (2008) — such as the underlying justifications for its passage, the lack of clarity regarding the type of the communications being collected, and the ‘incidental’ collection of Americans’ communications — are products of the unique institutional landscape that has developed over time in the US.

102 We refer here to the Terrorist Surveillance Program (or TSP) put into place by President Bush in 2001, and which collected the content of communications between the US and Afghanistan without any judicial authorization.
103 This communications of US citizens could quite easily be collected under these rules if they are communicating with a non-citizen currently under surveillance. Furthermore, as we describe below, US communications ended up being swept up ‘incidentally’ by the NSA based on the technological nature of their methods.
These two legislative enactments — the PATRIOT and the FISA Amendments Act — form the bulk of post 9/11 legislative action on the issue of government surveillance. Both acts were aimed at bolstering the intelligence agencies’ ability to anticipate and respond to possible terrorist threats. However, their passage also led to surreptitious bureaucratic infighting that expanded these authorities even further than had perhaps been anticipated by those who passed the laws. As described below, the expansion of the American surveillance state that happened after 9/11, and which surprised and outraged many, had far more to do with the institutional structure put in place to interpret and enforce these laws as it did with the laws themselves. Indeed, it was the exclusive constructive authority endowed to individuals within the executive branch that led to a significant disjuncture between what was authorized by law and what was being done in practice.

PT 4 — Dialogue Derailed: America’s Dual Track Approach to Constitutional Construction

The role of the “unconventional” set of constructive institutions came into sharp focus directly after the attacks of 9/11. The first and, for our purposes, most important surveillance program created in the wake of the 9/11 attacks was the Terrorist Surveillance Program (or TSP). Under this program, the Bush Administration asserted its authority to collect communications data and content from communications where at least one party was believed to be affiliated with Al-Qaeda, even if such communications were purely domestic. As such, they argued that the entire FISA

104 TSP was part of a broader initiative called the Presidential Surveillance Program (PSP). It was later revealed that the codename for TSP was “Stellarwind”.

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system, which, as highlighted above, was created by Congress for the explicit purpose of authorizing this type of surveillance, had no bearing on the range of actions that they were entitled to take. Rather, by relying on the argument that presidential prerogative had expanded during wartime, the Administration’s lawyers suggested that the intelligence agencies could collect such communications without a warrant, FISA or otherwise, being issued at all. The arguments put forth by John Yoo, one of the Administration’s top lawyers at the time, is informative on exactly this point, and speaks to the broader discourse of “prerogative politics” that have characterized debates over counter-terror issues in the US:

FISA cannot infringe the President’s inherent power under the Constitution to conduct national security searches, just as Congress cannot enact legislation that would interfere with the President’s Commander-in-Chief power to conduct military hostilities. In either case, congressional efforts to regulate the exercise of an inherent executive power would violate the separation of powers by allowing the legislative power to usurp the powers of the executive. (Yoo 8)

The second half of this statement is especially remarkable for what it suggests about the president’s power during periods of open hostility, as well as the prospects of sustaining limited government throughout the lifespan of the nation.

105 The main arguments put forth on this front were twofold. One, the President retains inherent authority as Commander in Chief that cannot be subverted by congressional statute. Second, the 2001 Authorization for the Use of Military Force, which authorized the use of force against agents involved in the attacks of 9/11, represented a grant of authority from Congress to the President.

106 It is important to note that even after the Authorization for the Use of Military Force in 2001, a declaration of war had not formally been issued. Thus, it is difficult to suggest, as Yoo (2002) does, that the President was at the height of their power.
It is in large part due to the fact that the constructions put forth by the Administration, such as that offered by Yoo (2002) above, took hold after the 9/11 attacks that the entire FISA system was slowly subverted to take on new roles. In the context of the Terrorist Surveillance Program, the government collected the content and metadata of vast amounts of communication traveling through links between the US and Afghanistan without authorization from FISC or any other independent body. They vacuumed up such communications aggressively, and with little recourse to whether those of Americans were included in what they were collecting. In interpreting the law to allow for such actions, the Administration subverted the FISA regime itself, which had explicitly been designed to provide oversight for the collection of such communications. However, in some sense, the Administration’s ability to take such actions was a product of the very fact that the FISA regime existed. For without the secrecy that such a system provides it would have been difficult to legitimate such a system of alternative (non-criminal) surveillance, nor, as we will show below, perpetuate its existence after the immediate threat of another terror attack had waned.

The judges on the Foreign Intelligence Surveillance Court didn’t know that the government was creatively circumventing the system of authorization and oversight for which they were responsible. Yet by 2003, the Administration’s lawyers had started to raise doubts about two components of the TSP program — the bulk collection of email and phone records and the collection of communications content linked to Al Qaeda suspects. Yet instead of scaling back these programs, the Administration sought to bring them into the broader FISA system via a creative reading of FISA and the amendments that had been made to it since 9/11.
In response to lingering doubts about the legality of the TSP, the FISA Court utilized its repertoire of “regime transformation”, though it has routinely embraced the legal arguments of executive agents, to legitimate the expansive collection of both bulk metadata and the content of foreign-to-domestic communications. The first set of authorities that were “brought under” the FISA system were those involving the bulk collection of email and telephone data. In both cases, the PATRIOT Act was utilized to justify the FISA Court’s decision to embrace these new authorities. In the case of email data, the PATRIOT Act (Section 214) added a provision to FISA to allow for the use of so-called “pen-register” and “trap and trace” devices in the context of foreign intelligence and counter-terror surveillance. These devices typically enable intelligence agencies to collect the metadata — such as the numbers of ingoing and outgoing calls or the duration of conversations — from a specific cellular device.

As a result of the PATRIOT Act, the government now needed to simply show that the information they were seeking was relevant to foreign intelligence investigation to obtain a warrant from the FISA Court to collect this type of information. The government’s creative construction of these provisions were two-fold. One, they argued that the concept of a “pen-register” device could be applied to internet and email. Thus, data contained on entire internet servers and fiber optic transmissions cables could now be captured by the National Surveillance Agency [NSA] (Savage 194). Two, the word relevant was reinterpreted to essentially refer to all communications coming across key parts of the internet’s infrastructure. The effect of these dual interpretations were to greatly reduce the targeted and individualized nature of FISA Court authorizations and to allow a great deal of information about
Americans’ online communications to be swept up alongside those of foreigners. In the context of telephone data, the Administration made a similar argument about the scope of the word *relevant* (Savage 197). Indeed, they argued that the PATRIOT Act allowed them to collect the entire calling records of many major telephone companies, even if they contained those of purely domestic communications.

The second set of authorities that were later legitimated under FISA relate to the collection of the content of foreign and foreign-to-domestic communications. In this case, lawyers in the executive branch used their position as “executive agenda setter” to justify the collection of an even broader array of foreign-to-domestic communications than they had under TSP. As mentioned above, under the Terrorist Surveillance Program the intelligence agencies were allowed to collect, without a warrant, the content of a wide range of communications traveling between the US and Afghanistan. In response to the program’s exposure in the press and increasing criticism from within the government, the Administration sought to put them on a better footing. Indeed, they went to the FISA Court with another creative interpretation about what was permitted under FISA. In 2006, the Department of Justice (DOJ) submitted a petition to the FISA Court that argued that the word *facility*, which had typically referred to a phone number or email address, could be interpreted as referring to the entire infrastructure carrying foreign-to-domestic communications. Thus, as long as there was reasonable suspicion to believe that a communication relating to Al-Qaeda was transiting the cable, the government was empowered to collect all of the

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107 In 2005, the NYTimes broke a story about the PSP (or TSP) program. The article won its authors, James Risen and Eric Litchblau, the Pulitzer Prize.
communications being carried by it. In the case of this set of authorities, Congress utilized it position as a “legislative agenda setter” to solidify (ex-post) what the government was already doing. Specifically, the passage of the FISA Amendments Act in 2008 enabled the government to retain many of the content collection capabilities that they had previously interpreted themselves to have, but which had come under increasing legal scrutiny over time.

With much internal disagreement amongst its members, the FISA Court initially agreed with the argument put forth by the Administration. Yet when another judge back tracked and said that FISA had never anticipated such substantial grants of authority, the Administration turned to Congress for ex-post confirmation that what they were doing was legal. In response, Congress did eventually pass the FISA Amendments Act (2008) to bring these authorities within the government’s control. The passage of the FISA Amendments Act by Congress can be interpreted in two alternative ways. Indeed, after its passage, many members of the Administration suggested that the Act confirmed that what they had been doing was lawful all along. However, opponents viewed it as the final manifestation of the drawn-out process of policy drift that had begun after 9/11. From this latter perspective, not only was the Administration’s initial decision not to go to Congress to ask for expanded authorities wrong, but the existence of the TSP made it politically difficult for legislators to vote against a program that was already in place and that many in the intelligence community claimed had saved American lives. Regardless of the position one takes, it

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108 The capture of communications using this method was called “UPSTREAM” collection.
109 On April 3, 2007 FISA Court judge Richard Vinson issued an opinion questioning the Administration’s interpretation of the term facility. 
is clear that the trajectory of the development of the content collections program greatly subverted the democratic process and, even after congressional acceptance of it, wasn’t fully transparent to legislators or the public more broadly.

**Conclusion —**

The development of the surveillance architecture in the US during the years after 9/11 has been characterized by a lack of transparency and one-sided discussions of what is required under the law. Indeed, in both the Bush and Obama Administrations, lawyers in the executive branch were granted an extraordinary amount of latitude to dictate the terms on which such programs could operate, as well as the constitutional bases for them. In the immediate wake of the attacks, the Bush Administration argued that the President’s Commander in Chief power gave him an unfettered ability to surveil a wide range of foreign-to-domestic communications without the need for a warrant from the Foreign Intelligence Surveillance Court.

As it became clear that the legal arguments justifying this program were tenuous at best, the Administration sought to put the program on better grounds by bringing it under the FISA regime. To do so, they offered creative legal arguments to the judges on the Foreign Intelligence Surveillance Court regarding what was actually allowed under congressional statute. As highlighted above, in many cases the Court bought into the Administrations’ arguments and allowed for new and often extraordinarily expansive programs to continue under their watch. In doing so, the Court came to play an entirely new set of functions from those for which it had been created in the late 1970s — as one observer keenly notes, such “programmatic approval amounted to the
court’s embracing a policymaking role that was more like an executive supervisor than a judicial decision-maker” (Savage 199). The democratic process had been replaced by legal maneuvering and arguments over presidential prerogative. The drift that occurred in the US’s surveillance architecture was facilitated by the fact a small group of lawyers was granted the ability to construct legal meaning in a process that was neither adversarial nor transparent.
Conclusion

Constitutional governance is incredibly fragile. It is difficult to sustain many of its integral attributes — such as constraints on executive authority, public trust, and the rule of law — during periods of crisis. The proliferation of terror attacks in Western constitutional democracies has brought into sharp focus exactly how difficult it can be to preserve constitutional ways of life. They have spurred governments to refocus the energies of their intelligence agencies on collecting a wider array of communications in an effort to prevent future attacks. In some instances, this was achieved through the passage of new laws. In others, it was accomplished through the circumvention of constitutional and institutional safeguards. Yet the common thread connecting the experiences of all of the polities examined in the study has been the prevalence of debates about how to properly reconcile citizens’ privacy with the security of the national community as a whole. The purpose of this study hasn’t been to assess the respective tradeoffs forged in each polity, but rather to examine the processes through which such tradeoffs have been reached and its implications for the maintenance of constitutional forms of governance. It has been my argument that a polity’s constitutional and institutional structure can either ameliorate or exacerbate the dangers presented by the necessity of forging such tradeoffs during moments of emergency.

In recent years, important strides have been made in both the UK and US to adopt surveillance reforms measures. The US succeeded in passing the USA Freedom Act in July, 2015. The Act overturned some portions of the PATRIOT Act and put the US on a path towards paring back some of the activities it had granted to its intelligence agencies in the wake of 9/11. Nonetheless, it represents only partial reform and some
observers have questioned whether the powers that previously operated under the PATRIOT Act would simply come to be legitimated on alternative legal grounds. Because of the unique manner in which America’s regime of constitutional construction has come to function, there is a concern that the powers of the surveillance state have become entrenched, such that the prospects for rigorous reform — of bringing the traditional set of constructive institutions back into dialogue over surveillance issues — is limited. A further reform agenda for the US would involve the restoration of customary patterns of institutional interaction between Congress and the executive branch. It could include the repeal of FISA and its replacement with an alternative surveillance architecture. It is my contention that such a restoration would best serve to preserve the fundamental constitutional attributes highlighted above, and, as such, to preserve constitutional forms of governance in the US.

In a similar manner, the government in the UK recently introduced a bill to radically reform their architecture for authorizing and conducting surveillance.\textsuperscript{110} If passed, the law would further increase the number of actors that are empowered to oversee the initiation of new surveillance warrants. Specifically, the bill requires that a judge to review all warrants that are aimed at the collection of communications content. Yet the author remains unconvinced that this new system will enhance constitutional governance in the UK markedly, or operate to prevent further institutional drift in the RIPA regime. One of the strengths of the British system has been the effectiveness of parliamentary debate in scrutinizing new and extant bills and preventing the passage of illiberal legislation. While some observers contend that the introduction of judicial

oversight will lead to greater scrutiny of governmental action in the UK, the case of the Foreign Intelligence Surveillance Court in the US counsels against rushing to such an assumption. Indeed, it could certainly be the case that the introduction of juridic actors into the British system would cause government surveillance issues to become less politicized and for a dual-track system, such as that evidenced in the US, to develop. Thus, a reform agenda for the UK should expand on the positive facets of the existing institutional structure. It should explore methods to further parliamentary oversight over the existing system — such as giving the Intelligence and Security Committee (ISC) broader oversight authority over GHCHQ and the other intelligence agencies — with the aim of increasing transparency and public’s understanding of what the government is doing on its behalf.

During a time of intense domestic turmoil, France is experimenting with formalizing the authorities of its intelligence agencies. As such, it runs the risk of acting too hastily and without proper consideration and scrutiny of new legal provisions. However, despite the conditions under which France moved to pass these new laws, its institutions scrutinized their content and provided transparency over their ultimate terms. Indeed, the constructive institutions in France have maintained dialogue despite facing the worst attacks on domestic soil in the nation’s history. This should be a lesson to other constitutional polities about the benefits that systems of “weak form” review can have during periods of emergency. Yet there are additional dangers presented by France’s unique institutional structure — including the presence of the “state of emergency”, which allows for the President of the Republic to garner an array of emergency powers. The enactment of an Amendment of to formalize the “state of
emergency” as a formal tenet of constitutional law, and to enable the president to declare it unilaterally, would present a lingering institutional vulnerability for the preservation of constitutionalism in France. For this reason, a reform agenda for France would stress the importance of maintaining existing avenues of institutional dialogue, while also continuing to bring Parliament to bear on the president’s emergency authorities.

It is important to build on the lessons that have been learned in the post 9/11 era about the importance of effective oversight and purposeful lawmaking during times of national emergency. To learn from experience, we must have a clear sense of the proper lessons to be taken away from it. In the case of government surveillance policy, myriad perspectives have been offered precisely on the question of what can be done better. There is a strong group of advocates who have argued that nations must do a better job in reconciling their laws with their broader commitments to civil liberties — that the central lesson to be learned is that privacy is increasingly under threat. Another perspective suggests that, in fact, there are few lesson to be learned at all — that emergencies sometimes require heightened security measures, and that allowing for such measures to be put into place will not endanger the broader constitutional systems in which they are adopted. It has been my purpose to offer an alternative view that considers the sustained constitutional and institutional effects that such policies can have. From this perspective, it is essential to assess the long-term effects that legislative and administrative action during periods of emergency have for maintaining fundamental principles of constitutionalism — such as constraints on executive authority, public trust, and the rule of law.
A Model of Constitutional Construction in Time

1) Design
2) Repertoire Endowment
3) Change

Annex #1

Constitutional Texts and Principles

Institutions of Construction

Independent Institutional Dynamics

- Drift
- Layering
- Grating

1) Institutional Development and Change
2) Repertoire Development

Institutions of the Surveillance State
Bibliography


