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Cover Page Footnote
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WE ARE ALL POST-9/11 NOW

Kim Lane Scheppelé*

INTRODUCTION

Bruce Ackerman’s new book has been published under the title Before the Next Attack.1 But the book originally had a different title: The Morning After the Next Attack.2

What’s in a title? I think that Ackerman’s last-minute title switch points us to one of the crucial pivot points of his book. The normative viability of Ackerman’s proposals depends on whether we are before or after the next attack. His willingness to trust that a government would retain its constitutional sensibility while acting effectively to block a looming threat relies crucially on that government setting up a plan of action before the attack, when it is not under the unbearable pressures that will hit it once an attack occurs. Ackerman believes that before an attack, government will operate responsibly, without panicking, to correctly balance the trade-offs between constitutional fidelity and antiterrorism effectiveness. After an attack, according to Ackerman, emotion, cries for action, and the overwhelming fear of a possible second attack will likely prevent the government from accomplishing this balance in a sensible way.3

After the Next Attack emphasizes the irrationality of the anticipated response; Before the Next Attack emphasizes the sanity of planning ahead. If one is giving advice, as Ackerman is clearly doing here, better to emphasize when the time is right to take advantage of his proposals—Before the Next Attack, then.

But here is the problem: By the time Ackerman wrote his book, 9/11 had already happened—and no one expects that 9/11 will be the last attack on the U.S. by terrorists bent on mass destruction. Practically speaking, then, at the moment that Ackerman’s book was written, the United States was both after one attack and before another. There was, in short, already no

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1. Bruce Ackerman, Before the Next Attack (2006).
uncontaminated “before all attacks” moment in which to decide what to do. Ackerman’s new title therefore describes a time that no longer exists as a possibility in the United States, except as a thought experiment.

Because we are all already post-9/11, we all already think about constitutional trade-offs and effective strategies against terrorism in a different way. Many constitutional scholars have already advocated the constitutionally problematic positions that Ackerman thought would follow an attack. What used to be bedrock constitutional understandings are now looking naïve to these self-proclaimed new constitutional realists. To them, separation of powers and respect for rights may now be options that only exist in pure form with no terrorists around.4

For starters, I cannot imagine that Ackerman himself would have written Before the Next Attack before any attack had happened. His proposals involve radical departures from American constitutional traditions that used to be a source of pride. Ackerman’s earlier writings show him to be a defender of a robust Constitution, one that changes over time in the direction of increased rights protection.5 Would Ackerman have suggested it would be acceptable for the President to authorize rounding up large numbers of people and to hold them without charges for “only” forty-five days6 unless it were already after a Constitution-shattering attack? Or, if a terrorist attack had not already occurred, would Ackerman have given such sweeping powers to the President to declare a general emergency in the first place—even if only for a limited time7—given that the American Constitution explicitly assigns all emergency powers to Congress (to suspend the writ of habeas corpus,8 to declare war,9 to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”10)? I very much doubt that many of the things he proposes in his new book would have looked like sensible proposals to the pre-9/11 Ackerman. Before the Next Attack has a post-attack author.

We have already lost the crucial moment on which the normative persuasiveness of Ackerman’s proposals rest. What should we do now? With the pre-panic moment already gone, I want to suggest that Ackerman

5. See, e.g., 1 Bruce Ackerman, We the People: Foundations (1991).
6. See, e.g., Ackerman, supra note 3, at 476.
7. Ackerman gives this exclusive power to the President “for a week or two while Congress is considering the matter.” Id.
9. Id. § 8, cl. 11.
10. Id. cl. 15.
is absolutely right in his second thought about where we should turn, as
America is tempted to lose its constitutional way after 9/11: We should
look abroad to see what others have done in their moments of terrorist-
induced panic.\footnote{11}

Why go outside the United States? Other countries have had a much
longer experience with pervasive domestic terrorism than has the United
States; other countries have overreacted, failed, and reassessed before us.
Other countries have also succeeded in suppressing terrorism without
abandoning their constitutional commitments, or, if they eliminated the
terrorist threat and lost their constitutional souls in doing so, some managed
to reconstruct themselves again, learning in the process. As the United
States debates what course of action to take, other countries have
performed, both before and after 9/11, political experiments that Americans
might want to assess before striking out on our own. Looking abroad
enables us to take advantage of experience without running ourselves
through the high-stakes experiment first. Perhaps Ackerman’s wisest
advice, now that we are all post-9/11, is to look abroad before we leap.

I. ACKERMAN’S FOREIGN INSPIRATION

Ackerman’s proposals were clearly inspired primarily by a country that
now sees itself as having shamefully overreacted to a terrorist threat. The
South African Constitution, newly launched after the emergency regime
that held apartheid in place, features strictly regulated emergency
powers.\footnote{12} It includes an “escalator” clause, like Ackerman’s, that requires a state of
emergency to be approved by the Parliament with an ever-increasing
majority as the distance from the crisis-triggering event grows.\footnote{13}
(Ackerman, however, goes beyond the one-time step-up in legislative
approval to propose ever-increasing majorities.)\footnote{14} The South African
Constitution also is explicit about which rights can be limited, and for how
long.\footnote{15} Some rights must be fully protected even during emergency (life
and human dignity may never be limited; slavery and servitude are never
permitted), while other rights may be temporarily squeezed (free speech and
liberty rights may be infringed for brief periods to handle the threat).\footnote{16}

\footnote{11. Ackerman’s Fordham article does not reference other countries’ practices as much as
does the book. Compare Ackerman, supra note 3, with Ackerman supra note 1.}
\footnote{13. See id. § 37(2)(b).}
\footnote{14. A majority vote would be needed to sustain a President’s declaration of emergency
in the moment, but after two months, sixty percent would be required; seventy percent would
be necessary after another two months; and eighty percent would be required for every two-
month extension after that. See Ackerman, supra note 3, at 476.}
\footnote{15. See S. Afr. Const. 1996 § 37(5)-(7).}
\footnote{16. See id. § 37(5)(c).}
Ackerman suggests something like this too.17 The crucial point about the South African model is that there are clear constitutional guidelines that determine which rights can be limited, how much they may be limited, and for how long they may be limited.18 This is the spirit of Ackerman’s proposals for the United States. Bringing emergencies in from the cold, incorporating them into a constitution as legally limited states of affairs, is something that the United States could usefully do. In this, I am in complete agreement with Ackerman.

But, in my view, Ackerman does not learn enough, even from the South African example. In addition to the explicit regulation of a state of emergency that Ackerman takes as a model for the United States, the South African Constitution puts strong limits on the use of the military in a “state of national defence”19 by explicitly requiring the military to adhere to both the Constitution and international law.20 When domestic politics counsel abandoning constitutional protections in precisely the way that Ackerman cautions us against, the international law of war may more firmly shore up commitments to the rule of law, separation of powers, and humanitarian protections precisely because the international community has institutions that stand outside particular national emergencies. As a result, there may be sensible voices that can warn more effectively about the consequences of going off the constitutional rails, and can argue better from the outside than we can from the inside when there has been a disproportionate response to a threat.21 Ackerman’s model also should have incorporated the use of international law to backstop domestic constitutional practice, though the American government’s present hostility to international constraint no doubt makes this proposal a nonstarter if one wants to have a real influence on policy. (The inability to “sell” an idea politically at any particular moment, however, does not mean that the idea is a bad one.) Although Ackerman does not propose using international law to leverage human rights protection in this way, it is another lesson one could learn from the South African model.

In addition to South Africa, other countries with recently enacted constitutions or recent constitutional amendments have also brought emergencies inside their constitutional orders, rather than allowing an

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17. Ackerman suggests that preventive detention can last no longer than forty-five days and that torture would be forbidden under all circumstances. See Ackerman, supra note 3, at 476.
19. Id. §§ 200-04.
20. Id. § 200(2).
21. In my own work, however, I have argued that this may no longer be as true as it once was. After 9/11, so many countries around the world changed their laws to respond to the terrorist threat that the number of countries that are not themselves in a state of emergency is declining. The international moves toward the use of emergency powers have occurred in large part because international institutions required them and coordinated a worldwide antiterrorism campaign. See generally Kim Lane Scheppele, The International State of Emergency (unpublished manuscript, on file with author and the Fordham Law Review).
emergency to set aside the constitution in the name of fighting a threat. In 1968, Germany amended its Basic Law to regulate emergencies constitutionally, and Russia's 1993 Constitution embedded constitutionally regulated emergency powers from the start. When Canada revised its Constitution in 1982 to more firmly entrench rights as legally enforceable claims in the constitutional order, it also enacted a new emergencies statute that required all emergency powers to be exercised within the framework of the present Constitution. At the same time, Canada also repealed the far-reaching War Measures Act, which had permitted emergencies with few constitutional constraints.

That said, none of these new constitutionalized frameworks for regulating emergency powers has ever been tested, and one hopes they never will be. In the time since each of these constitutions or constitutional amendments was adopted, no emergencies have occurred (or at least no emergencies have been declared) in any of these countries. As a result, we cannot see whether these constitutional restrictions actually would work in a time of crisis, or whether the limitations that they attempt to institutionalize would actually hold executive power accountable during difficult times. When an emergency is underway, one could imagine all too easily that a government's supporters in the parliament might delay a vote that had the potential to end emergency powers, or that the parliament—still panicked—would go on giving its assent to emergency governance even without much evidence of a continuing immediate threat. One could further imagine a democratically elected executive whipping up public fear to the point where the representatives in the parliament dared not reign in executive discretion. Additionally, one could imagine courts losing their nerve in evaluating the need for extreme measures taken by the executive branch, which might base its claim that there is a serious and looming threat on information that only it possesses or only it can assess. (Executives can virtually always say that their knowledge of a threat comes from secret sources that they claim would be a danger to national security to reveal, even to legislators or courts.) We do not know in an actual crisis whether the South African Constitution—or the German, Russian, or Canadian Constitutions, for that matter—would hold fast, bend, or break if the emergency provisions were in fact invoked to limit executive action in a crisis. They have never been put to the test.


23. For example, the Russian Constitution provides a list of rights that cannot be infringed during a state of emergency. See Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 56(3), available at http://www.oefre.unibe.ch/law/icl/rs00000.html.


25. Id. at 230.
Even among countries that have had occasions to use the constitutionalized powers of emergencies that their own law provides, the results have not been encouraging. Germany’s interwar experience involved the frequent invocation of Article 48 of the Weimar Constitution, which authorized and limited emergencies, but this constitutionalization of emergencies did not prevent one of the worst falls from constitutional governance the world has ever seen. Despite having constitutional emergency provisions in the constitutional text, the Russian government simply did not invoke them (with their associated limits) to fight the wars in Chechnya, though the Constitution seems designed for such uses. Canada did not use its emergency statute as a rubric under which to enact the country’s post-9/11 antiterrorism law, even though the post-9/11 law permitted constitutionally questionable practices to be justified in the name of a threat to national security. Constitutionalizing the uses of emergency powers does not mean that those constitutional provisions will in fact be used as envisioned in times of emergency.

As a result, though I share Ackerman’s sense that it is better to regulate emergencies inside the constitutional order than to leave emergency powers to chance and panic, I prefer to look at actually existing emergencies and how they have come into being, been limited, and eventually been ended regardless of whether their control was constitutionalized, rather than holding out high hopes for constitutional blueprints that have not yet been deployed against real threats. South Africa’s own apartheid-era experience with long-term emergency government, and the experience of other states that have fought long-term threats (or perceived threats), reveal how

27. “No state of emergency or martial law has been declared in Chechnya. No federal law has been enacted to restrict the rights of the population of the area. No derogation under Article 15 of the Convention has been made.” Case of Isayeva v. Russia, 41 Eur. Ct. H.R. 847, 875 (2005).
28. The institution of investigative hearings was one of the most controversial changes in Canadian law. In this procedure, judges interrogate people alleged to know about terrorist attacks, and those interrogated have no right to remain silent. The information so collected cannot be used in criminal prosecutions, however. Another controversial practice extended preventive detention. See Scheppele, North American Emergencies, supra note 24, at 237-38.
30. For a particularly careful, detailed account of the legal bases for states of emergency in a number of different countries, see Int’l Comm’n of Jurists, States of Emergency: Their Impact on Human Rights (1983). The countries that the International Commission of Jurists analyzes include Argentina (after the military coup of 1976), Canada (uses of the War Measures Act in the twentieth century), Colombia (long history of coups), “Eastern Europe” (characteristic features of the communist takeovers in East-Central Europe), Ghana (emergencies after independence), Greece (the coup of the generals from 1967-1974), India (the first three proclamations of emergency after independence), Malaysia (in the 1960s and 1970s), Northern Ireland (and British emergency rule there), Peru (emergencies since 1932), Syria (the 1962 coup), Thailand (declarations of emergency between 1932-1979), Turkey
dangerous it is to think about emergency government simply as a short-term burst of anti-constitutional activity that is easily reined in by an active parliament in a matter of a few days or weeks. Instead, the more common pattern is for a crisis to trigger a prolonged state of abnormal governance in which constitutional procedures are routinely violated.

Among countries that have not explicitly constitutionalized a detailed emergency regime, and even among those that have, there are also clear tendencies for emergency powers to exceed the depth and duration of the threats that brought them into being. The United States itself has certainly experienced over its history the temptations of emergency rule and also permitted extraordinary presidential powers long after the ends of the wars that provided the rationales for using emergency powers in the first place.31 Many of the United States’ European allies have been tempted by the siren song of emergency powers to use them beyond their initial justification and beyond their original subject-matters. Britain’s multi-decade campaign against the Irish Republican Army created long-term constitutional damage not limited just to Northern Ireland.32 The Basque separatist movement in Spain, fought in part through terrorism, eventually resulted in the delisting of the political wing of the movement, making its peaceful representation in the national Parliament impossible.33

What this limited survey tells us is that most governments that go down the state-of-emergency path remain in a state of emergency even longer than one would gather from the threat that generated the need for the emergency in the first place. Legal mechanisms meant to be invoked only briefly in a time of emergency are either never formally used in the first place or fail to be brief if they are invoked. During emergencies, and often for long periods of time, parliaments are disabled or disable themselves; courts defer or are suspended, limited, or ignored. The history of democratic states in fighting terrorism is often depressing. Only recently have states that have experienced not only terrorism but also their own hard-to-control overreactions have attempted to bring their own powers within the discipline of law. We do not yet know whether the new forms of constitutional control will work when a crisis strikes.

31. Even in the United States, the emergency powers given to President Woodrow Wilson during the First World War were withdrawn from him by a vote of the Congress after the war was over. Wilson killed the law that would have taken away these powers with a pocket veto. After the Second World War, many of the emergency powers granted to Roosevelt during the war did not lapse until 1953. See Kim Lane Scheppele, Small Emergencies, 40 Ga. L. Rev. 835, 847-51 (2006); Scheppele, North American Emergencies, supra note 24, at 219-28 (2006).
As a result, the biggest problem with actually existing emergencies, as Ackerman understands full well, is figuring out how to live with them, as well as how to end them. Campaigns against terrorism are not over in a day, a week, or even the forty-five days of Ackerman’s permitted preventive detention. As long as a threat appears to continue—and terrorist threats are typically of the long-term, grindingly persistent sort—it is hard to end emergency powers quickly. If the United States, and much of the rest of the world, is in the business of fighting terrorists over years and perhaps even decades—as I think is in fact the case—then we should not be looking primarily for emergency measures to be used in the first month or two after an attack. We need to think about how to maintain a serious fight against a threat over the long haul without destroying our constitutional order in the meantime. As a result, we need to think about how to build into our constitutional system more enduring measures for fighting terrorism while maintaining an ongoing constitutional system. The threat that the United States and others confront is not the threat that Ackerman fears most. We do not need a short-term exception to the constitutional order just to handle the threat of a second strike. Instead, we need durable, constitutionally responsible institutions that can fight long-term threats without undermining the constitutional system over a depressingly long period of time.

In looking to other countries’ experiences with terrorism, then, I suggest we do not look at what constitutions and laws authorized for the panicked period in the immediate aftermath of an attack. Instead, we should consider ways to institutionalize a fight against terrorism without sacrificing core constitutional principles. Fighting terrorism sits uneasily with ongoing constitutional governance, but the experience of other states tells us how we might design institutions to have minimal impact on constitutional government, on respect for rights and separation of powers, and on the realization of enduring principles for which constitutional governments stand. The way to do this is to concentrate the most constitutionally dangerous powers used in fighting terrorism in compact parts of the state, walled off from the parts of the state that will go on operating in a nonemergency fashion. These compact parts of the state—security agencies and terrorism investigation offices—themselves need to be strictly controlled by law with robust opportunities for oversight that honors both separation of powers across political institutions and the need for multiparty checks on power. And, of course, the protection of human rights and civil liberties needs to be maintained, even in the middle of the period of danger, with any deviations publicly justified and with state officials who are tempted to use constitutional shortcuts held to high standards of public accountability.

Although the amount we can learn from others’ experiences with terrorism is vast, in this short comment, I will limit myself to just two lessons: (1) the need for explicit and detailed statutory regulation of security agencies and their firm placement inside, rather than outside the
constitutional order; and (2) the importance of designing institutions to generate and preserve expertise on terrorism so that the state can concentrate terrorism investigations in a relatively small team of people who know where to look in a focused way for relevant information. Why these two? Security agencies will have an important role to play in the context of stealthy threats. They need to see a threat coming and work out ways to fight it as a preventive matter. They need to do this, however, without abusing their powers and without scanning further afield than the threat warrants. But in order for the security agencies to do this (and here is the relevance of my second point), a state needs ways to gather narrowly relevant information and to concentrate threat-related knowledge in the minds of as small a circle of experts as possible with as broad a commitment to nonpartisan oversight as possible. If both security agencies and expertise about terrorism are walled off from other institutions that may exercise powers against citizens and residents of states, if they are insulated from party politics and political division, if they are subject to oversight from multiple sources, and if they are run on the basis of expertise rather than political mandates, then there might be a chance of preserving a constitutional order even while a state is fighting a real and insidious threat.

II. ANTITERRORISM LESSONS FROM ABROAD

A. The Design of Security Agencies

The difference between fighting terrorism and fighting crime is generally thought to be that one generally apprehends criminals after the fact and one wants to stop terrorists before they strike. Of course the difference is not really so sharp: Many planned crimes—especially violent crimes that have many victims—should be interrupted in advance and one would of course want to arrest terrorists after the fact if they got that far. But those who want to set constitutions aside in response to terrorism say that the "crime model" for fighting terrorism does not work precisely because one needs to gather intelligence long before one knows for certain the danger posed by the specific target of the surveillance or questioning. Instead, they believe


35. George W. Bush's State of the Union Address in January 2004 made the case against the crime model:

I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted, and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations, and drawing up more ambitious plans. After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.
an antiterrorism campaign should be fought more like a war, with intelligence playing a crucial role in surveying the horizon for potential threats before they materialize. Given the vagueness of terrorist threats and the precision of criminal procedure, intelligence-gathering cannot follow the rules of criminal investigation—or so advocates of expanded police powers say; one must be able to poke around to see what is going on before one knows something concrete enough to get warrants or obtain judicial oversight to investigate.

How can intelligence agencies have the scope they need to detect threats before they materialize while still preserving constitutional protections that protect individual privacy, maintain limits on state action, and insist that no individual be targeted for surveillance or investigation unless there is an individuated suspicion that the target of the surveillance or investigation has done something wrong? The United States has not had a good track record of accomplishing both at once; the imperatives for surveillance and investigation during the enduring and vague threats of the Cold War quickly turned into mass abuse of civil liberties.

The controlling statutes that were put in place to prevent such abuses have been bypassed since the beginning of the United States’ “war on terrorism.” Do we have models that have done better?

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36. Richard A. Best, Jr., Cong. Research Serv., RL30252, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S. 8 (Dec. 2001), available at http://www.fas.org/irp/crs/RL30252.pdf#search=%22potential%20threats%20intelligence%20gathering%22 (“In the wake of the terrorist attacks on September 11, 2001, some attention was given to the question of whether the Osama bin Laden network in Afghanistan should be dealt with as a law enforcement or a military matter. The Bush Administration, unable to persuade Afghan authorities to arrest and hand over Bin Laden, quickly decided on a military option supported by covert intelligence units.”).

37. For the history of the distinction between criminal investigation and intelligence gathering, see William C. Banks, And the Wall Came Tumbling Down: Secret Surveillance After the Terror, 57 U. Miami L. Rev. 1147 (2003).

38. The documentation of the abuses of the FBI in domestic spying can be found most authoritatively in Select Comm. to Study Governmental Operations with Respect to Intelligence Activities of the U.S. Senate, Book II: Intelligence Activities and the Rights of Americans, S. Rep. No. 94-755, at 5-20 (1976) (summarizing the illegal covert surveillance action carried out over several decades, describing the FBI’s COINTELPRO program, which was “designed to ‘disrupt’ groups and ‘neutralize’ individuals deemed to be threats to domestic security,” and exposing the massive surveillance program that existed against Americans during the reign of FBI Director J. Edgar Hoover) [hereinafter Church Committee Report].

39. This is most obvious in the case of the Foreign Intelligence Surveillance Act (FISA), Pub. L. No. 95-511, tit. I, 101, 92 Stat. 1783 (1983) (codified at 50 U.S.C. §§ 1801-11 (2000)), which set up a system of alternative warrants to be used in intelligence investigations when the evidence available to investigators did not rise to the level of probable cause that a crime had been, was being, or was about to be committed. President Bush, however, decided to go around this system with his own surveillance program, designed, carried out, and continued without any input from either Congress or the courts. See David Sanger, In Address, Bush Says He Ordered Domestic Spying, N.Y. Times, Dec. 18, 2005, at A1.
While no national security apparatus is free of problems, the institution that seems to have had the best track record on both fighting terrorism and preserving civil liberties is the German domestic security service, named appropriately enough, the Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz or BfV). The BfV is responsible for counterespionage activities within Germany and is also charged with monitoring a wide variety of domestically based extremist groups. It is institutionally housed within the Federal Ministry of the Interior and is based in Cologne.

Why would I suggest looking to the BfV for a model? There are several reasons. First, the BfV’s statutory mandate is explicit and limited. Unlike the FBI, which has never had a framework statute setting out its powers and mechanisms of accountability, and which instead is guided by a series of Attorney General’s Guidelines that can be changed without legislative debate or approval, the BfV has a detailed statutory mandate that sets out precisely what it can and cannot do. The statute provides the democratically determined guidelines for the institution, outlines a clear legal framework for the operation of intelligence gathering, and allows the public to recognize when and how intelligence gathering may occur. The
mandate of the agency is out in the open, and it operates according to
publicly vetted and publicly accountable rules.

Second, the office carries out its investigations in the initial stages
through the use of publicly available documents and methods available to
all (for example, agents attend public meetings, read newspapers, carry out
surveillance of subjects in public places, or conduct voluntary interviews).
Only when BfV officials have a clear basis for suspicion may the
organization also use agents to infiltrate groups, engage in postal checks or
electronic surveillance, and use surreptitious photography. But each of
these more intrusive and worrisome exercises of surveillance powers are
themselves subject to strict legal requirements. For example, the control of
electronic surveillance is conducted by a system of parliamentary
committees under Article 10 of the Basic Law (which is discussed below).

Third, the powers of the BfV are strictly separated from ordinary policing
powers. The BfV is not authorized to carry out arrests, physical searches of
premises, nonconsensual interrogations, or seizure of objects. If such things
are deemed necessary by the BfV, then they must ask other state agencies
that do have such powers to carry out those tasks on behalf of the BfV.
These other agencies—usually the police acting under the authority of a
court or public prosecutor—will engage in those activities only if they
independently decide such actions are warranted. This double check on
intelligence procedures requires a different set of eyes and priorities to
review all requests for the most severely rights-affecting measures that can
be taken against someone. Because the BfV is institutionally separated
from the federal police but requires their cooperation in certain matters, the
BfV cannot conduct unlimited investigations but must justify their requests
for more information or for action to another agency.

Fourth, this organization of intelligence gathering has a substantial
system of parliamentary and judicial checks. The Parliamentary Control
Commission, which supervises the entire intelligence apparatus in which
the BfV is one part, consists of nine members from the Bundestag, the
lower house of the German Parliament. Five of the nine are elected from
within the governing coalition, and four are elected from among the
opposition parties. The chairmanship of the committee rotates at six-
month intervals between the government and opposition parties.

44. Federal Constitution Protection Law, supra note 42.
45. Grundgesetz [GG] [Constitution] art. 10(2) (F.R.G.), translated in The Basic Law,
supra note 22, at 90-92.
46. See Kim Lane Scheppele, supra note 40, at 109-10.
47. For the BfV's own documentation of the mechanisms that control it, see Bundesamt
48. Shlomo Shpiro, Parliament, Media and the Control of the Intelligence Services in
Germany, in Democracy, Law and Security: Internal Security Services in Contemporary
Europe 294, 298 (Jean-Paul Brodeur et al. eds., 2003).
49. See id.
50. See id.
government must report all intelligence activities to this committee, which must itself report to the Bundestag once every two years.\textsuperscript{51} The committee has access to a substantial amount of classified information that is removed from its required public reports.\textsuperscript{52}

As a result of this reporting requirement, there is a substantial separation-of-powers check on the operation of the intelligence services. Furthermore, because the leadership of the oversight committee rotates between the parliamentary majority and the parliamentary opposition, there is also a political check on the intelligence services as well. Even though the constitutional system in Germany ensures that the Chancellor will always have majority support in the Bundestag, the system of parliamentary oversight presupposes that the opposition parties must be able to check that the majority parties are not using the intelligence services for their own political purposes.

In addition to the Parliamentary Control Commission, there are two committees that have been established under Article 10 of the Constitution, which protects the privacy of communications.\textsuperscript{53} These committees review surveillance practices of both the intelligence services and the police.\textsuperscript{54} The G-10 Gremium (named in honor of Article 10 of the Constitution) consists of nine members of the Bundestag.\textsuperscript{55} It meets every six months to review and direct general policies about interception of mail, wiretaps, and other forms of electronic intercepts.\textsuperscript{56} The G-10 Commission consists of four legal experts (and four alternates) who are nominated by their political parties and meet together with representatives from the intelligence services about once per month.\textsuperscript{57} This group reviews the legality of each individual domestic communications intercept and has the right to suspend any individual intercept if it appears that the evidence sustaining it is weak or if the intercept infringes any law.\textsuperscript{58} The committee even reviews the list of “hit words” that computers use in strategic surveillance to determine which specific conversations to turn over for human attention.\textsuperscript{59} In addition to these ways of reviewing surveillance strategies, there is also the permanent possibility for the Bundestag to set up a special investigating committee if any particular surveillance practice generates concern.\textsuperscript{60}

\textsuperscript{51} Id.
\textsuperscript{52} Id. at 299.
\textsuperscript{53} Id. at 300.
\textsuperscript{54} See id. at 300-01.
\textsuperscript{55} Id. at 300.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 301.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 301-02.
\textsuperscript{60} Id. at 304-05. In addition to the possibility of setting up new and specialized constitutional commissions, two regular but separate parliamentary committees are charged with overseeing the budgets of the intelligence agencies, and the books of the agencies can be reviewed as well by a select group within the Federal Audit Office. Id. at 302-04.
The judiciary is generally active in controlling the potentially far-reaching powers of the domestic intelligence agencies. But the amendment to Article 10 of the Basic Law in 1968, permitting electronic interception of communications pursuant to a warrant and subject to review by a parliamentary committee, limited judicial review of ongoing surveillance. This limitation on judicial review during an ongoing communications intercept was challenged in the Federal Constitutional Court, which upheld the general substitution of parliamentary review for judicial review, although the existence of at least some judicial supervision no doubt made a difference to the Court. Further challenged in the European Court of Human Rights, the limitation on judicial review of surveillance divided that Court. But there, too, the Court eventually approved parliamentary review as the main form of oversight on ongoing electronic surveillance.

Even with parliamentary review largely substituting for judicial review in these cases, however, an individual who suspects that she is under surveillance may not only challenge the practice before the parliamentary commission supervising surveillance, but may also lodge a complaint directly with the Federal Constitutional Court. The Court may then ask the government for evidence of such surveillance, which the government is required to provide. The government may, however, provide the information in camera to the Court, which may itself only decide to make the information public by a two-thirds vote. But, under these special circumstances, there is constitutional review of individual surveillance protocols.

In addition to this constitutional option, other legal remedies may also be invoked by an individual who believes he or she is under surveillance:

If the person concerned is notified [of the surveillance], after the measures have been discontinued, that he has been subject to surveillance, several legal remedies against the interference with his rights become available to him. According to the information supplied by the [German] Government [to the European Court of Human Rights], the individual may: ... in an action for a declaration, have reviewed by an administrative court

61. The Basic Law provides,

(2) Restrictions [on the privacy of communications] may only be ordered pursuant to a statute. Where a restriction serves the protection of the free democratic basic order or the existence or security of the Federation or a State [Land], the statute may stipulate that the person affected shall not be informed and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament.

Grundgesetz [GG] [Constitution] art. 10(2) (F.R.G.), translated in The Basic Law, supra note 22, at 21.


64. For a description in English of the constitutional remedies available to an individual under Article 10 of the Basic Law, see id. at 223-34.
declaration, the legality of the application to him of the G 10 and the conformity with the law of the surveillance measures ordered; bring an action for damages in a civil court if he has been prejudiced; bring an action for the destruction or, if appropriate, restitution of documents; finally, if none of these remedies is successful, apply to the Federal Constitutional Court for a ruling as to whether there has been a breach of the Basic Law.65

The sticking point in this system of judicial review, however, is that not all of those who have been under surveillance will be notified that they have been so observed when the surveillance ends. This is where the parliamentary review becomes effectively the only substantial check on executive power.

That said, however, the Federal Constitutional Court has been quite aggressive in reviewing the constitutionality of general measures that may infringe on personal privacy. When the Basic Law was amended in 1998 to permit “technical means of eavesdropping” (bugging) in the home if the order to do so were issued by a panel of three judges,66 the Court reviewed the law that the Bundestag passed along with the constitutional amendment to bring the new regime of home surveillance into effect. In a sweeping decision in 2004—after the “war on terrorism” was well underway—the Federal Constitutional Court held that the new statute violated the Basic Law.67 Why? Because the principle of human dignity and the right to the inviolability of the home counseled stricter limitations on home surveillance than the law had set.68 In particular, since “bugs” were indifferent to the nature of the conversation being monitored, the Court ruled that their use was unconstitutional insofar as they might take in protected conversations between spouses, among close friends, or between a person and his lawyer, clergymen, or doctor.69 In addition, the Court ruled that any accidentally captured intimate conversations must be deleted immediately, and that surveillance could be permitted in the first place only when the crimes that suspects were thought to have been engaged in reached a high level of seriousness.70 All of these were reasons to send the law back to the Bundestag for extensive revision.

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65. Id. at 224.
68. Nohlen, supra note 67, at 682.
69. Id.
70. Id. at 685.
In addition to these formal mechanisms of checking investigative powers, the press in Germany enjoys substantial constitutional and statutory protection to investigate intelligence and policing practices. Not only is freedom of the press guaranteed in the Constitution, but there is an explicit constitutional prohibition on censorship. By statute, the press is guaranteed confidentiality of sources and informants, as well as immunity from police eavesdropping and searches of editorial offices. As a result, media coverage of the police and intelligence services is quite common, detailed, and critical. And because the intelligence services have not been scandal-free, this media check has been quite useful.

Even with all of the checks that the German system places on surveillance power, however, there are still strong suspicions that this power cannot be controlled in ways that protect constitutional rights adequately. As Verena Zöller has shown, the eighty-percent increase in telephone taps between 1996 and 2001 is hard to account for, as is the fact that only twenty-five percent of these taps ever led to someone being charged with a crime. Nearly sixty-five percent of those who were convicted of a crime based on telephone tap evidence were sentenced to less than five years in prison, suggesting that the crimes in question were not serious enough to warrant such an intrusion on privacy in the first place. About seventy-five percent of those placed under surveillance were never formally notified of the fact, which made later judicial vindication of their privacy rights difficult. Zöller takes these statistics as evidence that surveillance power, once granted and even with many constitutional checks, can still run amok.

As we can see, then, the constitutional control of extraordinary powers is extraordinarily difficult to achieve. Even the checks that the German system places on these powers may not always work. That said, and remembering why we started down this road in the first place, it is almost surely the case that the German system is likely to lead to less abuse of rights than the present American system in which the system of checks is much weaker. Even the German system of oversight, review, and accountability cannot guarantee that there will be no abuses, as Zöller’s disturbing statistics show. But they are certainly better than assuming

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71. The Basic Law provides,
(1) Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There may be no censorship.
72. Id.
73. Shpiro, supra note 48, at 306.
74. See id. at 305-08.
75. Zöller, supra note 67, at 483-83.
76. Id.
77. Id. at 483.
78. Id.
either that an executive can be trusted with all powers or that the security services themselves will know a constitutional violation when they see one.

B. The Concentration of Expertise

How else might a country fight terrorism for the long haul without upending its constitutional sensibility? As we will see from examining the experience of other countries, it is often beneficial both for effectiveness and for civil liberties to concentrate terrorism investigations in a group of people who are institutionally separated from ordinary criminal investigations and ordinary intelligence gathering. Such experts should be able to concentrate only on terrorism investigations without getting drawn into other matters. Expert terrorism investigators can use their expertise to sort the information that is crucial from the information that is misleading, a feature of expertise that turns out also to be beneficial for civil liberties. It also helps if these terrorism investigators are not connected directly to the executive branch of government, which may have its own agendas for investigation.

Since 9/11, however, the United States has not only not concentrated terrorism investigations in small, relatively independent, expert communities, but it has done just the opposite. The most experienced antiterrorism prosecutors in the United States, the U.S. Attorney’s office for the Southern District of New York, had successfully prosecuted nearly three dozen defendants accused of al-Qaeda-connected terror attacks before 9/11.\(^7\) But after 9/11, the attack-related prosecutions of Zacarias Moussaoui and John Walker Lindh were moved to the Eastern District of Virginia, away from the place where the experience was concentrated and into a venue where prosecutors had to start over with basic information about al-Qaeda, its organization, and its reach.\(^8\) New antiterrorism regulations were turned over for enforcement to people with virtually no experience. The enforcement of a whole slew of banking regulations designed to fight terrorism, for example, was given over at the start to completely inexperienced investigators.\(^9\) Despite attempting to create concentrations of expertise within the FBI, the effort has been plagued with inadequate staffing, high turnover and lack of experienced translators.\(^10\) Five different people held the top terrorism job at the FBI between 9/11 and

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79. “We saw the prosecutions as one of the means to prevention. I guess we locked up over 35 very dangerous terrorists.” The Abrams Report (MSNBC television broadcast Dec. 17, 2002) (transcript available on Lexis (transcript #121700cb.464) and on file at the Fordham Law Review).
the end of 2004. At the CIA, after 9/11, many senior analysts left. The United States has had such turnover in the top terrorism analyst positions that it has been hard to accumulate and analyze the narrowly relevant information that would be useful in preventing attacks.

At the same time, the Bush Administration has launched a program that uses the opposite of concentrated expertise. It is a program of indiscriminate mass data collection using computer-based techniques for sorting through mountains of records. The records themselves are generated by vacuum-cleaner-like collection methods that sweep up everything in their path. The government has created databases that accumulate information on millions of people, when only a few of them, at best, would be reasonable suspects. “Data mining” techniques are then employed to find correlated connections between suspects and others who overlap them. The correlations may well be due to chance in this sea of data. The National Security Agency has gathered a huge database of telephone records; the Transportation Safety Authority’s Computer Assisted Passenger Prescreening System collected information about all passengers on all commercial airlines regardless of individuated suspicion—or at least it did so before Congress ordered it to be revised (though not eliminated); the Multi-State Anti-Terrorism Information Exchange program (MATRIX) that links state criminal data to commercial databases with credit card information has also engendered controversy.

The Analysis, Dissemination, Visualization, Insight, and Semantic Enhancement (ADVISE) program within the Department of Homeland Security links information available from a diverse array of sources to create one of the largest databases in the world—all in the service of

85. According to Daniel Prieto, In May 2006, it was revealed that the NSA was augmenting domestic surveillance with large-scale data analysis of consumer telephone toll records. That revelation was only the latest instance of government efforts to use data mining and other technology in the war on terror. . . . There is ongoing controversy over the government’s use of private-sector and consumer data for counterterrorism purposes.

looking for terrorists. Of the five publicly known data-mining efforts that
the U.S. government has conducted in the “war on terror,” none complied
with federal privacy law by assessing privacy impacts of their practices,
according to a Government Accountability Office (formerly the
Government Accounting Office) audit.

There are two problems with constantly rotating terrorism investigators
and fishing through large databases as a substitute for following concrete
leads through old-fashioned police work. The first is that many more
innocent people may fall into the net of terrorism investigations because
those who cast the net are not experienced enough to sort out real leads
from alarming coincidences. As a result, there are likely to be a great many
“false positives,” which—in less neutral language—amount to civil liberties
violations. The second is that such investigations are less likely to succeed
at stopping actual plots than patient investigative work.

How else might information on terrorism and terrorists be gathered and
used with fewer assaults on data privacy and with a greater likelihood of
spotting only real suspects and not coincidental innocents? Here, too, we
might look abroad for models. In a number of European countries,
terrorism investigations are concentrated in the hands of small numbers of
specialists who stay at their jobs for long periods of time, developing a
sense of how terrorists operate, how terrorist networks grow and change,
and what constitutes a growing threat. In Spain and France, the two places
where such experts are most famous, these “investigating magistrates” are
located outside the executive branch and in the judiciary. Though some of
their specific powers are controversial in any human rights analysis, the
structural setup of their offices does not necessarily entail granting them the
most controversial powers of investigation.

88. Mark Clayton, US Plans Massive Data Sweep, Christian Science Monitor, Feb. 9,
2006, at 1.
89. Matthew B. Stannard, U.S. Phone-Call Database Ignites Privacy Uproar: Data
Mining: Commonly Used in Business To Find Patterns, It Rarely Focuses on Individuals,
S.F. Chron., May 12, 2006, at Al.
90. In Germany, data mining after 9/11 that examined the personal data of all university
students in the country produced no useful leads. See Ronald D. Lee & Paul M. Schwartz,
Beyond the “War” on Terrorism: Towards the New Intelligence Network, 103 Mich. L.
Rev. 1446, 1472 n.74 (2005). At least this data mining was authorized by a judge,
something that has not happened in the United States. But while data mining turned up
nothing, German police used normal police methods to detect and arrest two student
members of the al-Qaeda cell in Hamburg who had participated in planning the 9/11 attacks
themselves. For information on the trials of these two suspects see Kim Lane Schepple,
The Metastasis of Torture: Circulating Coerced Knowledge in the Anti-Terror Campaign
91. See Alexandrine Bouilhet, Belgium Criticizes French Leaks, Le Figaro, Dec. 2,
French antiterrorist judiciary have their own laws,” the chairman of the [Belgian
They make arrests both by day and by night, and can arrest wives in order to make their
husbands talk, entirely legally. These are their methods. Not ours.”).
Investigating magistrates, in the French and Spanish systems, perform some of the functions of grand juries in the United States: questioning witnesses, probing for evidence, trying to work out if a crime has been (or was about to be) committed. In the United States, a prosecutor (who is tied to the executive branch in the federal system) works with a jury of lay people to uncover evidence, while in France and Spain, chief investigators are part of the judiciary and work with their own teams of investigators (and sometimes their own teams of police) to investigate crimes.

The relative independence of the investigating magistrate has a certain advantage in antiterrorism campaigns. Antiterrorism campaigns can quickly devolve into general emergencies in which power is heavily concentrated in the hands of executives. As a result, having the investigative power lodged in a judiciary that is free of direct executive interference is a check on the concentration of executive power at such a time. In addition, if investigative magistrates are to have relatively broad powers of investigation, it is best to detach them from the overtly political branches that might have agendas like suppressing electoral competition and using the spoils of government for personal or party-political purposes. The danger of such positions is that they can become too independent, spinning out of any meaningful control by any other part of the government.

In both Spain and France, the logic of jurisdiction has concentrated terrorism investigations in the hands of particular now-famous investigative judges: Jean-Louis Bruguière in France and Baltasar Garzón in Spain. These two had been at their jobs for many years before 9/11 created a specialized sort of panic. Bruguière has been investigating Islamist radicals since a series of bombs exploded in Paris in the mid-1980s. After 9/11, commentators noted that only Bruguière warned before 9/11 that Islamic radicals were interested in using airplanes to crash into crucial landmarks. Garzón sits as a judge in the Audencia Nacional, the Spanish “National Court,” which is tasked with handling international and organized crime. His early work involved investigating domestic Spanish terrorism (including the police abuse in fighting it) and he gained international fame for attempting the extradition of General Augusto Pinochet to stand trial in

92. See Mary C. Daly, Some Thoughts on the Differences in Criminal Trials in the Civil and Common Law Legal Systems, 2 J. Inst. Stud. Legal Ethics 65, 67 (1999) (“From the accused’s perspective, the most critical part of French criminal procedure is the pretrial investigation. The ‘real combat,’ so to speak, takes place during the investigation. The trial is anticlimactic. There is no grand jury in France. In its place is the investigating magistrate.”).


94. In systems like France and Spain, it helps also that the judiciary is not overly politicized because judgeships are awarded through a system very like a civil service merit promotion system in which political influence has been minimized.


96. See id.
Spain for human rights abuses against Spanish nationals in Chile. Garzón began investigating Osama bin Laden and al-Qaeda in 1995 and has handled many terrorism investigations after 9/11, famously charging bin Laden in a 692-page indictment in 2003.

Both men are controversial, and the sources of controversy must be understood to assess whether their offices should be emulated. In general, the worry is about concentrating too much power in too few hands, as well as about the nature of the powers involved. The concentration of too much power problem can be solved with strategic oversight. For example, in France, investigating magistrates may indicate that a particular suspect should be charged with a crime, but the charge does not stick unless a panel of other judges reviews the evidence and agrees. The sorts of oversight we saw in Germany, where parliamentary committees review ongoing investigations for signs of abuse, might also be employed in a system like this.

By far the biggest criticism of investigative magistrates, however, is of the specific powers that they wield. The heavy use of preventive detention, ethnic profiling, and interrogations without counsel have all prompted concern about the way that the French have conducted antiterrorism investigations. In Spain, the permitted use of incommunicado detention for up to thirteen days in terrorism cases has generated criticism from human rights groups. But these powers do not necessarily come with the territory of investigative magistrates. Whether investigative magistrates should have these powers is a separate question from whether lodging terrorism investigations in the judiciary rather than in an executive-branch agency or ministry is a good idea. All investigative institutions come with strong potentials for abuse. It is only through designing effective oversight and review mechanisms that the potential for abuse will remain unrealized. The part of the investigative magistrate system that I want to praise as a model is the part that allows a small team of people to specialize in uncovering

99. See BBC Profile, supra note 97.
100. Myers, supra note 93, at 251-252.
101. See supra notes 42-74.
102. See Craig Whitlock, French Push Limits in Fight on Terrorism: Wide Prosecutorial Powers Draw Scant Public Dissent, Wash. Post, Nov. 2, 2004, at A1 (“France has embraced a law enforcement strategy that relies heavily on preemptive arrests, ethnic profiling and an efficient domestic intelligence-gathering network. French antiterrorism prosecutors and investigators are among the most powerful in Europe, backed by laws that allow them to interrogate suspects for days without interference from defense attorneys.”).
terrorist activity over a long period of time, separate from direct executive-branch control. The concentration of expertise in a relatively apolitical location is likely, in my view, to increase the chances of locating real terrorists while minimizing chances that the investigative powers will expand to reach individuals and subject matters that are not proper objects for such extraordinary powers.

**CONCLUSION**

When terror strikes, constitutional systems often go out of whack. Since 9/11, American legal analysts have rushed to propose ways to keep the constitutional order in line while fighting terrorism. Bruce Ackerman’s writings on the subject—whether positioned before or after the next attack—attempt to bring emergencies in from the cold, to normalize them for brief periods in order to protect against a second attack, and then to banish them from the operation of a stable constitutional order. His book and article in this volume are premised on the idea that emergencies are short-term crises that can be solved in a month or two before the normal can reemerge. But perhaps it is a sobering thought to recall that the visible part of the U.S. government did not rush to engage in extra-constitutional activities on the day of 9/11 itself. Instead, it closed down.\[104\] This suggests that the biggest threat is not the immediate aftermath, but the longer drawn-out struggle that an attack may presage.

Most emergencies, particularly those involving terrorism, are much more enduring than Ackerman suggests. They last not months, but years and even decades; they poison constitutional systems by normalizing practices that were unthinkable before the dark days of terror. That is why we need to think about practices we can live with for the long haul. We need to design institutions that are effective but not anti-constitutional, that are subject to constitutional constraint from the moment that they appear, and that are capable of being reigned in when they exceed their powers. While even the institutions that I have suggested as models here—the German domestic intelligence service and the French and Spanish system of investigative magistrates—are not free from criticism or potential for abuse, they do offer some ways to think about fighting terrorism while maintaining a system of constitutional checks.

Perhaps the greatest danger at times of emergency is that all power tends to flow toward the executive. Concentrated power is, as James Madison described, “the essence of tyranny.”\[105\] The examples that I have suggested here provide ways to spread power back through the legislative and judicial branches at times of crisis. In so doing, they offer at least some counterweight against the most likely source of internal threat. These institutions, if correctly designed, would also improve effectiveness in

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105. The Federalist No. 47 (James Madison).
detecting terror plots before they hatch because they permit focused investigations based on concentratee expertise.

If we can design institutions after 9/11 that are compatible with constitutional commitments to the separation of powers and the preservation of rights, then we will not need to give up the Constitution to fight terrorism. Instead, we can use this opportunity to remind ourselves that

[The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.]

Notes & Observations