In Case of Emergency

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By David Cole

Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism
by Bruce Ackerman
Yale University Press, 227 pp., $26.00

1.

It has been nearly five years since September 11, 2001, and thus far the United States has been spared another terrorist attack on home soil. That's just about the point when cancer patients in remission are told they can begin to relax if their symptoms have not recurred. But with the threat of terrorist attacks, we may never be able to let down our guard. Even if we were to eliminate al-Qaeda altogether—and some counterterrorism experts suggest that we may never know when that day has come, because al-Qaeda is more a loose-knit ideological movement than a distinct and coherent organization—there are always likely to be groups that resent the United States, and are willing to use violence to express their resentment. The issue is not so much Islamic fundamentalism as technological progress. The development of weapons of mass destruction—a development we pioneered—has made it increasingly easier for small groups or even people acting alone to inflict devastating damage. As Yale Law School professor Bruce Ackerman observes in Before the Next Attack, the state has lost its monopoly on the deployment of destructive technologies.

In this respect, the threat of terrorist attacks may be something that we must learn to live with—as a cancer patient learns to live with the ever-present possibility of recurrence. This feature of terrorism, however, only makes it all the more important that we adopt means for addressing it that are consistent with our deepest principles. The threat of terrorist attack is not a short-term phenomenon requiring temporary sacrifices, with the promise of an eventual return to normalcy, but a long-term condition. It is, as Vice President Dick Cheney has put it, "the new normal."

The fact that the terrorist threat is unlikely to abate anytime soon—or ever—makes a "war on terror" like no other war. While it is never possible, in the midst of a war, to say when it will end, this war may literally have no end. President Bush has said that the war "will not end until every terrorist group of global reach has been found, stopped, and defeated." That day will never arrive.

Many critics have argued that for these reasons, we must resist the label of the "war on terror." Once such rhetoric takes hold, those who care about civil liberties and civil rights will forever be on the defensive. The question is, what is the alternative?

Bruce Ackerman, one of the most creative legal minds of our generation, echoes the critics' concern about war talk and, to his credit, proposes an alternative—the "Emergency Constitution."

Al-Qaeda's terrorist attacks, he argues, should be viewed neither as acts of war, as the administration has treated them, nor as mere crimes, as some civil liberties advocates have argued, but as something in between—armed attacks causing a political "emergency." Such attacks, he claims, do not pose an "existential threat" to the nation; there is no risk that al-Qaeda will assume governmental power. They do, however, challenge the nation's "effective sovereignty," by calling into question the government's
ability to protect its people.

As a result, he suggests, neither a war model nor a business-as-usual model is apt. Rather, we need to authorize temporary emergency authorities in order to reassure a panicked citizenry that the state will swiftly restore order and maintain control. Otherwise, he warns, the government will inevitably overreact, employing rhetoric about war to justify extraordinary measures that undermine civil liberties. And with each attack, the overreaction will go further. Ackerman boldly claims that all of the world's constitutions, including our own, are defective in failing adequately to address such political emergencies, and proposes nothing less than a change in constitutional system.

Ackerman's skepticism of war rhetoric is well founded. His proposals, moreover, have been taken seriously. Among the legal authorities who have praised his book are Philip Heymann, a former US deputy attorney general, now a professor of law at Harvard, and Eugene Fidell, the president of the National Institute of Military Justice, who credits him with having written "a politically astute—and courageous—plan for preserving our constitutional system." Unfortunately, while Ackerman's diagnosis of the problem is incisive, his proposal would do nothing to cure it. When stripped of its own rhetoric, what Ackerman presents as a solution to an asserted constitutional defect turns out to be little more than a flawed preventive detention law. Far from solving the problem of overzealous responses to terrorist threats, Ackerman's proposal would likely exacerbate the problem, by freeing government officials to round up thousands of "terror suspects" without having to satisfy any court that there is any factual basis for the detentions. And his plan would do nothing to stop government officials from asserting extraordinary powers and undermining basic freedoms using other legal authorities.

Instead of the prompt judicial review that the Constitution generally requires when suspects are locked up, Ackerman would subject emergency preventive detention to an unusual legislative restraint. Borrowing from South Africa's constitution, which requires a 60 percent majority to sustain emergency powers, Ackerman would require the legislature to renew the emergency—and therefore the emergency authority to detain—at two-month intervals by increasingly lopsided "supermajorities." Initially, the legislature need only ratify the emergency by a simple majority, but after two months, continuation of the emergency would require a 60 percent majority; after four months a 70 percent majority would be necessary; and after six months 80 percent of the legislature would have to approve. This "supermajoritarian escalator," as Ackerman calls it, would institutionalize a presumption against prolonged emergencies, for without an overwhelming consensus, emergencies would be short-lived.

As long as the state of emergency is in effect, the president would have the power to lock up suspects for forty-five days, or until the emergency is terminated, whichever comes sooner. Upon an individual's arrest the government would have to make a "showing" in court of facts to justify its actions, but the court would have no power to assess the sufficiency of that showing. At no time during his period of incarceration would the suspect have any opportunity to challenge the evidentiary grounds for his detention. He would be able to seek judicial intervention only to bar the use of torture. At the end of the forty-five-day period, the government would have to release the suspect or charge him criminally. Those who are not charged or who are acquitted in a subsequent criminal trial would be compensated at a rate of $500 a day (or $22,500 for a prison term of forty-five days). Punitive damages would also be available, but only if prosecutors could be shown to have lied in seeking to justify a detention.

The idea behind the proposal is to give the president short-term emergency powers that will reassure the public and help forestall a second terrorist attack, while sharply limiting the period of the emergency in order to preserve civil liberties for the long term.

But Ackerman's proposal is fundamentally flawed for three reasons. First, there is no reason to believe that preventive detention without judicial review is either necessary or sufficient to protect us from a second attack. Whatever limited protection preventive detention might promise could be achieved without the drastic step of eliminating judicial review. Second, the existence of such a provision
would not forestall other abuses of civil liberties in the name of national security. Third, the proposal rests on a preference for legislative checks over judicial checks on questions of emergency powers and individual liberties, and that preference is unsupported by the factual record we have. While far from perfect, the courts have been more reliable than Congress when it comes to protecting the rights of the most vulnerable. Ackerman is right that we need credible alternatives to war talk, but his own alternative fails the test of plausibility.

2.

The historical record should caution us against encouraging widespread preventive detention in the name of national security. On three occasions, US authorities have resorted to mass preventive detention in periods of crisis. After eight bombs exploded in eight American cities within the same hour in 1919, the Justice Department launched what became known as the "Palmer Raids," even though they were planned by the young J. Edgar Hoover. Government officials rounded up thousands of foreign nationals on charges of technical immigration violations or association with Communist organizations, interrogated them without lawyers, and deported hundreds. None was found to have had any involvement in the bombings.

In World War II, President Franklin Delano Roosevelt authorized the internment of 110,000 persons of Japanese descent, more than 70,000 of whom were American citizens. The stated purpose was to forestall espionage or sabotage by Japanese and Japanese-Americans living on the West Coast. Not one of the internees was found to have been a spy or to have planned any sabotage.

After the attacks of September 11, Attorney General John Ashcroft launched the nation's third mass preventive detention campaign. In seven weeks, the government had arrested over a thousand so-called "terror suspects." During the first two years after September 11, the government imprisoned more than five thousand foreign nationals in preventive detention as part of its "war on terror." Virtually all were Arab and Muslim. Many were arrested and tried in secret. Most were arrested on technical immigration charges, and many were held long after their immigration cases were fully resolved. Nearly five years later, not one of the five thousand stands convicted of a terrorist offense.

Ackerman responds that the mere fact that preventive detention did not work in the past does not mean that it won't work in the future. It is "perfectly possible" that a dragnet might actually net a potential terrorist, he writes. But that is a terribly thin hope upon which to rest such an awesome power. Moreover, what all of the previous roundups had in common was that they did not require proof that the individuals detained posed any threat. Ackerman's proposal would do the same thing.

When Ackerman first proposed his idea in a *Yale Law Journal* article entitled "The Emergency Constitution," he called for preventive detention without any requirement that the government demonstrate any basis for suspicion. I wrote a reply, in which I criticized that aspect of his proposal. In response, Ackerman has now modified his proposal to provide that detention should be based on "reasonable suspicion" that a person may be engaged in an illegal act. That standard comes from a Supreme Court case permitting police to stop people briefly in public places in order to dispel or confirm their "reasonable suspicion" that a crime may be afoot. The Court concluded that because such brief stops are an important method for investigating potential crime, and impose only a minimal temporary intrusion, they may be carried out when the police have "reasonable suspicion" rather than "probable cause" of a crime. What is "reasonable suspicion"? The Court has said that it's "more than a hunch"; but it has also held that if a person runs away from the police in a high-crime area, that behavior is sufficient to meet the standard of "reasonable suspicion."

Whether a standard of suspicion created to justify temporary stops on public streets should be sufficient to warrant forty-five days of incarceration, as Ackerman proposes, raises a serious constitutional
question. But the more fundamental problem is that even this minimal standard is meaningless if judges cannot enforce it. Under Ackerman's proposal, a person wrongfully arrested on less than "reasonable suspicion" would have no recourse to a court while he was being held in jail. Nor would the presence or absence of "reasonable suspicion" affect compensation afterward. Upon release, those wrongfully arrested without "reasonable suspicion" would be entitled to no greater compensation than those lawfully arrested with "reasonable suspicion."

Compensation in Ackerman's scheme turns not on whether there was any basis for the detention in the first place, but only on whether a person is successfully prosecuted for a crime thereafter. Thus, those arrested without any legitimate basis get no compensation so long as prosecutors can convict them of even the most minor offense—from credit card fraud to a false statement on a government form. And those who are acquitted or never charged will get full compensation even if there was a legitimate basis for suspecting them at the time of detention. Accordingly, Ackerman's addition of a "reasonable suspicion" standard does not work, because literally nothing turns on whether the government complies with it.

This is not to suggest that preventive detention should be flatly prohibited. Most liberal democracies have preventive detention laws, and the United States already permits preventive detention of those awaiting trial or deportation hearings who pose a danger to others or a risk of flight, as well as those who are dangerous to others or mentally ill. A carefully formulated preventive detention law, preserving prompt judicial review, and restricting resort to other laws that have been abused for preventive detention purposes in the past, might lead to fewer innocents wrongly detained while preserving the authority to hold the truly dangerous. But there is no reason to believe that a preventive detention law that, in effect, authorizes arrest without grounds for suspicion would make us any safer. And it would give official approval to the mass detention of innocents.

3.

Ackerman's proposal also fails to meet his goal of preventing more radical abuses of civil liberties. In his view, the preventive detention provision will somehow satisfy the government and the public that an emergency will be adequately addressed, and will therefore reduce the risk that Congress or the president will seek still broader powers. This is no more than wishful thinking, and again, it is directly contrary to the historical evidence. Ackerman portrays his "state of emergency" as something "new," but there is in fact nothing new about emergency power. As Ackerman acknowledges, the Romans gave the executive special powers during states of emergency, and most European constitutions do so to this day. US law has long provided for emergency powers. In the twentieth century alone, Congress passed some 470 laws delegating emergency powers to the president, yet their existence did not protect us from abuses of civil liberties.

American law currently includes a wide range of emergency powers. Indeed, citing the National Emergencies Act, President Bush declared an emergency just twelve days after the attacks of September 11. On the basis of that declaration, he has used emergency powers to freeze the assets of anyone he labels a "specially designated terrorist," without charges of wrongdoing, hearings, or trials, and he has authorized other government officials to add to this blacklist anyone "otherwise associated" with those on the list—again regardless of wrongdoing and without notice, hearing, or trial. Yet the availability of such extraordinary emergency powers did nothing to stop the administration from invoking a "war on terror" and adopting a raft of other measures that radically infringe on civil liberties—from wiretapping without a warrant to indefinite incommunicado detention to torture.

Part of the problem is that emergencies and wars are not mutually exclusive; so the existence of emergency powers in no way precludes the exercise of war powers. The attack on September 11 gave rise to an emergency and was followed by a war. No one disputes that the attack created emergency
conditions within the United States. And both the UN Security Council and NATO recognized that al-Qaeda's acts constituted an "armed attack" justifying a military response in self-defense. After the Taliban government refused to arrest the al-Qaeda leaders, most nations supported the US attack in Afghanistan. Ackerman himself acknowledges that the conflict with Afghanistan was properly called a war. But if military force is an appropriate response to a catastrophic terrorist attack, there is no reason to believe that the existence of the additional emergency detention powers Ackerman proposes will do anything to reduce reliance on war powers or "war talk" after the attack takes place.

Ackerman contends that by providing short-term emergency measures, we will reduce the likelihood that terrorist attacks will lead to long-term losses of civil liberties. Without emergency powers, he argues, Congress will be tempted, as it was in the Patriot Act, to expand executive discretion permanently. But if the threat that terrorism poses is itself permanent—as Ackerman himself argues—it is not clear why only short-term changes are appropriate. While temporary preventive detention is certainly one way for a government to respond to terrorist threats, it is not the only or even the principal way. Since September 11, the Bush administration has, among other things, (1) reorganized the federal bureaucracy, (2) increased border and airport security, (3) reduced barriers to information sharing among law enforcement and intelligence officials, (4) prohibited the financing of terrorist organizations, (5) expanded prohibitions on money laundering, (6) sent undercover informants into mosques, (7) engaged in warrantless wiretapping of Americans, (8) prosecuted lawyers, translators, and Web site managers for speech, (9) detained "enemy combatants" at Guantánamo Bay, Bagram Air Force Base in Afghanistan, and in Iraq, (10) carried out "targeted assassinations" of al-Qaeda suspects, (11) created a network of secret detention centers around the world into which the government has "disappeared" other suspected al-Qaeda leaders, (12) employed coercive interrogation tactics up to and including torture, and (13) rendered other suspects to third countries to be tortured there. Ackerman offers no reason to think that giving the president the power to detain suspects without charges for forty-five days after the September 11 attacks would have forestalled any of these measures.

What is more, Ackerman quickly acknowledges that our amendment process makes all but the most uncontroversial constitutional amendments virtually impossible to enact, and that this is also true of his scheme for emergency powers. Instead, he proposes a "framework statute." But this in turn further diminishes any likelihood that Ackerman's plan would have any limiting effect on post-attack responses. Unlike a constitutional amendment, a statute would have no binding effect on subsequent Congresses. The Constitution gives Congress the power to enact or repeal any law within its authority, so long as it obtains a bare majority of each house and the approval of the president. If a majority of Congress believes that emergency conditions persist six months after an armed attack, but 21 percent of the Senate disagrees, nothing would stop the majority from repealing the requirement for larger and larger majorities—Ackerman's "supermajoritarian escalator"—or simply passing another law giving the president the same or even broader authorities.

Ackerman suggests that courts should strictly scrutinize any subsequent laws that undermine the "supermajoritarian escalator"; but if the escalator is only a statute, there would be no legal basis for doing so. When statutes conflict, the long-established rule is that the later statute prevails over the earlier, because Congress is always free to change its mind. At best, the existence of a statutory supermajoritarian escalator might have some persuasive but nonbinding effects on Congress; but if the pressures to act after a second or third catastrophic attack are as strong as Ackerman warns they will be, such precatory effects will not be nearly enough. For Ackerman's proposal to have any chance of limiting further damage to civil liberties, it would have to be a constitutional amendment—but as he concedes, that is not even within the realm of possibility.

4.

Underlying Ackerman's proposal is a distrust of courts that is fashionable in the legal academy.
Ackerman claims that judges cannot be relied upon during times of emergency, and that therefore it is better to place our bets on Congress. Ackerman criticizes at length the Supreme Court's treatment of Yaser Hamdi and José Padilla—US citizens designated as enemy combatants—to illustrate his point, but his arguments here are again unpersuasive. He castigates the Court, for example, for upholding the president's authority to detain Hamdi, a US citizen captured fighting for the enemy on the battlefield in Afghanistan, and he criticizes the Court for "balancing" Hamdi's rights against government claims based on security when it came to deciding what legal process was appropriate for him. But on the question of authority to detain Hamdi, Ackerman concedes that the US was at war in Afghanistan when Hamdi was captured, and he does not dispute that it is entirely routine—and lawful—for nations to detain those fighting for the enemy during wartime.

As for whether Hamdi was denied due process, the Court has long used a test that balances individual rights against security requirements to assess the appropriate procedures when the government claims preventive detention is necessary. It uses such a test in cases ranging from the detention of those awaiting criminal trial or immigration hearings to the "civil commitment" of mentally ill and dangerous citizens. In the absence of an absolute prohibition on preventive detention—something neither this country nor any other nation of which I am aware has ever accepted—it is difficult to see how else to assess appropriate procedures than by balancing, as the Court does in *Hamdi*, the detained person's rights against the government's security needs. One can certainly disagree with the particular balance the Court struck; but Ackerman's preventive detention procedure would offer even less protection to Hamdi's rights. The Court in *Hamdi* held that at an irreducible minimum, due process requires that a detainee have a meaningful opportunity to confront the charges against him before an impartial decision-maker; Ackerman's scheme would offer no opportunity whatever to challenge the basis for incarceration.

So Ackerman's criticisms are overblown. Moreover, he fails to acknowledge the most important feature of the Court's 2004 decisions about "enemy combatants"—their powerful refutation of the President's argument that his detention authority could not be subjected to any meaningful judicial review.

If the courts do not afford fully adequate protection, Congress is certainly no better. Hamdi and Padilla would both be in military detention today had the matter been left to Congress, which did nothing to protect either man during their many years behind bars, despite the fact that their treatment prompted probably the most widespread condemnation by lawyers and the public of any tactic used in the "war on terror," including even the torture at Abu Ghraib.

5.

Ackerman is correct that those concerned with the demise of civil liberties need to offer credible alternatives to the administration's "war on terror." The conservative columnist David Brooks pithily captured the political reality in commenting on the January hearings for Supreme Court Justice Samuel Alito. While Democratic senators had futilely pressed Alito on the law, the Republicans had insisted on the need for security. Brooks said, "You saw people like Lindsay Graham, a Republican, saying, 'I'm worried about terrorists.' You saw Democrats saying, 'I'm worried about the NSA.' That is a clear winner for the Republicans." In today's political climate, and certainly for this administration, security often takes precedence over law. If they are to get national political support, liberals must offer sensible security proposals that are consistent with basic principles of the rule of law.

But Ackerman's alternative is not sensible. That he goes to such lengths as to suggest an "Emergency Constitution" authorizing detention without charges may suggest to some that existing laws and procedures are inadequate to provide security in states of emergency. In fact, there is already a wide range of measures that are legal and appropriate in responding to a terrorist attack and seeking to prevent another attack. They include: increasing security at borders, airports, and other sites of potential attack, such as chemical plants; using military force, detentions, and trials, so long as they are consistent with the
UN Charter and the laws of war; investigating potential terrorists pursuant to the Foreign Intelligence Surveillance Act; prosecuting those who conspire to engage in terrorist acts or aid or abet such acts; securing nuclear materials to keep them out of terrorists' hands; improving coordination between law enforcement and intelligence officials; increasing aid to foreign communities where poverty and resentment toward the US have been exploited by terrorists; reducing US dependence on oil to offset the perverse incentives that such dependence creates for American foreign policy; and making progress toward global disarmament. Such measures, and they are only a sample, would increase US security without necessarily undermining constitutional principles, and most significantly, without encouraging the rampant anti-Americanism that the Bush administration's disregard of the rule of law has exacerbated around the world.

In the end, Ackerman's book has a distinct air of unreality about it. He pleads eloquently for legislative reform now—"before the next attack." But the reality is that nothing substantial happens in Congress unless actual events and political pressures create a need for action. The September 11 attacks brought about widespread changes, some of them sensible and long-needed, others hasty and wrong-headed. The revelations of prisoner abuse at Abu Ghraib and elsewhere, coupled with the sustained attention afforded these issues by human rights groups and the press, led to the McCain Amendment, which reaffirmed that the prohibition on cruel, inhuman, and degrading treatment extends to all human beings everywhere—and not just to Americans or those held within the United States, as the Bush administration had secretly asserted. Similarly, political and legal challenges to Guantánamo have forced reforms there, including the introduction of hearings to determine the status of prisoners, reduced reliance on coercive interrogation tactics, and the release of over 250 detainees. At home, a concerted campaign by librarians and civil libertarians led to restrictions on the Patriot Act provision authorizing the seizure of library records in foreign intelligence investigations.

None of these reforms has been as effective or extensive as they should have been. Congress undercut the McCain Amendment by enacting another law that barred Guantánamo detainees from seeking any judicial protection if they are being subjected to torture. When President Bush signed the amendment, he attached a statement asserting that, as commander in chief, he had the power to violate it whenever he chose to do so. Despite the reforms at Guantánamo, the government is still holding many people there who pose no threat whatever to the US. The government itself has determined that only 8 percent of the Guantánamo detainees were fighters for al-Qaeda. No high-level US official has been held responsible for the widespread pattern of torture and coercive interrogation revealed at Abu Ghraib, Guantánamo, and elsewhere. And earlier this year Congress reauthorized the Patriot Act without even discussing many of its most troubling provisions—such as those authorizing deportation of people for their political associations, and empowering the attorney general to lock up foreign nationals without charges.

But whether one stresses the progress made by those who care about civil liberties and the rule of law or the distance we still have to go to restore those values, there is, and will continue to be, a continuing political and legal struggle over the character of American democracy in the face of what is, in all likelihood, a permanent threat of catastrophic terrorism. Abstract pleas for structural reform, such as Ackerman's, are unlikely to have much effect without careful attention to the government's particular failures to protect rights and security. If remedies are to be taken seriously, they must be responsive to real needs. Ackerman's proposal fails not only because it is insufficiently thought through, but more fundamentally because it is disconnected from the reality of what is actually happening to people denied elementary rights.

Notes


[3] Those interested in a more empirical attempt to articulate an alternative national security vision would do well to read Harvard professors Philip Heymann and Juliette Kayyem's new book, Protecting Liberty in an Age of Terror (MIT Press, 2005). Heymann and Kayyem, both of whom worked on national security issues in the Clinton Justice Department, consulted an impressively diverse range of national security experts, and offer recommendations on everything from domestic surveillance to coercive interrogation and targeted killings. While some of their recommendations, especially their proposal to authorize what they call "highly coercive interrogation" short of torture, are questionable, their approach is more comprehensive and more attentive to reality than Ackerman's.


Letters

October 19, 2006: Bruce Ackerman, An 'Emergency Constitution'?