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THE EMERGENCY CONSTITUTION IN THE POST-SEPTEMBER 11 WORLD ORDER

THE CONSTITUTION AS BLACK BOX DURING NATIONAL EMERGENCIES: COMMENT ON BRUCE ACKERMAN'S *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM*

*Martha Minow**

INTRODUCTION

Panic in the face of danger is an understandable human response. Yet, as fiction author Katherine Paterson has written, "[T]o fear is one thing. To let fear grab you by the tail and swing you around is another."[1] Bruce Ackerman's book, *Before the Next Attack*,[2] is to be commended for urging us to guard against overreactions to terrorism and for proposing detailed safeguards to confine overreactions. Also admirable are the book's thorough analysis of the United States' current confrontation with terrorism and the book's reliance on historical examples from around the world to justify the author's proposals. Nevertheless, the book contains a serious flaw: The book shifts from a frank acknowledgment of the problems generated by confronting terrorism to a kind of utopianism that ignores many of those very problems. Ackerman's work, in other words, alternates between pessimism and optimism. Perhaps such shifting is an occupational hazard of advocating for civil liberties in the shadow of terrorist threats. My thoughts below on Ackerman's book will no doubt betray a similar mix of pessimism and optimism. Part I discusses five of the book's most important contributions, while Part II criticizes the book's analyses, especially in light of recent U.S. experiences. Part II also argues that "security," not Ackerman's theory of "emergency," should be the conceptual foundation guiding the government's policies against terrorist threats. Finally, Part III develops policy changes that are needed for the

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1. Katherine Peterson, Jacob Have I Loved 63 (Harper Trophy 1990) (1980).

2. Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (2006).

U.S. to advance security as what once may have seemed like a short-term confrontation with terrorism becomes recognized as a chronic condition.

I. ACKERMAN'S CONTRIBUTIONS

Before the Next Attack makes five significant contributions: (1) anticipating fear and overreaction to terror; (2) developing concrete plans that could be valuable in a crisis and could sharpen the public's sense of priorities; (3) predicting the long-term consequences for our constitutional democracy from short-term responses to terrorism; (4) subjecting all of the government's policy initiatives regarding terrorism to constitutional analysis; and (5) rejecting "war" and "criminal justice" as the legal justifications for the United States' responses to terror. The paragraphs below discuss these contributions further.

Ackerman's first contribution is addressing two genuine features of human fear: overreaction and poor judgment in a crisis. Our Constitution's framers proceeded with frank acknowledgement of human self-interest and used it deliberately in the institutional design of our government. Ackerman similarly acknowledges human self-interest in describing the risks of overreaction to terror. A more detailed treatment of psychological reactions to fear, however, would clarify the scope of the risks and potentially identify resources for institutional reform. We know that fear makes us overreact and misjudge. For example, Cass Sunstein has recently canvassed the empirical research about human perceptions of risks and attending fear.[3] Sunstein describes how people think that risks that they can imagine are especially likely to actualize, regardless of evidence, and how people tend to focus on worst-case scenarios without discounting for probability. Furthermore, people tend to focus on immediate risks rather than any long-term risks created by responding to danger. Although Ackerman did not incorporate such psychological research in his analyses, his work helpfully examines historical evidence of overreaction to terrorism and security threats during the Roman Empire, during the American Civil War, during Britain's handling of Northern Ireland, and during the European response to 9/11. These examples typify political overreaction to terrorism. The examples also offer Ackerman the chance to distinguish the types of threats to a polity's existence: threats that warrant the most drastic measures from lesser threats. Ultimately, Ackerman argues that the 9/11 attack, and a possible next attack, fall in this lesser category.

Ackerman's second contribution in *Before the Next Attack* is hedging against predictable panic by suggesting concrete plans that anticipate a terrorist attack against the United States. Here he emphasizes the distortion

3. *See* Cass R. Sunstein, Laws of Fear: Beyond the Precautionary Principle 35-63 (2005).

of judgment exercised in the midst of emergencies and works out in advance contingency plans for maintaining government operations in case a dirty bomb or other assault destroys part of a city or a group of key governmental actors. Making such plans in advance is both wise and crucial[4] because human beings do not think well in emergencies.[5] Ackerman not only calls upon us to do the thinking in advance; he provides guidance with highly specific plans to put into effect in the case of the next emergency. This kind of contingency planning is vital. Motivating officials and voters to adopt anticipatory plans is a true challenge, however, for the forces of inertia and denial operate here at least as much as they explain why so few people prepare for their deaths by writing wills.[6]

Hence, Ackerman joins Congressman Brian Baird in outlining a line of succession in the event that terrorist acts incapacitate state governors, congressional representatives, senators, or U.S. Supreme Court Justices.[7] Ackerman also calls for a "supermajoritarian escalator" through a framework statute to control presidential power by requiring increasing numbers of congressional votes to extend emergency measures over time.[8] Throughout his book, Ackerman seeks to ensure that counterterrorism measures suspending usual rights are only temporary.

Ackerman's third contribution is championing long-term analysis in an effort to ensure that short-term responses to terrorism neither destroy nor erode national constitutional values. This is why he calls for successively escalating majority-vote requirements before Congress can authorize extensions of emergency powers to the executive branch. I admire the impulse behind this important recommendation, but I doubt its practicality on several levels. Even if the political will could be mustered to adopt such a provision, nothing would prevent Congress from abandoning the provision's terms by a simple majority when it comes time for the supermajority vote. Moreover, the capacity of Congress to act as an effective check would be impaired because the executive maintains the power to control information about terrorist threats and to shield abuses of executive power from politicians and journalists. Furthermore, contemporary events in the United States rebut the assumption that the passage of time would quell the sense of emergency justifying the

4. *See, e.g.*, Ackerman, *supra* note 2, at 88-90 (describing how the constitutions of Poland and South Africa mandate that any state of emergency has a limited duration extendable only by the legislative branch).

5. *See, e.g.*, Sunstein, *supra* note 3, at 206 ("An understanding of the dynamics of fear helps explain why individuals and governments often overreact to risks to national security. A readily available incident can lead people to exaggerate the threat.").

6. *See* Joel C. Dobris et al., Estates and Trusts 62 (2d ed. 2003) (noting that most Americans die without wills); Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Found. Res. J. 319, 336-40 (describing the demographics and attitudes characterizing testate and intestate individuals).

7. Ackerman, *supra* note 2, at 142-68.

8. *Id.* at 80-83.

suspension of usual restrictions on governmental power. The most obvious recent evidence is Congress's recent affirmation and expansion of broadened executive powers with the reauthorization of the USA PATRIOT Act five years after 9/11.[9]

Ackerman's fourth contribution is to treat the totality of policy initiatives responding to terror as relevant to constitutional analysis. He rightly points out that all of these initiatives affect the viability of constitutional rights and checks and balances. Nevertheless, the details of Ackerman's specific statutory framework for contingency planning and his proposal for the supermajority escalator are less important than the recognition that the Constitution must not be forgotten when developing statutes and practices to confront terrorism. How we arrange our governance to deal with terrorism will define us; the extent to which we are able to mobilize and activate congressional and judicial monitoring will determine whether the checking function of the branches will persist and whether watchdogs for individual rights will have a voice. More fundamentally, establishing distinct statutory bases for the response to terror will make it conceptually and politically easier to sever the governance practices responding to terrorist threats from the law permitted by the Constitution. The laws responding to terrorism that are permitted to persist beyond short-term crises must reflect our deepest commitments. In this context, even statutory and regulatory proposals should be understood as part of our "constitution," for they will come to constitute us.

A fifth vital contribution of Ackerman is rejecting "war" and "criminal justice" as paradigms for the U.S. responses to terrorism after 9/11. He convincingly demonstrates how the rhetoric of war escalates both fear and executive power without sufficient evidence. He similarly points out the fatal flaw of framing counterterrorism within the conception of criminal justice: Criminal justice does not offer a context for taking national precautions or for preventing further catastrophe, nor does it speak to how individual rights should be treated outside of criminal prosecutions.

In rejecting the paradigms of war and criminal justice, Ackerman proposes that the U.S. couch counterterrorism measures within the framework of responding to an "emergency." Unfortunately, his own arguments expose the insufficiency of his proposed framework. Precisely because the terrorist threat has no obvious end-point, the concept of an "emergency" is inadequate to the challenge at hand and would be inadequate even in the immediate aftermath of another attack.[10] The crucial challenge now is to reject the faulty view that we can and must sacrifice our

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9. Charles Babington, *Congress Votes to Renew Patriot Act, With Changes*, Wash. Post, Mar. 8, 2006, at A3. The renewal produced only a slight restriction in the use of subpoenas without judicial approval in libraries. The renewal also made permanent all but two provisions and enlarged federal power to engage in secret surveillance of phones, records, and homes of terrorist suspects. *Id.* For other examples from recent U.S. practice that provide further grounds for doubting Ackerman's presuppositions, see *infra* Part II.

10. *See* Ackerman, *supra* note 2, at 58-60.

commitment to fundamental rights for what is imagined to be a temporary emergency: The problem is not temporary and the solution is not abandonment of our fundamental commitments. Thus, as I will argue below, a better framework is "security," which is sufficiently ample to encompass both the advancement of our physical safety and the preservation of the very rights that are essential to our security. Sorting out the book's strengths and problems requires more criticism.

II. CRITIQUES IN LIGHT OF RECENT U.S. EXPERIENCES

Before the Next Attack contains flashes of optimism. Unfortunately, the book's optimism is at best utopian and at worst irrelevant to the actual scene. This is perplexing because Ackerman pitches the project as a realistic one, cautioning against ostrich behavior. Yet, as discussed below, his key proposals are disconnected from real politics. Ultimately, Ackerman's proposals are better seen as a heuristic device framing potentially useful analyses, rather than as practical solutions.

One example of his proposals' disconnect from real politics comes from his discussion of congressional oversight committees. Ackerman's discussion begins by acknowledging the Bush Administration's efforts to keep detentions and surveillance secret and to press for more secrecy. In that context, Ackerman recommends that congressional oversight committees be guaranteed minority members.[11] This recommendation seems both insufficient and unrealistic. The secret use of undisclosed off-shore detention centers and domestic surveillance techniques emerged from journalist reporting and government leaks—not from congressional oversight.[12] Similarly, journalists and officials uncomfortable with the Administration's practices were responsible for bringing to public attention the Administration's use of coercive interrogation techniques.[13]

Such events indicate that there is no assurance that the Administration will be forthcoming with anyone in Congress. Nor is there strong reason to believe that when (as now) the same political party controls both Congress

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11. *See id.* at 83-87.

12. *Committee Schedules Hearings on Bush Censure*, Seattle Times, Mar. 25, 2006, at A5 (describing how the Senate Judiciary Committee is to hold hearings on Senator Russ Feingold's proposed censure of President Bush after the disclosure of his domestic spying program); Eric Schmitt & Carolyn Marshall, *In Secret Unit's 'Black Room,' A Grim Portrait of U.S. Abuse*, N.Y. Times, Mar. 19, 2006, at A1. The Administration threatened to prosecute those responsible for leaking information, while journalists received awards for uncovering the information. *See, e.g.*, Dan Eggen, *White House Trains Efforts on Media Leaks; Sources, Reporters Could Be Prosecuted*, Wash. Post, Mar. 5, 2006, at A1; Robert D. McFadden, *Articles on C.I.A. Prisons and Katrina Win Polk Awards*, N.Y. Times, Feb. 21, 2006, at B4 (reporting awards to journalists who uncovered secret CIA prisons in Europe).

13. *See* Jane Mayer, *Annals of the Pentagon: The Memo*, New Yorker, Feb. 27, 2006, at 32-41. President George W. Bush finally acknowledged the existence of such secret prisons in a speech announcing the transfer of those detained in them. Deb Riechmann, *Bush Admits the CIA Runs Secret Prisons*, ABC News, Sept. 7, 2006, http://abcnews.go.com/Politics/wireStory?id=2403673.

and the executive branch, the congressional majority will push for, or acquiesce to, a proposal to guarantee involvement of minority members in crucial oversight work.[14] Furthermore, it is far from clear that "minority" here includes individuals with real capacity for skepticism, motivation to engage critically, and distance from the Administration. For example, after leaks from the Administration revealed the Administration's secret domestic spying program, the Democrats' flabby resistance to the program came to light.[15] Republicans such as Senator Arlen Specter, even in arranging a compromise to exempt the domestic spying program from previous legal restraints, have exercised as much critical oversight over the program as the Democrats, if not more.[16] Thus, an important question confronts Ackerman: How would minority party members summon sufficient independence and courage to provide meaningful review of the executive, given little evidence of such abilities in the past? The U.S. experience since 9/11 gives no indication that time's passage strengthens political or judicial resistance to the fears raised by terrorism.

Ackerman's proposed compensation for erroneous detention is another example of a disjuncture between his suggestions and the U.S. experience since 9/11. Let us put to one side the political feasibility of generating sufficient support for compensating detainees.[17] A more devastating defect of Ackerman's proposal is its reliance on transparency and self-restraint—precisely the qualities lacking in the current Administration's behavior. How is the public to learn about the conduct warranting compensation when the government insists on keeping the conduct secret? Consultation with congressional leadership about antiterrorism responses occurred in secret. Even hearings of the Foreign Intelligence Surveillance Court remain undisclosed. When the public learned that this court's secret procedures were ignored by a domestic surveillance initiative, Congress debated retroactive authorization rather than recompense for those affected by it.[18] Even if there was political will to pursue Ackerman's compensation idea, who would be in a position to know who deserves it and to ensure that those eligible actually get it?

A further disjuncture between Ackerman's book and the U.S. experience since 9/11 becomes apparent through his treatment of the case of Jose Padilla. Ackerman wrote with hope that the case of Jose Padilla would return to the Supreme Court and offer the opportunity for protecting U.S.

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14. *See* Carl P. Leubsdorf, *Republicans Have Been Reluctant to Stand Up to the Administration*, Dallas Morning News (Online), Feb. 9, 2006, http://www.dallasnews.com/sharedcontent/dws/dn/opinion/columnists/cleubsdorf/stories/DN-leubsdorf_09edi.ART.State.Edition1.c616e57.html.

15. Jeff Zeleny, *Democrats Leary of Call for Censure: Rebuke of Bush May Backfire, Some Fear*, Chi. Trib., Mar. 17, 2006, § 1, at 3.

16. *See* Charlie Savage, *Deal on Spy Program in Works: Bill Would Let Court Approve Wiretaps*, Boston Globe, Feb. 28, 2006, at A3.

17. *Cf.* Ackerman, *supra* note 2, at 51-56 (discussing issues surrounding compensating detainees).

18. Emily Bazelon, *Legalize It?*, Boston Globe, Feb. 19, 2006, at E1.

citizens from limitless detention. Ackerman is not to be faulted for failing to anticipate precisely how the Bush Administration would maneuver in the case of Padilla, but this history offers a sober contrast to the book's optimism.

Padilla is a U.S. citizen who was arrested in the United States (at O'Hare Airport) and detained not with charges but with suspicion of plotting a dirty bomb attack. Padilla became a central focus of the fight over executive power in the response to terrorism. As the Administration held him in detention without charges, it claimed the courts lacked authority to hear Padilla's habeas corpus challenges. The Supreme Court asserted its power to hear habeas petitions from "enemy combatants" held in detention without charges, but the Court dismissed an initial petition on the technical ground that the petition named the wrong government official and was filed in the wrong court. As a second petition, correcting that error, worked its way back to the Supreme Court, the federal government transferred Padilla from military detention with no criminal charges[19] and then urged the Supreme Court to dismiss the case as moot.[20] The government chose at this moment to charge him not with terrorism, violence, or even conspiracy to commit violence. Instead, as of this writing, Padilla stands charged with playing a role in a conspiracy to support terrorist groups overseas.[21] If Padilla posed such great danger as to warrant the extraordinary measures of arresting a U.S. citizen on U.S. soil and holding him without charges, the transfer to civilian prison with no charges of terrorism or allegations of violence seems like a considerable fallback position for the government. Furthermore, the government's treatment of Padilla echoes the Administration's decision to release Yaser Hamdi (conditioned on his return to Saudi Arabia and his agreement to give up U.S. citizenship) after the Supreme Court held that the military had to provide him with a hearing about his detention as a suspected terrorist and enemy combatant. The treatment of Padilla and Hamdi raise real questions about the capacity of checks and balances to work even several years after the 9/11 terrorist attacks.

The events surrounding Padilla and Hamdi also raise doubts about whether the executive branch can exercise power with responsibility,

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19. In a fascinating turn of events, the U.S. Court of Appeals for the Fourth Circuit—which had approved the military detention with charges—opposed the government's motion for an "eleventh-hour transfer" because it jeopardized Supreme Court review of the matter. Linda Greenhouse, *Justices Let U.S. Transfer Padilla to Civilian Custody*, N.Y. Times, Jan. 5, 2006, at A22.

20. Adam Liptak, *Alito Vote May Be Decisive in Marquee Cases this Term*, N.Y. Times, Feb. 1, 2006, at A1. It is not clear why the Administration so fears Supreme Court review, especially with two new appointees. Note that Justice Alito hired as a law clerk a former aid to former Attorney General John Ashcroft who helped to craft the Administration's policies in response to 9/11. Charles Lane, *Alito Hires as a Clerk Former Ashcroft Aide: Lawyer Played Key Role at Justice Dept.*, Wash. Post, Feb. 15, 2006, at A12.

21. Despite the history of intense security concerns, the federal district court judge directed that Jose Padilla should not appear in handcuffs in court unless the Administration can demonstrate that he poses a specific security risk. Vanessa Blum, *Federal Judge Orders Padilla's Cuffs Removed*, Sun-Sentinel (Fort Lauderdale, Fla.), Feb. 4, 2006, at 8B.

restraint, or candor once a terrorism crisis abates. David Cole voices such doubts in citing the failures of the Administration to identify a single Al-Qaeda cell in the United States or to generate convictions through the massive use of preventive techniques.[22] One could go further and ask whether whatever gains have been secured through the Administration's actions—including the use of detention without charges, the denial of access to attorneys, the use of secret prisons, and the use of coercive interrogation—outweigh the injuries that these actions pose to our international image and our own principles. By abandoning legal rules in the treatment of suspects, we may even inspire more rage against the United States and fail the test posed by Secretary of Defense Donald Rumsfeld in 2003: "Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?"[23]

In sum, the behavior of the executive, the Congress, and the courts in the United States since 9/11 cast serious doubts about three key presuppositions in Ackerman's book: (1) that as time passes after a major terrorist attack, the executive will permit sufficient information about its conduct to enable congressional and judicial oversight; (2) that Congress will exercise more independent checks on executive power; and (3) that minority party leadership, if given a voice, will check majority party power grabs. Because of these doubts, as well as the chronic nature of terrorist threats so well described by Ackerman, the framework of "emergency" is insufficient as a way to cabin the powers of the executive. This would be true whether the "emergency" is understood as the ongoing crisis unleashed since 9/11 or instead as a new "emergency" triggered by a next attack.

Hence, Ackerman's central proposals—the escalating supermajority requirement to renew and extend executive authority, compensation for those wrongfully detained, and permission to suspend fundamental guarantees against detention without due process or the protection of sufficient governmental suspicion—are both practically implausible and conceptually insufficient protections for national and individual interests. As an alternative, I offer "security," broadly conceived, as the alternative for responding to terrorism. Here I mean to join Ackerman in rejecting the frameworks of war and criminal justice as the proper legal understandings of terror. Yet "security" rather than "emergency" more aptly expresses and implements these wise lessons that Ackerman himself explores: Proposals must (1) anticipate fear and overreaction to terror; (2) develop concrete

22. David Cole, *Are We Safer?*, N.Y. Review of Books, Mar. 9, 2006, at 15 (reviewing Daniel Benjamin & Steven Simon, The Next Attack: The Failure of the War on Terror and a Strategy for Getting it Right (2005)).

23. *Rumsfeld's War-On-Terror Memo*, USA Today (Online), May 20, 2005, http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm (reprinting a memorandum from Donald Rumsfeld, dated October 16, 2003, posing this question along with other inquiries about how to measure success and failure in the global war on terrorism).

contingency plans that could be valuable in a crisis and can sharpen the sense of public priorities; (3) attend to the long-run consequences for our constitutional democracy from short-term responses to terrorism; and (4) treat the totality of policy initiatives responding to terror as relevant to constitutional analysis, as all the initiatives affect the viability of constitutional rights and checks and balances.

III. THE NATIONAL SECURITY CONSTITUTION

Responses to terrorism should reject the rhetoric of war and the paradigm of criminal justice. Following Ackerman's book, I believe that such rejection is the starting point for responsible counterterrorism analysis. I also follow Ackerman in treating the entire collection of national policy responses, not only judicial interpretation of the Constitution, as germane constitutional analysis. Furthermore, anticipating the predictable overreactions of panic and fear is a central imperative that entails maintaining a long-term view about the effects of short-term reactions.

All of these elements add up, in my mind, to the obligation to enhance national security directly and effectively both before a next attack on U.S. soil and after such an attack, should one occur. Surprisingly, this central meaning of "security" is not the watchword of U.S. policies, despite the elaborate organizational shuffling involved in the creation of a Department of Homeland Security. For, as many learned reports and commentators have noted, the U.S. response since 9/11 has left woefully unaddressed key areas of vulnerability to terrorism. These include (1) the continued disorganization of intelligence resources and inadequate capacity to infiltrate, interpret, and analyze terrorist cells and domestic and international Arabic sources;[24] (2) the continued exposure of ports and container transport to terrorism;[25] (3) the continued failure to secure nuclear material domestically and internationally;[26] and (4) the inconsistent regulation of materials that could be used in bioterrorism.[27]

Thoughtful and specific proposals for strengthening national security abound. For example, in *The Next Attack*, Daniel Benjamin and Steven Simon argue for improving the nation's intelligence capacity; identifying, capturing, and disrupting terrorists; safeguarding nuclear materials and dangerous weapons to keep them from hands of terrorists; identifying and

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24. *See generally* 9/11 Comm'n, Final Report of the National Commission on Terrorist Attacks Upon the United States (2004).

25. *See* Stephen Flynn, America the Vulnerable: How Our Government Is Failing to Protect Us from Terrorism 81-110 (2004).

26. *See* Nat'l Research Council, Strengthening Long-Term Nuclear Security 2-3 (2006), *available at* http://newton.nap.edu/catalog/11377.html. *See generally* James L. Ford & C. Richard Schuller, Controlling Threats to Nuclear Security: A Holistic Model (1997); Rensselaer W. Lee III, Smuggling Armageddon: The Nuclear Black Market in the Former Soviet Union and Europe (1998).

27. *See, e.g.*, Joshua Lederberg, *Introduction*, *in* Biological Weapons: Limiting the Threat 5-7 (Joshua Lederberg ed., 1999).

protecting the most vulnerable targets in the country, including container cargo at shipping ports, water supplies, and chemical plants; and reducing the creation of new terrorists by addressing their grievances.[28] The intelligence capacity in the nation remains in need of serious improvement, given the continued documented rivalries and inefficiencies that impaired interpretation and action before 9/11. Professional intelligence analysts who predict that terrorists like Zacarias Massaoui will fly a plane into the World Trade Center should get a hearing at the highest levels. If this does not occur, then there is something deeply broken in the intelligence apparatus.

Rigorous understanding of the scope and meaning of "security" should inform policy. National security in a democracy entails not only protecting borders and citizens from physical threat, but also promoting democratic accountability and respect for human rights. This broader conception, exemplified by the approach to counterterrorism pursued by Canada, rejects the assumption that the nation must sacrifice human rights for security and instead treats both physical security and human rights as indispensable to national security. One reason given by the Canadian government for this treatment is that adherence to human rights reduces terrorists' ability to recruit: "The first line of defense in countering terrorist recruitment is the promotion of accountable, democratic governments that respect human rights, allow for peaceful dissent, take action to fulfill the aspirations of their people, and respect diversity."[29] The commitment to human rights enforcement runs deeper, however, as an element of personal security. When Irwin Colter served as Minister of Justice and Attorney General of Canada, he explained that there is no contradiction between the protection of security and the protection of human rights because each point in the same direction: toward the protection of personal, national, and international security.[30] Hence, intelligence efforts, border security, transportation security, and emergency planning must each comport with the due process and the rule of law by consistently prohibiting torture, by refusing to single out minorities for discriminatory treatment, and by adhering to clear sunset provisions for preventive detention and investigatory hearings.[31]

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28. *See generally* Daniel Benjamin and Steven Simon, The Next Attack: The Failure of the War on Terror and a Strategy for Getting it Right (2005).

29. Foreign Affairs and Int'l Trade Canada, Canadian Dep't of Foreign Affairs, Terrorism, http://www.dfait-maeci.gc.ca/internationalcrime/terrorism-en.asp (last visited Aug. 29, 2006); *see also* Gov't of Canada, Securing an Open Society: Canada's National Security Policy (2004), *available at* http://www.pco-bcp.gc.ca/docs/Publications/NatSecurnat/natsecurnat_e.pdf.

30. Irwin Cotler, Minister of Justice and Attorney General of Canada, On the Occasion of an Appearance Before the Special Committee of the Senate on the Anti-Terrorism Act (Feb. 21, 2005), *available at* http://www.justice.gc.ca/en/news/sp/2005/doc_31398.html.

31. *Id.*

This conception of national security[32] is implicit in the constitutions of South Africa and Poland, both of which have provisions specifying fundamental rights that must be respected even during an emergency declared under those constitutions.[33] Ackerman notes these provisions, but he does not endorse them. This is surprising. If your goal is to minimize incursions on fundamental civil liberties during emergencies, specifying the rights that must be respected even during an emergency would seem to be one of the most direct ways to minimize jeopardy to constitutionalism in the fight against terrorism. Even if one predicts that the government, including the courts, will not comply one-hundred percent with such commitments to preserve fundamental rights, embracing a conception of security that includes protecting rights—and specifies rights that cannot be undermined even in urgent contexts—seems a good place to start in reducing long-run jeopardy to rights.

Instead, in the absence of a rights-protecting provision, the United States government placed in charge of the Department of Homeland Security Michael Chertoff, the very individual who called for the round-up of Muslims, resulting in widespread mistreatment of detainees and not one charge related to terrorism.[34] The Administration has systematically bypassed warrant requirements, arrogating law enforcement and surveillance to itself without judicial supervision, in advance of congressional or judicial approval for this practice.[35] The lawyers for the White House have pursued legal arguments to permit cruel, degrading treatment in interrogation and detention.[36]

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32. Such a conception of national security bears a modest resemblance to the United Nation's effort to build a conception of human security, exemplified by the 2003 Final Report of the United Nations Commission on Human Security:

> Human security means protecting fundamental freedoms—freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.... [Human Security] encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her own potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear and the freedom of future generations to inherit a healthy natural environment—these are the interrelated building blocks of human, and therefore national, security.

U.N. Comm'n on Human Sec., Human Security Now 4 (2003), *available at* http://www.humansecurity-chs.org/finalreport/English/FinalReport.pdf (internal quotations omitted).

33. *See* Ackerman, *supra* note 2, at 88-90.

34. William Finnegan, *Comment: Homeland Insecurity*, New Yorker, Feb. 7, 2005, at 30.

35. Lowell Bergman et al., *Spy Agency Data After Sept. 11 Led FBI to Dead Ends*, N.Y. Times, Jan. 17, 2006, at A1.

36. *See generally* The Torture Papers: The Road to Abu Ghraib (Karen J. Greenberg & Joshua L. Dratel, eds. 2005).

These are failures of leadership, not exigencies demanded by an emergency. Albert J. Mora, the outgoing general counsel of the U.S. Navy, authored a memo detailing his failed efforts to halt the policy of authorizing cruelty in the treatment of terror suspects. He explained,

> [P]eople were afraid that more 9/11s would happen, so getting the information became the overriding objective. But there was a failure to look more broadly at the ramifications. These were enormously hardworking, patriotic individuals. When you put together the pieces, it's all so sad. To preserve flexibility, they were willing to throw away our values.[37]

"Throwing away" our values is not only sad; it also jeopardizes the security that the Constitution is intended to ensure. Panic during emergencies is understandable. That is why Bruce Ackerman has performed a crucial service in pushing lawyers, political leaders, and citizens to think before the next terrorism crisis and to devise a plan that, in the event of a crisis, protects safety and maintains a commitment to law. The conduct of law and politics in the United States since 2001 suggests, however, that we need to think more about safeguarding fundamental rights and less about assuring executive power. We need to think more about promoting checks and balances and the disclosure of information necessary to do so, rather than expecting that time's passage will generate more resistance to executive prerogatives.

To combat terrorism, the government will no doubt continue discussions and decisions secluded from public view. But even so, those who govern in our name should pursue both physical security and the protection of human rights. For that, we need the activism and engaged participation of judges and congressional leaders in checking and overseeing executive actions, albeit often through in camera proceedings and closed sessions.

Some may wonder what in camera oversight affords. Here, even in my most pessimistic moments, I would urge that judicial and congressional involvement, in secret or closed sessions, is necessary. The sheer fact that executive action will have to be justified to others alters the decisions made within the executive branch. And even if much that we value is sacrificed in the meantime, at least such sessions hold out the possibility of review sometime in the future, assuming enough of us and our commitment to law and rights survive. The ability to review these sessions is rather like the "black box," or cockpit voice recorder and flight data recorder, located on airplanes and required by the National Transportation Safety Board.[38] These devices can record engine sounds, conversations, and technical navigational information; in case of an accident, these devices help

37. *See* Mayer, *supra* note 13, at 41.

38. Nat'l Transp. Safety Bd., History and Mission, www.ntsb.gov/ABT_NTSB/history.htm (last visited Aug. 29, 2006).

investigators determine what went wrong.[39] Perhaps genuine planning for our security calls for establishing a National Security Safety Board, analogous to the National Transportation Safety Board, and directing it to investigate breaches of both our security and the human rights essential to that security. Our policies and our Constitution should be this kind of black box, monitoring what is done in our names, for our own safety. For if immediate public debate and review is curtailed due to exigent circumstances and due to the demands of security itself, there must be subsequent occasions for evaluation and review, even in closed sessions, both to deter governmental misconduct and to give the nation the chance to learn from its experience. Government agents, even when acting with the best of motives, will not be as careful when they know that nobody is ever going to review their conduct than when they know someone will hold them accountable. Like the cockpit "black box," our policies must keep sufficient record of all that is done to permit assessment later. Our policies and our Constitution must not be determined by an unknowable decision maker that remains forever a mystery.

We should take our fear as the prompt to protect ourselves and our values. Otherwise, in our predictable panic, we may jettison what we care about and give our enemies grounds to expose our hypocrisy or, worse, celebrate what they made us become. After 9/11, we will always be living before the next attack. As the short-run becomes the long-run, let us make sure to sharpen, not dull, tools of accountability and democracy.[40]

39. Nat'l Transp. Safety Bd., Cockpit Voice Recorders (CVR) and Flight Data Recorders (FDR), www.ntsb.gov/aviation/CVR_FDR.htm (last visited Aug. 29, 2006) (providing information on requirements established by the National Transportation Safety Board, an independent federal agency charged by Congress with investigating every civil aviation accident in the United States).

40. Unfortunately, the Military Commissions Act of 2006 undermines the tools of accountability by sharply curtailing independent judicial review of executive detentions of non-U.S. citizens once the executive characterizes them as enemy combatants. *See* Warren Richey, *New Lawsuits Challenge Detainee Act*, Christian Sci. Monitor (Boston), Oct. 6, 2006, at 1.