

Anticipative Criminal Investigation

Marianne F.H. Hirsch Ballin

Anticipative Criminal Investigation

Theory and Counterterrorism Practice
in the Netherlands and the United States

T · M · C · A S S E R P R E S S

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To my parents

Foreword

Law performs three national security functions. It provides substantive authority to act. It provides essential process. And, it conveys essential societal and security values. In United States practice each of these foundational functions is found in Constitutional law, statutory law, and Executive directive.¹

9/11 put uncommon strain on each of these law functions. In truth, the stress was already evident as the law evolved from the certitude of Cold War substance, structure, and values, to a less certain orientation toward rogue states and transnational threats, including non-state actors intent on obtaining and, in the case of at least al-Qaeda, using weapons of mass destruction (WMD). There were advents of the future to come; including the 1993 attack on the World Trade Center and the 1995 attack on the Murrah Federal Building in Oklahoma City.

However, legal and especially legislative change was incremental, if it occurred at all. In the mid-1990s, spending was increased on WMD preparedness; the military was authorized to assist in the event of a WMD incident; however, efforts to expand the government's surveillance authorities in the area of roving wiretap and "lone wolf"² authority were rebuffed in the Congress. The Executive's identification of the WMD and al-Qaeda threat was more robust as were subsequent overt efforts to target Osama Bin Laden. Less evident were the covert efforts to do the same until referenced in the 9/11 Commission Report. In the 1990s then, the United States had moved, or was moving, from a reactive or law

¹ In simplest manifestation, for example, the Constitution provides for a structure of separate and shared powers, which at one time describes the enumerated substantive authority of each branch, describes the process by which the branches coexist and reflects the legal value that power in a democracy should be dispersed rather than concentrated in a single branch or person.

² Authority under the Foreign Intelligence Surveillance Act directed toward the would-be terrorist acting alone who by definition would not meet the traditional predicate as an "agent of a foreign power," which definition includes international terrorist organizations.

enforcement paradigm to an intelligence driven preventive paradigm in combating terrorism. However, a collective sense of urgency did not emerge or bind the political branches of government.

9/11 changed all that in the United States as well as in the Netherlands as this thoughtful and important work of scholarship describes. In Europe, the Madrid train attack of 11 March 2004 and London transit attack of 7 July 2005 confirmed this change. To some, it seemed, western democracies faced a zero-sum choice between security and liberty as well as between a criminal and a military paradigm of response. As *Anticipative Criminal Investigation (ACI)* reports, the debate was framed among other ways as one between the function of the prosecutorial sword – the tools used by the government to fact-find – and the shield – the safeguards that provide a fair system of justice and that protect individual rights.³ In the U.S., the paradigmatic debate focused on three subjects: extraordinary rendition, interrogation tactics, and surveillance techniques. (“Targeted killing” would join the debate at a later date.) While the Netherlands did not cross the threshold of targeted killing in the 1990s as the U.S. did, in some respects it has exceeded U.S. law in its anticipative reach in the area of criminal investigation.

In both countries the focus was on the immediate, the next attack. As Justice Jackson noted of government decision-making in the context of the 1952 Steel Seizure Case, “the tendency is strong to emphasize transient results upon policies.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J. concurring). Those who have served in the national security field know this focus well. The pressure is greatest on lawyers when lives are at stake. But those trained in law will also know the rest of the Jackson admonition: “... and lose sight of enduring consequences upon the balanced power of our Republic.” That is why a focus on legal process and values, and not just substance, is imperative in time of crisis. That is also why studies such as *Anticipative Criminal Investigation (ACI)* are essential to our understanding of law and its relation to national security.

ACI analyzes the transition from a reactive to an anticipatory criminal law framework for preventing terrorism in the Netherlands and in the United States. The focus is on one aspect of the legal debate, what the Dutch refer to as Special Investigative Techniques (SIT) and what U.S. readers will recognize as the intelligence and law enforcement tools of electronic surveillance, physical surveillance, clandestine search, infiltration, mail cover, and more. A number of core questions are asked and analyzed: Who may engage in such activities? Based on what factual predicate, if any? What use may be made of the information obtained? And, what forms of accountability apply?

In U.S. practice, such techniques date to the advent of the Republic, as the rubric “eavesdropping” suggests. As envoy to France, Ben Franklin was an accomplished, albeit amateur intelligence operative. President Lincoln was an avid intelligence consumer, known to read Confederate communications obtained by

³ P. 14 below.

agents tapping into telegraph wires.⁴ Formal legal permit came later in both criminal and intelligence context in the form of Supreme Court case law (*Katz v. United States*, 389 U.S. 347 (1967); *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972)) and express statutory authorization (Title III of the Omnibus Safe Streets Act of 1968; Foreign Intelligence Surveillance Act of 1978).

There the law more or less settled until 9/11 and the external discovery of an internal “Wall” between criminal and intelligence investigative methods within the Department of Justice and FBI. So too, old proposals for roving authority and “lone wolf” authority were quickly renewed. The “Wall,” as it turned out, was based on concerns that the threshold for intelligence surveillance (reason to believe the target is an agent of foreign power or international terrorist organization) would be used to circumvent the probable cause predicate for criminal surveillance (reason to believe a crime had been, was being, or would be committed). However, as the Foreign Intelligence Surveillance Court of Review noted, espionage and terrorism necessarily and simultaneously raise both security and criminal law implications and thus the predicate for “the Wall” was tenuous from a legal and policy point of view.

There followed the serial PATRIOT Act debates over whether to authorize roving intelligence wiretaps, access to business records, and the free exchange of information obtained through intelligence and criminal investigative methods. In each case, prevention ultimately prevailed. The principle of protection was preserved in process, but not by prohibition. And, of course, there was the debate that did not occur: Could the President authorize warrantless electronic surveillance pursuant to his implied constitutional authority as Chief Executive and Commander in Chief?

As *ACI* recounts, the Dutch legal framework applicable to intelligence led investigative activities followed a different path to a comparable end. Dutch law includes a concept of “legality” – “the requirement of a foundation in law for every governmental action that interferes with the rights or freedoms of citizens.”⁵ In the most intrusive circumstances an explicit basis in law is required.⁶ Through application of the European Convention on Human Rights, Dutch law also implies a requirement of “foreseeability” – sufficient transparency in the law that those subject to its force are on general notice of its reach.⁷

The key Dutch authorities are found in criminal context in parliamentary acts dating to the 1926 Dutch Code of Criminal Procedure (CCP), the 1999 Act on Special Investigative Techniques, the 2004 Act on Terrorist Crimes, and the 2006 Act to Broaden the Possibilities to Investigate Terrorist Crimes. The 2004 Act, for

⁴ Lincoln also served as his own case officer, running a spy named Lloyd from within the White House. We know this, because Lloyd’s estate eventually sued to recoup promised payments in the case of *Totten v. United States*, 92 U.S. 105 (1875).

⁵ P. 43.

⁶ P. 78.

⁷ Pp. 50 and 114-116.

example, increased penalties for certain crimes with terrorist motive. It also criminalized conduct preparatory to acts of terrorism, thus shifting both traditional and intelligence investigative resources to an inherently anticipative context. In 2005, the Parliament also created the position of National Coordinator for Counterterrorism to serve as “the spider in the web.”⁸ In addition, the 2006 Act changed the predicate for SIT from one of “reasonable suspicion” to one of “indications of terrorism,” clearly a reduced standard, but one without parliamentary or judicial definition. The 2006 Act also authorized the extraordinary search of objects, vehicles, and people for up to twelve hours and with respect to a specifically indicated area upon determination by the Public Prosecutor that terrorist indications present an immediate threat. Permanent search authorization is also granted within designated security zones, like airports and train stations, pursuant to an administrative decree that the zone is under permanent threat of attack.

The intelligence keystones in Dutch law are more amorphous, for as *ACI* notes,

“the powers available to the AIVD are regulated by requiring, for the use of the most intrusive powers, the permission of the relevant Minister and, otherwise, on behalf of the Minister, the permission of the head of the AIVD... Because the AIVD’s task is to protect the national security and not to collect evidence for criminal prosecution, the AIVD’s use of these special powers is not further restrained by some threshold, such as having a reasonable suspicion under criminal procedural law, nor subjected to judicial review.”⁹

However, 9/11 brought greater emphasis on the express identification of authority as well as on anticipatory investigation to prevent terrorism. Significantly, it was after 9/11 that the functions of the national Dutch intelligence service, the General Intelligence and Security Service (AIVD), were expressly defined in enabling legislation called the Intelligence and Security Services Act of 2002. In addition, the 2006 Act and corresponding changes to the criminal procedural law, as well as the Shielded Witnesses Act, were intended to trigger the sharing of information between the intelligence service (AIVD) and the public prosecutor at an earlier moment and stimulate such sharing in general.

Most significantly, perhaps, from an enabling perspective, the 2006 Act on Shielded Witnesses permits AIVD witnesses to provide intelligence testimony, including testimony based on liaison sourcing, in the presence of the investigating magistrate alone. While the defendant can participate by telecommunication or through the submission of questions, *ACI* dryly notes, “in the end the interest of national security trumps the criminal procedural interest of equality of arms and adversarial proceedings.” “Although the trial judge still has the final say on what sources of evidence a conviction will be based, he cannot further examine the conclusion of the examining magistrate as to the veracity of the AIVD-information.”¹⁰

⁸ P. 200.

⁹ Pp. 88-9.

¹⁰ Pp. 192-193.

In U.S. law, such a limitation would implicate the 6th Amendment right of a criminal defendant to cross-examine his accusers. To the extent there is a comparable U.S. law, the Classified Information Procedures Act (CIPA) places the burden on the Government to place the defendant in as good a position as they would have been had they been able to access and use relevant and material classified information, or face judicial dismissal of the charges. In civil context, of course, the State Secrets Doctrine is more comparable to the Dutch Witness Protection Act.

Aside from providing an outstanding review of the law in both countries, *ACT*'s comparative perspective is important and commendable. First, there are the evident bonds between the two legal traditions rooted in a parallel commitment to what the U.S. calls the rule of law and what the Dutch call "*Rechtsstaat*," "the state's subjection to limits on its power as provided by law."¹¹ There is also the manifest pressure each system faces to prevent catastrophic acts of terrorism. The United States is not alone in its legal values or in facing a catastrophic violence. It is also worth remembering that in a global system of transport, commerce, and communication, the safety of passengers and cargo alike is only as strong as the weakest link – whether that link is found at Schiphol Airport or New York harbor.

Second, understanding the bonds between the Dutch and U.S. legal experience one might also better derive lessons-learned from that experience. In this regard, one is reminded how eerily similar are the 9/11 Commission report and the Canadian report on the 1985 terrorist bombing of Air India Flight 182. Applying a comparative approach, one might avoid mistakes already made as well as benefit from successful example. One might ask, are there measures of accountability in Dutch practice that might better effectuate the substance, process, and legal values in U.S. practice, or conversely?

Some greater perspective is surely useful in both directions. A number of examples illustrate. In Dutch practice, for example, accountability is almost exclusively dependent on a hierarchical process of SIT approval, rather than the judicial approval found in U.S. FISA and Title III practice. The Public Prosecutor is the central actor, and in certain cases, the investigating magistrate. In short, the Dutch system appears to rely on the integrity of decision-makers, rather than on external checks and balances. However, Dutch law also includes an express "duty to draw up records;" a written record of the investigator's activities and findings. And, because the system is premised on criminal prosecution as the ultimate means of prevention, there is ex post judicial review of SIT at trial with the possibility of evidentiary exclusion.

On a privacy continuum, the U.S. debate on governmental access to business records, including library computer and loan records, is given new perspective when considered in light of the Dutch concept of "administrative disturbance," the obtrusive observation of a person for whom cause does not exist to arrest. Administrative disturbance is intended to disrupt the person's daily life in a

¹¹ P. 8.

manner that will alert the suspect that they are under suspicion and that will disturb preparation of criminal conduct.¹² (One is reminded here of the former U.S. State Department and the obtrusive manner in which he was followed by U.S. authorities while under investigation for espionage in 1989.)

Similarly, debates about profiling might be informed by the Dutch experience in applying special security zones or imminent threat searches. Likewise, one might consider the distinctions between a Dutch system based on “legality” – “the requirement of a foundation in law for every governmental action that interferes with the rights or freedoms of citizens”¹³ – and a U.S. system in which substantial authority is vested in the President through implied authority derived from Article II. How, for example, do the comparative advantages in flexibility that Article II provides weigh against the reduction in accountability and the risk that critical actors will take fewer risks when the law is not clearly stated or clearly invoked, either because it is invoked in vague constitutional manner, or done so in secret?

As a final illustration, the Dutch principles of proportionality and subsidiarity warrant identification and comment. Subsidiarity equates to necessity; in other words, a determination that the specific method is necessary to achieve an investigative need. This concept corresponds in U.S. law with the concept of last resort, whereas the most intrusive methods will only be used when other methods are unavailing. Proportionality is defined variously within *ACI* as: the principle that “the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued;” and the “require[ment] that the ‘harm’ inflicted’ by using investigative powers may not exceed the harm which will result from refraining from the investigative action.”¹⁴ As *ACI* notes, this formulation seems to lead ineluctably to the application of “less strict standards for the investigation of serious crimes.” Proportionality, while found in the law of armed conflict, has no immediate investigative corollary in U.S. practice. The exigent circumstances doctrine and minimization perhaps come closest. One has to wonder just how slippery the proportionality slope is, especially where catastrophic terrorism is at issue. On the other hand, the concept may also reflect a realistic and honest assessment of the compulsion state actors feel to flexibly use the law when confronted by dangerous facts, in which case proportionality might also be viewed as a refreshing form of decisional transparency.

Third, it is noteworthy that the Netherlands has expressly chosen a law enforcement paradigm for addressing terrorism. (“Because terrorism is considered to be criminal behavior, the Dutch government considered the criminal justice system as the primary area for dealing with terrorists.”)¹⁵ As debate in the United States continues as to whether to apply a criminal, military, or mixed paradigm to terrorist interrogation, adjudication, and detention, it is interesting to consider the

¹² P. 202.

¹³ P. 43.

¹⁴ Pp. 557-558.

¹⁵ P. 168.

strengths and weaknesses of a Dutch system that is committed at the outset to an anticipative criminal paradigm. So too one might consider whether the relative volume and scale make any comparison apt.

However one compares and contrasts the U.S. and Dutch experiences, *ACI* makes clear that in both contexts, 9/11 irrevocably changed the backdrop in which choices about investigative methods are made – the risk and realization of catastrophic terrorism, including the prospective use of WMD. That threat has not disappeared with the demise of Osama Bin Laden, or for that matter Kim Jong-il. However, this is a good opportunity to take a moment to reflect on what has occurred and what might yet occur. That is one reason why this book is important. The book is inherently timely coming as it does soon after the tenth anniversary of 9/11. But it is not a retrospective. It looks to the future through the prism of the past. What started as a WMD problem will continue as a WMD problem, and thus persist long past the death of Bin Laden. The imperative of anticipation and prevention remains.

That means Justice Jackson’s admonition is as relevant today as it was in 1952, on 9/10 and on 9/12. This is a book about finding our long-term equilibrium, the enduring consequences of anticipative criminal investigation and law. In my view, it succeeds in doing so for four reasons.

First, *ACI* eschews the false dichotomous choices of security versus liberty, and shield versus sword. It does not treat these concepts as zero-sum exercises in balance. “The ‘balancing’ approach fails to acknowledge that the protection of certain interests is non-negotiable.”¹⁶

Second, *ACI* avoids the trap of aggregate symbols, like “security” or “liberty,” and breaks each down into finite and tangible values like the presumption of innocence, due process, fair trial, *and* the right to a private life free from the violent interference of others. Symbols like “Guantanamo” or “military paradigm” in reality are aggregates of complex and distinct choices about how to prevent terrorism by identifying, capturing, interrogating, and detaining persons while at the same time adjudicating their status and their conduct.

Third, *ACI* returns time and again to all three purposes of law – substance, process, and values. Thus, the book describes with equal care the essential procedural requirements associated with each positive authority. It also places that process in context recognizing that process is neither inherently good nor bad. It is not done to make lawyers happy. Good process exists to ensure that the law effectively serves as both sword and shield. If process is effective, it will prevent the state from overreaching and thereby also cause the state to focus its finite investigative assets on more important targets.

Likewise, one can attempt to “legislate” the creation of an “Information Sharing Environment,” as the U.S. Congress has done, but information sharing ultimately depends on process and values. Hence, *ACI* describes and compares the

¹⁶ P. 606.

Dutch Counterterrorism Information Box, located at AIVD Headquarters, with the U.S. National Counterterrorism Center and Joint Terrorism Task Force structure.

Finally, and most importantly, *ACI* returns us to our roots, the core values law is intended to reflect and protect. As has been said of the common law is also true of national security law. If one is not attentive, the law can move in incremental tacks away from the shore of constitutional intent, until the shore falls out of sight. The author is committed to liberty *and* security, the sword *and* the shield, and the recognition that all are rooted in our fundamental legal values. Those values include a concept of human dignity that imposes on the state “the positive duty to protect any individual present in its territory against violations of his/her fundamental rights by others” and “the negative duty to refrain, as much as possible, from interfering with the personal freedom of individuals.”¹⁷ In U.S. law, comparable duties are found in Article II and the Bill of Rights to the Constitution, the preamble to which declares at the outset that the Constitution is established to “provide for the common defense” and “secure the blessings of liberty.” The art of national security policy and law is to utilize all the tools of national power and do so in a manner consistent with democratic process and our legal values. *ACI* is a book that goes a long way in the area of SIT to telling us when and how to do just that.

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¹⁷ P. 12.

Acknowledgments

The past decade may be typified by the difficulties Western States had in finding a rule of law-based answer to terrorism. Implementing adequate preventive measures within the criminal justice system turned out to be a complex task. States have usually justified terrorism laws by considering security an interest that overrides traditional protective rules. In this book a rule of law approach is taken in which the term rule of law is understood as requiring attention both for liberty and security. From this perspective this book goes back to the roots of rule of law based legal systems in order to draw borders on the state's powers in terrorism prevention. Albeit focusing on the manner in which the Netherlands and the United States have implemented legislation facilitating anticipative criminal investigations, the rule of law approach of this book surpasses differences between legal systems. With this approach I hope to be able to deliver a contribution for reflection, both on measures taken to confront terrorism and on a changed society trying to control ostensibly not fully controllable threats.

The basis for this book is my PhD-research at the Willem Pompe Institute of Utrecht University between 2007 and 2011. It is to Professor John Vervaele and Professor Stijn Franken at Utrecht University, that I owe the most gratitude: for their always harmonious guidance, the continuing inspiration they give me and their support in finding my own way through the extensive subject-matter of anticipative investigations in the Netherlands and the United States. The manuscript was closed on November 5th, 2011. Any changes in the law that have since occurred could not be included.

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comparative approach of my research. It is an honor to be able to include his foreword in this book.

To my Thomas I reserve the most gratitude. As the person closest to me, his unconditional love, support and patience have been the most meaningful encouragement while writing this book. My parents are my biggest example. Their devotion in contributing to a just society inspired me to choose law as a study. To my parents, whose love, faith and encouragement has always given me strength, I dedicate this book.

December 2011

Marianne F.H. Hirsch Ballin

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List of Abbreviations

ACHR	American Convention on Human Rights
ACLU	American Civil Liberties Union
AG	Attorney General
AIVD	General Intelligence and Security Service [<i>Algemene Inlichtingen- en Veiligheidsdienst</i>]
AUMF	Authorization for Use of Military Force
BVD	National Security Service, predecessor of the AIVD [<i>Binnenlandse Veiligheidsdienst</i>]
CCP	(Dutch) Code of Criminal Procedure
CIA	Central Intelligence Agency
CIE	Criminal Intelligence Unit [<i>Criminele Inlichtingen Eenheid</i>]
CIPA	Validity and Construction of Classified Information Procedures Act
CT-Infobox	Counterterrorism Information box [<i>Contraterrorisme Infobox</i>]
CTC	Central Assessment Committee [<i>Centrale Toetsingscommissie</i>]
DCI	Director of Central Intelligence
DIOG	Domestic Investigations and Operations Guide
DNI	Director of National Intelligence
DoJ	Department of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECrHR	European Court of Human Rights
EU	European Union
FAA	FISA Amendments Act of 2008
FISA	Foreign Intelligence Surveillance Act of 1978
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
HR	Dutch Supreme Court [<i>Hoge Raad der Nederlanden</i>]

IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
JTTF	Joint Terrorism Task Force
KLPD	National Police Services Agency [<i>Korps landelijke politiediensten</i>]
KMar	Royal Netherlands Marechaussee [<i>Koninklijke Marechaussee</i>]
MIVD	Military Intelligence and Security Service [<i>Militaire Inlichtingen- en Veiligheidsdienst</i>]
NCTb	National Coordinator for Counterterrorism [<i>Nationaal Coördinator Terrorismebestrijding</i>]
NSA	National Security Agency
NSC	National Security Council
NSI	National Security Investigations
NSL	National Security Letter
PPS	Public Prosecution Service
RID	Regional Intelligence Service [<i>Regionale Inlichtingendienst</i>]
SIT	Special Investigative Techniques
UN	United Nations
US	United States of America
WED	Economic Offenses Act [<i>Wet op de economische delicten</i>]
WIV 2002	Intelligence and Security Services Act of 2002 [<i>Wet op de inlichtingen- en veiligheidsdiensten 2002</i>]
WWV 1994	Road Traffic Act [<i>Wegenverkeerswet 1994</i>]
WWM	Weapons and Ammunition Act [<i>Wet wapens en munitie</i>]