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GLOBAL VIEW

Who Needs Jacques Bauer?

The Napoleonic Code is more conducive to counterterrorism than the U.S. Constitution.

BY BRET STEPHENS

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Twenty-nine defendants went on trial earlier this month in a Spanish courtroom for complicity in the March 11, 2004 Madrid train bombings that killed 191 commuters and injured another 1,800. Among the accused: Jamal Zougam, a 33-year-old Moroccan immigrant who once ran a cell-phone business. In June 2001, Spanish police raided Mr. Zougam's apartment, where they found jihadist literature and the telephone numbers of suspected terrorists. But the Spaniards judged the evidence insufficient to arrest or even wiretap him. Today, the Moroccan is believed to have furnished the cellphones through which the train bombs were detonated.

In raiding Mr. Zougam's apartment, the Spanish were acting on a request from French investigative magistrate and counterterrorism supremo Jean-Louis Bruguiere. Earlier, Mr. Bruguiere had also warned the Canadian government about a suspicious Algerian asylum-seeker named Ahmed Ressay, but the Canadians took no real action. On Dec. 14, 1999 Mr. Ressay--a k a the Millennium Bomber--was arrested by U.S. customs agents as he attempted to cross the border at Port Angeles, Wash., with nitroglycerin and timing devices concealed in his spare tire.

It would be reassuring to believe that somewhere in the ranks of the FBI or CIA America has a Jean-Louis Bruguiere of its own. But we probably don't, and not because we lack for domestic talent, investigative prowess, foreign connections, the will to fight terrorism or the forensic genius of a Gallic nose. What we lack is a system of laws that allows a man like Mr. Bruguiere to operate the way he does. Unless we're willing to trade in the Constitution for the Code Napoleon, we are not likely to get it.



Consider the powers granted to Mr. Bruguiere and his colleagues. Warrantless wiretaps? Not a problem under French law, as long as the Interior Ministry approves. Court-issued search warrants based on probable cause? Not needed to conduct a search. Hearsay evidence? Admissible in court. Habeas corpus? Suspects can be held and questioned by authorities for up to 96 hours without judicial supervision or the notification of third parties. Profiling? French officials commonly boast of having a "spy in every mosque." A wall of separation between intelligence and law enforcement agencies? France's domestic and foreign intelligence bureaus work hand-in-glove. Bail? Authorities can detain suspects in "investigative" detentions for up to a year. Mr. Bruguiere once held 138 suspects on terrorism-related charges. The courts eventually cleared 51 of the suspects--some of whom had spent *four* years in preventive detention--at their 1998 trial.



In the U.S., Mr. Bruguiere's activities would amount to one long and tangled violation of the First, Fourth, Fifth, Sixth and Eighth Amendments to the

Constitution. And that's not counting the immense legal superstructures that successive Supreme Courts have built over and around the Bill of Rights. In France, however, Mr. Bruguiere, though not without his critics, is a folk hero, equally at home with governments of the left and right. The main point in his favor is that whatever it is he's doing, it works.

"Every single attempt to bomb France since 1995 has been stopped before execution," notes a former Interior Ministry senior official. "The French policy has been [to] make sure no terrorist hits at home. We know perfectly well that foreign-policy triangulation is not sufficient for that, [even if] it helps us go down a notch or two in the order of priority [jihadist] targets. So we've complemented our anti-U.S. foreign policy with ruthless domestic measures."

That's something that U.S. civil libertarians, who frequently argue that the Bush administration should follow the "European model" of treating terrorism as a law-enforcement issue instead of a military one, might usefully keep in mind. As lawyers David Rivkin and Lee Casey argue in the forthcoming issue of *The National Interest*, "the [Napoleonic] Civil Law system offers considerable advantages to the state in combating terrorism--especially in terms of investigative tools and a level of secrecy--that are simply unavailable in the ordinary Common Law criminal prosecution and trial, at least as governed by the United States Constitution."



Again, review the contrasts between American and European practices. Except in limited circumstances, the U.S. does not allow pretrial detentions. But according to figures compiled by the U.S. State Department, 38% of individuals held in Italian prisons in 2005 were awaiting trial or the outcome of an appeal, while Spanish law allows for pre-trial detentions that can last as long as four years for terrorism suspects. In the U.S., the Posse Comitatus Act forbids the use of the military in law-enforcement work, and paramilitary units are relatively rare. By contrast, most European countries deploy huge paramilitary forces: Italy's Carabinieri; France's Gendarmerie Nationale; Spain's Guardia Civil.

Even Britain, which shares America's common law traditions, has been forced by Irish and now Islamist terrorism to resort to administrative detentions, trials without jury (the famous Diplock courts) and ubiquitous public surveillance. Wiretapping is authorized by the Home Secretary--that is, a member of the government--rather than an independent judge. In the early days of the Northern Irish "troubles," the government of Edward Heath placed some 2,000 suspects, without charge, in internment camps. Ironically, it was the decision to treat terrorists as ordinary criminals that led to the famous hunger strikes of Bobby Sands and his IRA crew.

All this calls into question the seriousness, if not the sincerity, of European complaints that under the Bush administration the U.S. has become a serial human-rights violator. Europeans have every right to be proud of civil servants like Mr. Bruguiere and a legal tradition that in many ways has been remarkably successful against terrorism. But that is not the American way, nor can it be if we intend to be true to a constitutional order of checks and balances, judicial review and a high respect for the rights of the accused. When President Bush declared a war on terror after 9/11, it was because he had no other realistic legal alternative. And when the rest of us make invidious comparisons between Europe and America, we should keep our fundamental differences in mind. There is no European 82nd Airborne, and there is no American Jean-Louis Bruguiere. *Mr. Stephens is a member of The Wall Street Journal's editorial board. His column appears in the Journal Tuesdays.*

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