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A Pantomime of Privacy: Terrorism and Investigative Powers in German Constitutional Law

Russell A. Miller

Washington & Lee University School of Law, millerra@wlu.edu

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A PANTOMIME OF PRIVACY: TERRORISM AND INVESTIGATIVE POWERS IN GERMAN CONSTITUTIONAL LAW

RUSSELL A. MILLER

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A PANTOMIME OF PRIVACY: TERRORISM AND INVESTIGATIVE POWERS IN GERMAN CONSTITUTIONAL LAW

RUSSELL A. MILLER*

Abstract: Germany is widely regarded as a global model for the privacy protection its constitutional regime offers against intrusive intelligence-gathering and law enforcement surveillance. There is some basis for Germany's privacy "exceptionalism," especially as the text of the German Constitution ("Basic Law") provides explicit textual protections that America's Eighteenth Century Constitution lacks. The German Federal Constitutional Court has added to those doctrines with an expansive interpretation of the more general rights to dignity (Basic Law Article 1) and the free development of one's personality (Basic Law Article 2). This jurisprudence includes constitutional liberty guarantees such as the absolute protection of a "core area of privacy," a "right to informational self-determination," and a right to the "security and integrity of information-technology systems." On closer examination, however, Germany's burnished privacy reputation may not be so well deserved. The Constitutional Court's assessment of challenged intelligence-gathering or investigative powers through the framework of the proportionality principle means, more often than not, that the intrusive measures survive constitutional scrutiny so long as they are adapted to accommodate an array of detailed, finely tuned safeguards that are meant to minimize and mitigate infringements on privacy. Armed with a close analysis of its recent, seminal decision in the *BKA-Act Case*, in this Article I argue that this adds up to a mere pantomime of privacy—a privacy of precise data retention and deletion timelines, for example—but not the robust "right to be let alone" that contemporary privacy advocates demand.

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* Professor of Law, Washington & Lee University School of Law, Co-Editor-in-Chief of the *German Law Journal*, and editor of the book *Privacy and Power: Transatlantic Relations in the Shadow of the NSA-Affair* (Cambridge University Press 2017). Helpful feedback on this project came from the participants of the fourth annual Montpelier Comparative Constitutional Law Roundtable (October 2016), especially Sabrina Ragone. Washington & Lee University law student Roland Hartung provided excellent research support. Professor Miller is grateful to the Lewis Law Center at Washington & Lee University School of Law and the Max Planck Institute for Comparative Public Law and Public International Law (Heidelberg) for supporting this project. Where indicated, the author is responsible for translation from German to English.

INTRODUCTION

2016 was a big year for Germany's Federal Criminal Police Office, *Bundeskriminalamt* ("BKA"). The agency made a big splash at the box office, as they featured prominently as Keystone Cops in the popcorn blockbuster, *Captain America: Civil War*.¹ A black-helmeted, balaclava-clad BKA unit made a messy but ultimately successful chase of the film's titular superhero across Austria and Romania. But the BKA was not able to prevent the inevitable, explosive battle royal at the Leipzig/Halle Airport.² There were no signs of BKA agents as two super-powered teams tore each other (and the airport) apart. Still, the conspicuous absence of civilians at the scene suggests that the German authorities, surely with the help of the BKA, managed to evacuate the airport before all hell broke loose.³

The BKA fared even better in a major decision issued by the German Federal Constitutional Court, *Bundesverfassungsgericht* ("Constitutional Court") on April 20, 2016, referred to in this Article as the *BKA-Act Case*.⁴ Even if they remain less flashy than Marvel's superheroes, Germany's post-9/11 law enforcement and intelligence services are mutated, muscled-up versions of the services that existed in the relatively quiet and seemingly aimless post-Cold War years. These new powers include, in various constellations secured across a dizzying number of statutes, the authority to investigate at an earlier point in time, using more intrusive measures, in order to prosecute or prevent a broader range of crimes and threats.⁵ The BKA was the last agency to benefit from enhanced powers, in part because of the difficult federalism issues implicated by the German states' long-standing, nearly exclusive pre-

¹ CAPTAIN AMERICA: CIVIL WAR (Marvel Studios 2016).

² *Id.*; Doreen Beilke, *Für Captain America! Hier fliegt unser Airport in die Luft*, BILD (Nov. 27, 2015), <http://www.bild.de/regional/leipzig/captain-america/hier-fliegt-unser-airport-in-die-luft-43565250.bild.html> [<https://perma.cc/9M9U-GZHQ>].

³ See CAPTAIN AMERICA, *supra* note 1. The BKA is drawn into the film's "plot" by a bloody terrorist bombing at the U.N. Headquarters in Vienna. *Id.* Against the backdrop of the recent terror attacks in Paris, Brussels, and Berlin (not to mention the whole post-9/11 era), the bloated but hugely lucrative super hero genre currently hawked by Hollywood can be read as an escapist commentary on the helplessness movie audiences feel in the face of the continuing and very real threat of fundamentalist-inspired terrorism. See, e.g., TOM POLLARD, HOLLYWOOD 9/11: SUPERHEROES, SUPERVILLAINS, AND SUPER DISASTERS 97 (2011) (suggesting that superheroes, as the embodiment of Cold War-era scientific and technological advancements, reflects the U.S. populace's general anxieties regarding combatting "terrorist attacks; . . . dictatorial, corrupt governments; . . . global climate change; and] . . . economic depression").

⁴ See generally Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220, 2017 (*BKA-Act case*).

⁵ See DORLE HELLMUTH, COUNTERTERRORISM AND THE STATE: WESTERN RESPONSES TO 9/11, at 78–127 (2015) (presenting an insightful account of the politics behind these reforms).

rogative over criminal law enforcement in the Federal Republic.⁶ It took a major overhaul of the German Constitution's ("Basic Law") federalism framework in 2006 to resolve the barriers to the creation of a more robust and centralized federal law enforcement role in the fight against international terrorism.⁷ The amending law—entitled the "Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism" (*Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt*—"BKA-Act")—entered into force in late 2008.⁸ That law did not empower the BKA to disregard the jurisdictional limits that the German agents casually flout in *Captain America* in their pursuit across both Austria and Romania, but the new powers granted to the BKA were nonetheless expansive and controversial at the time the law was enacted. Critics worried about the creation of a powerful, centralized law enforcement authority that was destined (if not designed) to run roughshod over civil liberties.⁹ Unsurprisingly, the law became the focus of constitutional complaints before the Constitutional Court.¹⁰

In the *BKA-Act Case* the Constitutional Court's First Senate resolved the constitutional challenges to the amended BKA-Act in a long, complex, and contested judgment that left most of the BKA's intrusive new investigative powers in place. Still, the Constitutional Court identified a number of

⁶ See *id.* at 102.

⁷ See GRUNDGESETZ [GG] [BASIC LAW] art. 73(1)[9a], translation at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf [<https://perma.cc/RR4T-VWMT>]; Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], Aug. 28, 2006, BUNDESGESETZBLATT [BGBl] I at 2034; see also Arthur Gunlicks, *German Federalism Reform: Part One*, 8 GERMAN L.J. 111, 113 (2007) (quoting the former prime minister of Bavaria who called federalism reform "the Mother of all Reforms").

⁸ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BUNDESGESETZBLATT [BGBl] I at 3083. This law amended and was integrated into the pre-existing BKA-Act. See Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BUNDESGESETZBLATT [BGBl] I at 1650, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, art. 7, https://www.gesetze-im-internet.de/bkag_1997/BKAG.pdf [<https://perma.cc/A9ZV-GFLW>].

⁹ E.g., *Neues BKA-Gesetz: Opposition spricht von "schwarzem Tag für die Grundrechte,"* SPIEGEL ONLINE (Dec. 19, 2008, 6:16 PM), <http://www.spiegel.de/politik/deutschland/neues-bka-gesetz-opposition-spricht-von-schwarzem-tag-fuer-die-grundrechte-a-597652.html> [<https://perma.cc/7TKP-8BWS>] (describing passage of the new BKA-Act as a "dark day") [hereinafter *Opposition spricht*]; *BKA-Gesetz: FDP befürchtet "eine Art deutsches FBI,"* FRANKFURTER ALLGEMEINE (Nov. 13, 2008, 12:37 PM), <http://www.faz.net/aktuell/politik/inland/bka-gesetz-fdp-befuerchtet-eine-art-deutsches-fbi-1728463.html> [<https://perma.cc/SUB8-ANHR>] (explaining the Free Democratic Party's reservations about creating the German equivalent of the U.S. FBI).

¹⁰ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (241–49), 2017 (analyzing the constitutionality of multiple provisions of the 2008 BKA Act).

discrete, finely calibrated constitutional shortcomings in the amended law and ordered the German Parliament (*Bundestag*) to make the necessary, specifically articulated changes before June 30, 2018.¹¹ It is an important decision that, for several reasons, merits careful scrutiny. Above all, in assessing the new law's many provisions, the Constitutional Court engaged with, consolidated, and expanded upon its extensive jurisprudence on questions of privacy and security—an area in which the Constitutional Court has been extremely active in the last decade.¹² The *BKA-Act Case* invites a broad review of privacy law doctrine in Germany and it represents that field's latest advance.¹³ Particularly with the NSA-Affair in mind (although neither the NSA nor Edward Snowden are mentioned in the decision),¹⁴ the *BKA-Act Case* is also significant because, for the first time, the Constitutional Court considered the constitutional limits on international transfers of investigative and intelligence information.¹⁵

Its status as a milestone of German privacy and security jurisprudence justifies a thorough assessment of the *BKA-Act Case*. But that is not the on-

¹¹ *Id.* at (351).

¹² Jörg Diehl & Dietmar Hipp, *Urteil zum BKA-Gesetz: Polizisten murren über Verfassungsgericht*, SPIEGEL ONLINE (Apr. 20, 2016, 6:07 PM), <http://www.spiegel.de/politik/deutschland/bundesverfassungsgericht-karlsruhe-bremst-bka-gesetz-a-1088298.html> [<https://perma.cc/MQ3Y-2NW6>]. Pointing to judgments in the 2004 *Acoustical Surveillance Case*, the 2008 *Online Search Case*, and the 2010 *Data-Retention Case*, the German news magazine *Der Spiegel* described the *BKA-Act Case* as the “tentative end-point” of the Constitutional Court’s post-9/11 jurisprudence, in which the court “reviewed numerous counter-terrorism and security laws, which it found to be partially or wholly unconstitutional.” *Id.* (Russell A. Miller trans.); see also Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 2, 2010, 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 260, 2010 (*Data-Retention Case*); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 27, 2008, 120 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 274, 2009 (*Online Search Case*); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 3, 2004, 109 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 279, 2004 (*Acoustical Surveillance Case*).

¹³ Diehl & Hipp, *supra* note 12; see 141 BVERFGE 220 (351) (asserting the Constitutional Court’s broad authority to analyze the constitutionality of entire legislative acts).

¹⁴ The “NSA-Affair” refers to the world-wide controversy triggered by the massive trove of top-secret U.S. (and other countries’) intelligence information leaked in 2013 by former National Security Agency (“NSA”) contractor, Edward Snowden. Snowden’s former employer, the NSA, was particularly implicated by the leaks, which exposed a number of highly-invasive, voracious surveillance and data-collection programs. See generally GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE (2014) (documenting the NSA-Affair through his personal interactions with Edward Snowden); PRIVACY AND POWER: A TRANSATLANTIC DIALOGUE IN THE SHADOW OF THE NSA-AFFAIR (Russell A. Miller ed., 2017) (providing multi-faceted analysis of privacy rights and investigative powers in light of the NSA-Affair through a compilation of essays).

¹⁵ See 141 BVERFGE 220 (341–51) (discussing section 14 of the BKA Act, and holding that international data transfers were permissible so long as the BKA takes measures to ensure the foreign entity’s use of the information comports with German privacy standards).

ly reason to give it our attention. The case also invites critical reflection on broader issues raised by Germany's privacy and security jurisprudence.

One of these issues is the Constitutional Court's detailed, painstaking approach to the *BKA-Act Case* and other judgments in this area of the law. In this mode, the Constitutional Court draws finely calibrated, and very specific legislative terms out of the Basic Law's non-textual and amorphous commitment to constitutional proportionality. The concern this interpretive approach raises was central to the arguments advanced by the dissenting justices in the *BKA-Act Case*. They objected that the Constitutional Court is too deeply involved in the delicate policy matters implicated by security issues.¹⁶ The Constitutional Court's approach strips parliament of its authority over an existential policy question that clearly demands, to the fullest extent possible, the advantages of democratic processes, including expertise, responsiveness, and accountability. This is a form of the "judicial activism" critique that is familiar to American constitutional law scholars and commentators and it draws on what some critics see as the Constitutional Court's seemingly limitless role—at the expense of more democratically-accountable institutions—in shaping German law and policy.¹⁷

A second, and more fundamental issue, is the question: to what kind of privacy does the Constitutional Court aspire? It is a confounding question prompted by a sharp incongruity. On the one hand, the *BKA-Act Case* was widely praised as a clarion manifesto for privacy in our digital age.¹⁸ This is a common perception of Germany's "exceptional" privacy and security law framework. But, on the other hand, the Constitutional Court deemed most of the BKA's intrusive new surveillance powers to be constitutional. The justices merely insisted on a number of minute, finely-detailed corrections straining for just a bit more clarity in the BKA-Act and just a little more procedural restraint from the BKA.¹⁹ The list of these constitutional flaws can almost seem banal. They certainly do not live up to the hopes of today's best-known privacy advocates. Instead it is a privacy jurisprudence writ small, where precise deletion deadlines and careful documentation of surveillance

¹⁶ *Id.* at (353–78).

¹⁷ See generally Matthias Jestaedt, *Phänomen Bundesverfassungsgericht. Was das Gericht zu dem macht, was es ist*, in *DAS ENTGRENZTE GERICHT: EINE KRITISCHE BILANZ NACH SECHZIG JAHREN BUNDESVERFASSUNGSGERICHT 77–158* (2011) (discussing the German Constitutional Court's central role in shaping German politics, and questioning the limits, or lack thereof, of its authority).

¹⁸ See, e.g., Gudula Geuther, *Wert des Rechts in Zeiten der Bedrohung*, *DEUTSCHLANDFUNK* (Apr. 20, 2016), <http://blogs.deutschlandfunk.de/berlinbruessel/2016/04/20/wert-des-rechts-in-zeiten-der-bedrohung/> [<https://perma.cc/ZH2N-ZFBB>] (describing the case as a "milestone in data protection") (Russell A. Miller trans.).

¹⁹ See *infra* notes 151–562 and accompanying text.

count for more than “the right to be let alone.”²⁰ In the light of this odd inconsistency, it is fair to question whether it is accurate to portray German law—as it is now canonized in the *BKA-Act Case*—as a model for the enlightened respect for privacy and individual liberty. The Constitutional Court’s defenders will argue that its measured jurisprudence is an unavoidable consequence of the fact that, in Germany, judicial review means the application of the proportionality principle. In that framework, constitutional privacy protection mostly involves an act of balancing that almost always concedes the state’s authority to encroach on basic rights (often in extreme ways) as long as the investigative measures are tangled up in a web of minute, finely-detailed procedures. German constitutional privacy protection, despite the respect it enjoys, remains just one interest that ought to be maximized alongside other interests to the extent possible. In Germany, despite the hype, privacy is not an absolute right.

This Article proceeds in two parts. In Part I, I present the background to the *BKA-Act Case*, including an introduction to the BKA and a survey of the history of the amended BKA-Act.²¹ In Part II, I undertake a thorough analysis of the *BKA-Act Case*.²² In the Conclusion, I offer my critique of the case, arguing that the Constitutional Court is overly active in a field that demands greater deference to the parliament and that, in any case, leads to a proportional jurisprudence that is merely a pantomime of privacy.²³

I. BACKGROUND

A. The Federal Criminal Police Office (BKA) and Its Evolution

The BKA was originally envisioned as a national clearinghouse for the facilitation of the federal states’ nearly exclusive competence over law enforcement.²⁴ The BKA’s mandate was limited to “combatting common crime to the degree that it transcends the territory of a single state.”²⁵ The first federal law establishing the BKA affirmed that the prevention and prosecution of criminal activities would “remain a state competence.”²⁶ The decentralization of law enforcement power mirrored the general commitment to

²⁰ Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

²¹ See *infra* notes 24–96 and accompanying text.

²² See *infra* notes 97–562 and accompanying text.

²³ See *infra* notes 563–586 and accompanying text.

²⁴ See GRUNDGESETZ [GG] [BASIC LAW] art. 73(1)[10] (granting Germany’s federal government the sole legislative power over law enforcement).

²⁵ Gesetz über die Einrichtung eines Bundeskriminalpolizeiamtes (Bundeskriminalamtes) [BKAG] [Federal Criminal Police Office Act], Mar. 8, 1951, BUNDESGESETZBLATT [BGBl.] I 165, § 1 (Russell A. Miller trans.).

²⁶ *Id.* § 4 (Russell A. Miller trans.).

administrative federalism in Germany's post-war constitutional order.²⁷ In this scheme, the federation largely bears the responsibility for enacting law, which, in turn, is implemented by public authorities organized and maintained by the states.²⁸ Substantive and procedural criminal law in Germany, for example, is provided by the Federal Criminal Code (*Strafgesetzbuch*—"StGB") and Federal Code of Criminal Procedure (*Strafprozessordnung*—"StPO").²⁹ Yet the enforcement of the criminal law—prevention, investigation, and prosecution—is carried out by the states' criminal police offices (*Landeskriminalämter*), prosecuting attorneys (*Staatsanwaltschaften*), and courts (*Gerichte*). It is widely accepted that the federation was denied these law enforcement powers, especially the intrusive power to investigate criminal activity, as an acknowledgment of the great harm perpetrated by centralized police power during the National Socialist era.³⁰

Yet, the history of the BKA is a tale of the gradual expansion of the agency's mandate. The BKA website credits this trajectory to "social and political developments as well as technical progress."³¹ The former particularly refers to the domestic, left-wing terrorism that gripped West Germany during the 1970s and 1980s.³² As early as 1973, as the long struggle with the *Rote Armee Fraktion* ("Red Army Faction") was just dawning, the BKA-Act was amended to give the BKA a leading role in coordinating investigative communications and maintaining investigative data throughout the country.³³ More significantly, the 1973 legislation gave the BKA origi-

²⁷ DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 114–23, 143–45 (3d ed., rev. 2012) (detailing Germany's federalism structure and the role of local administrative authority).

²⁸ *Id.*

²⁹ See generally STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], <https://www.gesetze-im-internet.de/stpo/StPo.pdf> [<https://perma.cc/2JHR-3TQP>]; STRAFGESETZBUCH [STGB] [PENAL CODE], <https://www.gesetze-im-internet.de/stgb/StGB.pdf> [<https://perma.cc/2P7K-WBQ2>].

³⁰ DAVID P. CONRADT & ERIC LANGENBACHER, *THE GERMAN POLITY* 300–01 (10th ed. 2013); George E. Berkley, *Centralization, Democracy, and the Police*, 61 J. CRIM. L. & CRIMINOLOGY & POLICE SCIENCE 309, 309 (1970).

³¹ *The BKA*, BUNDESKRIMINALAMT, https://www.bka.de/EN/Home/home_node.html [<https://perma.cc/GQL2-NUGX>].

³² See Hans-Ludwig Zachert, Former President of the BKA, Remarks at the Bonn House of History Conference on Freedom and Security: *Historie des BKA—Von den Gründungsjahren zur Gegenwart* 10–12 (June 17, 2011), https://www.bka.de/DE/DasBKA/Historie/STVeranstaltung/stVeranstaltung_node.html (follow "Historie des BKA—Von den Gründungsjahren zur Gegenwart" hyperlink) [<https://perma.cc/8Q3A-DK29>] (providing a synopsis of the history of the BKA). In the beginning of the 1970s the Federal Criminal Police Office saw increases in personnel and resources due in part to the fight against the Red Army Faction. *Id.* at 9.

³³ *Zweites Gesetz zur Änderung des Gesetzes über die Einrichtung eines Bundeskriminalpolizeiamtes [Bundeskriminalamtes]* [Second Act Amending the Act Establishing a Federal Criminal

nal investigative responsibility over a modest slate of crimes.³⁴ Former BKA President Hans-Ludwig Zachert called this an “epochal leap forward” for the agency.³⁵

As with many other federal institutions, reunification prompted further reform of the BKA’s brief. The 1997 BKA-Act, for example, gave the agency investigative responsibility for enforcing section 129a of the Federal Criminal Code,³⁶ which outlaws the formation of “criminal” or “terrorist” organizations.³⁷ For the fulfillment of its duties, the 1997 BKA-Act gave the agency the authority to collect, store, use, and transfer personally-revealing information.³⁸ This power extended to secret measures deployed far in advance of the commission of a crime, in particular when a specific case involved threats to life, physical safety, or liberty.³⁹ These measures, however, were subject to a strict set of statutory restrictions. For example, they could be implemented only when necessary and only for the prosecution of serious crimes or the prevention of grave threats.⁴⁰ In addition, section 12 of the 1997 BKA-Act added explicit data-protection measures to the regime.⁴¹ Finally, the 1997 BKA-Act prohibited new uses of the information collected and maintained by the agency, and it imposed reporting and deletion requirements with respect to the agency’s information-gathering initiatives.⁴²

The BKA’s evolution continued throughout the 2000s, largely in response to the September 11, 2001 terrorist attacks in the United States. German counter-terrorism capacities became a central part of the reaction to those events because a number of the 9/11 terrorists had lived in Hamburg—perhaps plotting the attacks—without being detected.⁴³ Legislation

Police Office], June 30, 1973, BUNDESGESETZBLATT [BGBl] I at 701, § 2; A.F. Carter, *The West German “Bundeskriminalamt,”* 49 POLICE J. 199, 201, 203–04 (1976).

³⁴ Zweites Gesetz zur Änderung des Gesetzes über die Einrichtung eines Bundeskriminalpolizeiamtes [Bundeskriminalamtes] [Second Act Amending the Act Establishing a Federal Criminal Police Office], June 30, 1973, BGBl I at 701, § 4 (giving the BKA authority over certain weapons-related crimes, and attacks on federal government agents, for example).

³⁵ Zachert, *supra* note 32, at 9 (Russell A. Miller trans.).

³⁶ Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BGBl I at 1650, § 4(1)[3]–[4].

³⁷ STRAFGESETZBUCH [STGB] [PENAL CODE], last amended by Gesetz [G], May 30, 2016, BGBl I at 1254, § 129a.

³⁸ Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BGBl I at 1650, § 7.

³⁹ *Id.* §§ 15, 23–25.

⁴⁰ *Id.* §§ 7–9.

⁴¹ *Id.* § 12.

⁴² *Id.* §§ 30–32.

⁴³ Carol J. Williams, *German Terror Cell’s Link to 9/11 Detailed*, L.A. TIMES (Aug. 30, 2002), <http://articles.latimes.com/2002/aug/30/world/fg-hijack30> [<https://perma.cc/5RV6-VN4G>].

enacted in Germany while the World Trade Center rubble was still smoldering constituted “a direct response to the 9/11 attacks, aiming to rectify the legal loopholes that allowed Al-Qaeda terrorists to use Germany as a logistical sanctuary.”⁴⁴ The BKA’s original investigative competence was again expanded to include cyberattacks on Germany.⁴⁵ The agency’s authority to root out and prevent crimes was also enhanced. It gained greater access to diverse information stored across public and private sources, which was to be used as the raw material needed to pursue data-mining and data-profiling programs.⁴⁶ Still, most of the post-9/11 reforms did not fundamentally alter the states’ entrenched priority over criminal law enforcement.⁴⁷

One post-9/11 development involved the creation of a Joint Counterterrorism Center (*Gemeinsame Terrorismusabwehrzentrum*—“GTAZ”) for the integration of “police and intelligence analysis capacities in the area of Islamic terrorism/extremism across all government levels.”⁴⁸ The BKA is one of the participating agencies at the GTAZ, a platform that aims to facilitate cooperation and information exchange among Germany’s many federal and state law enforcement and intelligence agencies. The GTAZ does not have independent authority in the fields of law enforcement or intelligence-gathering and it does not have an independent director.⁴⁹ Instead, more than a dozen autonomous agencies have assigned liaison staff to the GTAZ’s new Berlin campus. The highly-cherished separation (*Trennungsgebot*) of law enforcement’s power to investigate and prosecute crimes,⁵⁰ on the one hand, and the intelligence community’s threat-analysis and intelligence-

See generally TERRY McDERMOTT, *PERFECT SOLDIERS: THE 9/11 HIJACKERS: WHO THEY WERE, WHY THEY DID IT* (2006) (discussing in detail the lives of the perpetrators of the 9/11 attacks).

⁴⁴ HELLMUTH, *supra* note 5, at 90; *see* Gesetz zur Bekämpfung des internationalen Terrorismus [TBG] [Act to Combat International Terrorism], Jan. 9, 2002, BUNDESGESETZBLATT [BGBl] I at 361.

⁴⁵ Gesetz zur Bekämpfung des internationalen Terrorismus [TBG] [Act to Combat International Terrorism], Jan. 9, 2002, BGBl I at 361, art. 10(1).

⁴⁶ *See id.* at art. 10(2); HELLMUTH, *supra* note 5, at 90.

⁴⁷ *See* HELLMUTH, *supra* note 5, at 90–91 (noting that critics viewed the reforms as simply disguised iterations of already-existing “policy blueprints”).

⁴⁸ *Id.* at 99.

⁴⁹ *Gemeinsames Terrorismusabwehrzentrum (GTAZ—Joint Counter-Terrorism Centre)*, BUNDESAMT FÜR VERFASSUNGSSCHUTZ, <https://www.verfassungsschutz.de/en/fields-of-work/islamism-and-islamist-terrorism/gtazen> [https://perma.cc/F3VP-8QF3].

⁵⁰ *See* Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493, 527 (2007) (comparing the U.S. FBI’s lack of distinction between law enforcement and intelligence activities with Germany’s strict separation policy). *See generally* CHRISTOPH STREIB, *Das Trennungsgebot Zwischen Polizei und Nachrichtendiensten: Im Lichte aktueller Herausforderungen des Sicherheitsrechts*, in 12 RECHTSPOLITISCHES SYMPOSIUM (2011) (discussing the need to separate law enforcement from intelligence operations in order to protect both individual safety and freedom).

gathering powers, on the other hand, is preserved through a number of not-completely convincing formalities.⁵¹ Participating agencies on either side of the law enforcement/intelligence divide, for example, are housed in separate buildings at the GTAZ campus.⁵² Furthermore, agents from the two sectors only communicate and cooperate through provisional working groups, resource pooling, and at daily briefings.⁵³ The BKA—and the GTAZ itself—credit this new cooperative infrastructure with helping to uncover the terrorist plot of the so-called Sauerland Group in 2007.⁵⁴

Another post-9/11 reform involved the establishment of a joint Counter-terrorism Database (*Antiterrordatei*—“ATD”).⁵⁵ The founding law explained that, under the direction of the BKA, the ATD would consist in a “joint, standardized and centralized counter-terrorism database” on behalf of all of Germany’s federal and state law enforcement and intelligence agencies.⁵⁶ Nearly forty security agencies are obliged to contribute to this easily-accessible, networked database,⁵⁷ which contains a comprehensive catalogue of information about suspects, including their communications data, residences, banking practices, nationality, transport and weapons certifications, contact persons, and religious affiliations.⁵⁸ The ATD faced a constitutional challenge before the Constitutional Court, which ruled in 2013 that the basic structure of the database was compatible with the constitutional right to informational self-determination.⁵⁹ But, prefiguring the Constitutional Court’s approach to the *BKA-Act Case*, the Constitutional Court’s First Senate objected on constitutional grounds to a number of the details of the ATD framework.⁶⁰

⁵¹ See Marc Engelhart, *The National Socialist Underground (NSU) Case: Structural Reform of Intelligence Agencies’ Involvement in Criminal Investigations?*, in PRIVACY AND POWER: A TRANSATLANTIC DIALOGUE IN THE SHADOW OF THE NSA-AFFAIR, *supra* note 14, at 375–400 (discussing the structure and function of various German intelligence agencies).

⁵² HELLMUTH, *supra* note 5, at 100.

⁵³ *Id.*

⁵⁴ See Nicholas Kulish, *Germany Sentences 4 in Terror Case*, N.Y. TIMES (Mar. 4, 2010), <http://www.nytimes.com/2010/03/05/world/europe/05germany.html> [<https://perma.cc/HP72-XCN8>] (detailing the take-down of the Sauerland cell, responsible for the 2005 attacks in London).

⁵⁵ Antiterrordateigesetz [ATD] [Counter-Terrorism Database Law], Dec. 22, 2006, BUNDESGESETZBLATT [BGBl] I at 3409, §§ 1, 3; HELLMUTH, *supra* note 5, at 104–07.

⁵⁶ Antiterrordateigesetz [ATD] [Counter-Terrorism Database Law], Dec. 22, 2006, BGBl I at 3409, § 1 (Russell A. Miller trans.).

⁵⁷ Zachert, *supra* note 32, at 16–17.

⁵⁸ Antiterrordateigesetz [ATD] [Counter-Terrorism Database Law], Dec. 22, 2006, BGBl I at 3409, § 3.

⁵⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 24, 2013, 133 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 277, 2014.

⁶⁰ See generally *id.* (holding parts of sections 1–3 and 5 of the Counter-Terrorism Database Act, regarding collection and maintenance of data, incompatible with the Basic Law).

B. 2008 Amendments to the BKA-Act

Despite the far-reaching reform implemented in the first years after 9/11, the German states largely retained their entrenched priority over criminal law enforcement. That finally changed with the substantial innovation achieved by the amendments to the BKA-Act approved at the end of 2008.⁶¹ This is the law with which the Constitutional Court's *BKA-Act Case* was concerned. A summary of the amended BKA-Act's provisions is necessary at this stage to help detail the significance of the changes it prescribed, and because the Constitutional Court's *BKA-Act Case* decision engages fixedly—and formalistically—with the concrete terms of the new law.

As a starting point, it must be said that the 2008 amendments to the BKA-Act would not have been possible without major federalism reform in 2006, granting the federation

exclusive legislative power with respect to . . . protection by the Federal Criminal Police Office against the dangers of international terrorism when a threat transcends the boundary of one *Land*, when the jurisdiction of a *Land's* police authorities cannot be perceived, or when the highest authority of an individual *Land* requests the assumption of federal responsibility⁶²

Dorle Hellmuth tells the remarkable and winding story of the political struggle to reframe the BKA's authority after the constitutional barriers had been eliminated.⁶³ At the time, its critics saw the new BKA-Act as a “dark day for basic rights,” and agonized that it created a “German FBI.”⁶⁴ The “Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism” added nearly thirty new provisions to the 1997 BKA-Act. The BKA's original competence over threats posed by international terrorism was secured by the new section 4a.⁶⁵ This included

⁶¹ See Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083 (amending the original 1997 BKA Act).

⁶² GRUNDGESETZ [GG] [BASIC LAW] art. 73(1)[9a]; see Gunlicks, *supra* note 7, at 120 (discussing Article 73). *Land* is the German term for “country,” but in the context of the German federal state the term refers to one of the sixteen federal states that constitute the Federal Republic of Germany.

⁶³ See HELLMUTH, *supra* note 5, at 99–115 (describing the development of the new GTAZ in the wake of the 2004 Madrid bombings).

⁶⁴ *Opposition spricht*, *supra* note 9.

⁶⁵ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 4a.

the investigation and prosecution of the actions covered by section 129a of the German Criminal Code, which criminalizes the formation of terrorist organizations, defined as organizations whose aims include aggravated murder, genocide, war crimes, or crimes against personal liberty.⁶⁶ To carry out this new counter-terrorism competence, the 2008 law granted the BKA a slate of new investigative powers, including the following (identifying only those that played a central role in the Constitutional Court's 2016 decision):

- authority to collect personally-revealing data;⁶⁷
- authority to subpoena information;⁶⁸
- authority to take special measures to collect information (regular personal observation, use of technology to conduct surveillance outside the home, and use of informants and undercover agents);⁶⁹
- authority to use technology for surveillance inside and outside the home;⁷⁰
- authority to conduct data-mining;⁷¹
- authority to secretly intrude on, manipulate, and collect data from information-technology systems;⁷²
- authority to conduct telecommunications surveillance;⁷³ and
- authority to collect telecommunications meta-data.⁷⁴

The BKA Act, as amended by the 2008 Act, also authorized the BKA's cooperation with external security agencies, including non-E.U. entities. In particular, the law authorized the transfer of the information it might obtain from the exercise of its intrusive new investigative powers.⁷⁵ None of this, however, constituted a blank check. In two ways, the 2008 law imposed a number of limitations on the BKA's use of its new competences.

⁶⁶ STRAFGESETZBUCH [STGB] [PENAL CODE], last amended by Gesetz [G], May 30, 2016, BGBl I at 1254, § 129a.

⁶⁷ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20b.

⁶⁸ *Id.* § 20c.

⁶⁹ *Id.* § 20g.

⁷⁰ *Id.* § 20h.

⁷¹ *Id.* § 20j.

⁷² *Id.* § 20k.

⁷³ *Id.* § 20l.

⁷⁴ *Id.* § 20m.

⁷⁵ Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BUNDESGESETZBLATT [BGBl] I at 1650, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, § 14, https://www.gesetze-im-internet.de/bkag_1997/BKAG.pdf [<https://perma.cc/A9ZV-GFLW>]. Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BGBl I at 1650.

First, the powers were authorized only in relation to threats or crimes of a particularly serious nature, and they could only be deployed against specifically identified individuals.⁷⁶ In general terms, for example, section 4a restricted the BKA to investigations involving national threats, to circumstances in which the jurisdiction of a state criminal police office cannot be recognized, and to cases in which a state agency asks the BKA to assume investigative responsibility.⁷⁷ Furthermore, section 4a limited the BKA's involvement in the criminal investigation of terrorist organizations—section 129a StGB—to cases in which the suspected activities aimed to substantially disturb the public, violently threaten domestic or international institutions, or destroy the foundational political, constitutional, or economic structures of a state, the federation, or an international organization.⁷⁸ Many of the new, discrete investigative powers also contained their own subject matter and personal restrictions. Section 20h, as an example of the former, permitted technological surveillance outside the home only in cases involving “an imminent threat to the survival or security of the state, or to the life, limbs, or freedom of a person, or property having meaningful value and the preservation of which is in the public interest.”⁷⁹ Or, as an example of the latter, section 20b limited the BKA's authority to collect personally-revealing information to only the targeted suspect and to third parties who are “not merely casually or accidentally connected with the suspect and who had knowledge of the criminal enterprise or who might benefit from the criminal enterprise.”⁸⁰

Second, the entire regime was framed by a number of procedural restrictions, including general protections and discrete, provision-specific protections. Section 11, which imposed a record-keeping obligation on the BKA when it exercised its new authority to collect information, is an example of the general procedural protections provided by the 2008 amendments to the BKA-Act.⁸¹ Section 16 had a similar character in that it generally required the BKA to terminate any investigative measure being conducted inside a home if there is an intrusion on the intimate zone of privacy that German constitutional jurisprudence refers to as the “core-area for the private arrangement of one's life” (*Kernbereich privater Lebensgestaltung*).⁸²

⁷⁶ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl. I at 3083, § 4a.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* § 20h(1) (Russell A. Miller trans.).

⁸⁰ *Id.* § 20b(2)[1] (Russell A. Miller trans.).

⁸¹ *Id.* § 11.

⁸² *Id.* § 16.

Other general procedural protections provided by the 2008 law included judicial review of the investigative measures and the duty to inform those affected by the investigative measures.⁸³ Many of the new investigative measures were also constrained by discrete, provision-specific procedural requirements. For instance, the special measures for the collection of personally-revealing information were limited in duration,⁸⁴ and the measures had to be ordered by the director of the relevant unit of the BKA.⁸⁵ The intrusions into a suspect's information-technology systems authorized by section 20k, as another example of a provision-specific procedural restriction, could be carried out so long as it was technologically assured that only those changes would be made to the information-technology system that would be necessary for the collection of data.⁸⁶ The results of the data-mining measures authorized by section 20j, as yet another example of discrete procedural limits, were to be deleted "as soon as the object of the investigative measure was achieved or proved to be impossible to achieve."⁸⁷

This is not a comprehensive accounting of the detailed and highly-technical features of the 2008 amending law. But, before I more thoroughly describe the Constitutional Court's equally technical and detailed judgment in the *BKA-Act Case*, this summary demonstrates two points. First, it might suggest why the BKA's new powers stirred so much alarm. The BKA acquired newly-expansive original jurisdiction to conduct counter-terrorism criminal investigations. At the same time, the agency was given deeply-intrusive investigative powers that were fairly portrayed in the media as, among other Orwellian possibilities, the authority to "conduct around-the-clock surveillance, not only acoustical but also optical, even in a person's bathroom and bedroom."⁸⁸ Second, it should suggest the complexity of the challenged regime's framework that encompassed: the general grant of investigative authority, but limited to only a variety of subject matter circumstances; the concreteness and imminence of a suspected threat or criminal action; the grant of specific investigative measures, some with variable scope depending on the nature of the threat justifying the investigation, the depth of the measure's intrusion on privacy, and the attenuation of the affected per-

⁸³ *Id.* §§ 20v, 20w.

⁸⁴ *Id.* § 20g(2)[1].

⁸⁵ *Id.* § 20g(3).

⁸⁶ *Id.* § 20k(2)[2].

⁸⁷ *Id.* § 20j(3) (Russell A. Miller trans.).

⁸⁸ *BKA-Gesetz ist teilweise verfassungswidrig*, ZEIT ONLINE (Apr. 20, 2016, 10:13 AM), <http://www.zeit.de/digital/2016-04/bka-gesetz-zu-terrorbekaempfung-ist-teilweise-verfassungswidrig> [<https://perma.cc/RR2T-EZG9>] (Russell A. Miller trans.).

son's links to the threat; and a wide-range of general and specific procedural protections.

Despite all the unease it fostered, it is not at all clear that the 2008 law turned the BKA into the ravenous, liberty-disregarding avatar of the American FBI that its critics feared (if that is at all a justifiable characterization of the FBI). As expected, the German Federal Government strenuously disputed this portrayal at the oral hearing before the Constitutional Court's First Senate in the *BKA-Act Case*.⁸⁹ Federal Interior Minister, Thomas de Maiziere, and BKA President, Holger Münch, argued that the new measures had been applied with great restraint.⁹⁰ They cited only fifteen cases in which the BKA had taken actions under its new counter-terrorism investigative competence (section 4a).⁹¹ They also claimed that, pursuant to that authority, the BKA had implemented just one online search of a suspect's information-technology systems (section 20k) and undertaken telecommunications surveillance measures on only four occasions (section 20l).⁹² One external assessment confirmed the modest nature of Germany's domestic surveillance practices (relative to the practices of the equivalent American and English agencies), due in large part to the German agency's very limited budgetary and technological capacities.⁹³ But with little public information about the BKA's implementation of the new measures available, it is impossible to assess the credibility of these claims. In fact, one of the duties imposed on the BKA by the Constitutional Court's judgment in the *BKA-Act Case* is an obligation to document and report to the parliament about the uses it makes of the new investigative measures.⁹⁴

Still, and not only because of its institutional interests in the matter, there is reason to question the BKA's candor and propriety. In recent years, the agency has been mired in a scandal suggesting it neither acted objectively nor with appropriate speed with respect to evidence the agency obtained that implicated a high-ranking parliamentarian and a senior member of the BKA staff in the purchase of child pornography.⁹⁵ At the very least, the insights

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ European Parliament Directorate-Gen. for Internal Policies, Policy Dep't C: Citizens' Rights & Constitutional Affairs, *National Programmes for Mass Surveillance of Personal Data in EU Member States and Their Compatibility with EU Law*, at 19–26, PE 493.032 (2013), http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/2_polddeptc_study_2_polddeptc_study_en.pdf [<https://perma.cc/9T63-XL6Q>].

⁹⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (285), 2017.

⁹⁵ *E.g.*, Philipp Alvares de Souza Soares & Hubert Gude, *Fall Edathy: Auch BKA-Spitzenbeamter stand auf Kinderporno-Kundenliste*, SPIEGEL ONLINE (Feb. 28, 2014, 5:30 PM), <http://www.>

gained into the BKA's professionalism during the resulting parliamentary investigation do not inspire confidence in the agency's commitment to transparency and objectivity, or its willingness to regulate itself.⁹⁶

II. THE BKA-ACT CASE

The *BKA-Act Case* involved constitutional challenges to a controversial expansion of the BKA's powers in the area of counter-terrorism. Despite the Federal Government's assertion that its modest use of these powers did not merit the unease stirred by the 2008 law, the BKA-Act's fate before the Constitutional Court was predictable. In light of its recent jurisprudence in the privacy and security area,⁹⁷ the Constitutional Court was destined to scrutinize the law's provisions for their proportionality and to conclude, in the end, that the law should survive—but only if the legislature narrowed the provisions' possible effects with a number of judicially-ordained specific, and sometimes highly-technical, limitations.

The framework for review the Constitutional Court was bound to apply to the *BKA-Act Case*, including the various components that were repeated throughout the Constitutional Court's recent jurisprudence, can be reduced to three steps in its proportionality analysis.⁹⁸

In the first step, the Constitutional Court would discuss the significance of the basic rights implicated by the surveillance measures. These would involve Basic Law Articles 10(1) (telecommunications privacy), 13(1) (inviolability of the home), and 1(1) (human dignity) in conjunction

spiegel.de/politik/deutschland/bka-spitzenbeamter-befand-sich-auf-edathy-liste-a-956362.html [https://perma.cc/9FEN-PMV4] (asserting that high-up BKA officials possessed child pornography); Von Tanjev Schultz, *Gutachten im Fall Edathy rügt Bundeskriminalamt*, SÜDDUETSCHER ZEITUNG (Aug. 4, 2015, 6:21 PM), <http://www.sueddeutsche.de/politik/kinderporno-afaaere-gutachten-im-fall-edathy-ruegt-bundeskriminalamt-1.2594941> [https://perma.cc/78BW-LTZV] (explaining that an expert report on the Edathy child pornography case reprimanded the BKA for failing to take appropriate investigative action).

⁹⁶ Beschlussempfehlung und Bericht [Resolution and Report], DEUTSCHER BUNDESTAG: DRUCKSACHE [BR] 18/1948, <http://dip21.bundestag.de/dip21/btd/18/019/1801948.pdf> [https://perma.cc/5KF8-JNDV]; see Soares & Gude, *supra* note 95 (criticizing the BKA's willingness to police its own members).

⁹⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 2, 2010, 125 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 260, 2010 (*Data-Retention Case*); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 27, 2008, 120 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 274, 2009 (*Online Search Case*); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 3, 2004, 109 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 279, 2004 (*Acoustical Surveillance Case*).

⁹⁸ See KOMMERS & MILLER, *supra* note 27, at 67 (describing the “three-step process” in the Constitutional Court's proportionality analysis).

with 2(1) (personal freedom).⁹⁹ Some particular constitutional interests would play important roles in the case, including the right to informational self-determination and the right to the confidentiality and integrity of information-technology systems. The absolute respect owed to the “core-area for the private arrangement of one’s life” also would be significant. Finally, in this first step, the Constitutional Court would have to assess the severity of the intrusion on these protected interests. In doing so, it would show special concern for the ways new and ubiquitous technology permits deeply penetrating, mosaic glimpses into individuals’ private lives.

In the second step, the Constitutional Court would have to determine the importance of the objective the BKA-Act provided as justification for the use of these new rights-infringing measures. Several concerns would be at stake here, particularly the state aim to promote paramount objectives in criminal law enforcement or threat prevention. This has often been characterized as grave or serious crimes; a threat to the life, limbs, or freedom of an individual; or as a threat to the foundation or survival of the state. The Constitutional Court would insist that the state’s objectives be clearly and unambiguously identified in the statute. The Constitutional Court would also insist that the use of the information-gathering measures must be justified by concrete threats, involving specific targets that are confirmed by factual indications.

In the third step, applying proportionality in a narrower sense, the Constitutional Court would assess whether a provision was adequately limited to produce only the acceptably minimal degree of intrusion on a basic right. For example, the Constitutional Court would demand that a provision is appropriately specific and clear. And it would determine if the law provides an appropriate range of procedural protections, including transparency requirements, judicial supervision, reporting requirements, strict requirements for the retention and deletion of information, and rules governing the further use or transfer of the information.

This is precisely the approach the Constitutional Court’s First Senate followed in the *BKA-Act Case*, and it is the framework I follow in describing each part of this long and complex judgment.

Following oral hearings held in July 2015, the Constitutional Court issued its decision in the *BKA-Act Case* on April 20, 2016.¹⁰⁰ The case, involving scores of legislative provisions and involving the most sensitive and

⁹⁹ GRUNDGESETZ [GG] [BASIC LAW], arts. 1(1), 2(1), 10(1), 13(1).

¹⁰⁰ *Id.*; see Diana Niedernhöfer, *Bundesverfassungsgericht prüft BKA-Gesetz*, SÜDWEST PRESSE (Aug. 8, 2015), <http://www.swp.de/ulm/nachrichten/politik/Bundesverfassungsgericht-prueft-BKA-Gesetz;art4306,3321688> [<https://perma.cc/A3ZC-SP9U>] (highlighting the concerns the Constitutional Court discussed with respect to privacy rights implicated by the BKA-Act).

technical issues, was always bound to be “*sehr komplex und sehr zerklüftet*” (“very complex and very differentiated”).¹⁰¹ It took the Constitutional Court eighty dense pages (including dissenting opinions from Justices Eichberger and Schluckebier) to settle the matter. As the Constitutional Court’s earlier jurisprudence in the privacy and security area made predictable, the law generally survived the Constitutional Court’s scrutiny. Only two provisions of the law were ruled unconstitutional and void.¹⁰² Several other provisions, however, were found to be incompatible with the Basic Law.¹⁰³ In these instances, the Constitutional Court worked out exquisitely-detailed and extensive corrections that the parliament was ordered to implement before June 30, 2018.¹⁰⁴

I present my survey of the case in four parts. First, I offer some introductory and comparative reflections on the Constitutional Court’s judgment.¹⁰⁵ Second, I describe and comment on the Constitutional Court’s discrete engagement with a number of the new investigative measures granted to the BKA by the amended BKA-Act.¹⁰⁶ Third, I describe and comment on the Constitutional Court’s assessment of the general, broadly applicable procedural protections provided by the amended law.¹⁰⁷ Fourth, I describe and comment on the Constitutional Court’s engagement with the new law’s provisions regulating the secondary use or the transfer of the investigative information the BKA acquires pursuant to its new powers.¹⁰⁸ This final aspect of the Constitutional Court’s decision, especially to the degree that it outlined the constitutional parameters for transfers of the BKA’s investigative information to foreign security agencies, is particularly relevant to observers, commentators, intelligence community professionals, and policy-makers outside of Germany.

¹⁰¹ Niedernhöfer, *supra* note 100. Constitutional Court Justice Kirchhof used this phrase to introduce the matter at the oral arguments in the case. *Id.*

¹⁰² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (351), 2017. Namely, sections 20h(1)[1]{c} and 20v(6)[5] were found constitutionally incompatible and void. Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKA-TerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, §§ 20h(1)[1]{c}, 20v(6)[5].

¹⁰³ 141 BVERFGE 220 (352).

¹⁰⁴ *Id.* at (351–52); *see infra* notes 151–562 and accompanying text.

¹⁰⁵ *See infra* notes 109–150 and accompanying text.

¹⁰⁶ *See infra* notes 151–370 and accompanying text.

¹⁰⁷ *See infra* notes 371–437 and accompanying text.

¹⁰⁸ *See infra* notes 438–562 and accompanying text.

A. Introductory and Comparative Reflections on the BKA-Act Case

Two general features of the *BKA-Act Case* should be mentioned at the start, especially because they have such profound effects on the nature and style of the Constitutional Court's decision. These introductory insights can be brought into focus by some comparative reflections.

First, it is remarkable that the Constitutional Court could exercise jurisdiction over the case at all. The Constitutional Court Act (*Bundesverfassungsgesetz*) generally requires that parties bringing a complaint show that they have been “directly, personally, and presently affected” by the alleged constitutional violation.¹⁰⁹ But the Constitutional Court has recognized that secret investigations and intelligence-gathering represent an exception to this rule. The secrecy cloaking these state activities, the Constitutional Court has explained, means the surveillance might never be discovered by potential complainants and, consequently, that the state might be able to evade constitutional limits on the exercise of its power.¹¹⁰ The Constitutional Court ruled in previous cases that, in these circumstances, it would be enough to establish standing if the complainant can show “with some probability” that his or her constitutional rights have been harmed.¹¹¹ The *BKA-Act Case* is an example of this exception. The complainants pointed only to the mere existence of the amended BKA-Act—and not to a specific, proven instance of implementation by executive authorities that affected them personally—as the basis of their complaints.¹¹² This was enough to satisfy the Constitutional Court, which noted that the complainants had no way of knowing whether they had been the objects of the BKA's new investigative measures because of the secrecy shrouding the measures, and because the law lacked adequate reporting requirements.¹¹³ The Constitutional Court was satisfied, however, that the complainants' political beliefs, professional activities, and unique private contacts created an adequate likelihood they had been affected by the challenged measures.¹¹⁴ This means that the Constitutional Court considered the complaints to be challenges to the whole law, which it would review in total abstraction and not at all limited by the

¹⁰⁹ Bundesverfassungsgesetz [BVerfGG] [Federal Constitutional Court Act], Aug. 11, 1993, BUNDESGESETZBLATT [BGBl] I at 1474, last amended by Verordnung [V], Aug. 31, 2015, BGBl I at 1474, § 90 abs. 1, <https://www.gesetze-im-internet.de/bverfkg/BVerfGG.pdf> [<https://perma.cc/R3J9-4B2A>] (Russell A. Miller trans.).

¹¹⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 20, 1984, 67 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 157 (292–93), 1987.

¹¹¹ *Id.* (Russell A. Miller trans.).

¹¹² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (224–25, 241–42), 2017.

¹¹³ *Id.* at (241–42).

¹¹⁴ *Id.*

concrete facts of any specific circumstances involving any of the new investigative practices authorized by the amended BKA-Act. This unbounded examination of the legislation essentially functions as a form of abstract judicial review, even if it is formally brought as a constitutional complaint.

Abstract review is unknown in the American judicial tradition.¹¹⁵ Instead, the U.S. courts strictly enforce the standing doctrine as part of the U.S. Constitution's "controversies" requirement.¹¹⁶ The U.S. Supreme Court has not recognized an exception in intelligence cases. In his opinion for the U.S. Supreme Court in *Clapper v. Amnesty International*, Justice Alito said, "we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence-gathering and foreign affairs."¹¹⁷ In *Clapper*, the U.S. Supreme Court found that rights advocates lacked standing to challenge the portions of the Foreign Intelligence Surveillance Act under which many of the NSA's surveillance and data-collection programs operate because the advocates' belief that their legitimate activities would nevertheless lead to surveillance was not enough to establish a "certainly impending" and "fairly traceable" constitutional injury.¹¹⁸ The U.S. Supreme Court insisted that "an objectively reasonable likelihood" that the plaintiffs' communications would be intercepted at some point in the future was too attenuated and speculative to meet the standing doctrine's "injury in fact" requirement.¹¹⁹ The U.S. Supreme Court was unconcerned that more definitive evidence of an injury would be nearly impossible to develop with respect to the NSA's highly-secretive operations, noting in particular the importance of maintaining the separation of powers—and judicial restraint generally—in the context of the government's intelligence-gathering activities.¹²⁰

Yet, these were precisely the circumstances under which the complainants (who the Constitutional Court described as "human rights activists") proceeded in the *BKA-Act Case*.¹²¹ Similarly attenuated circumstances

¹¹⁵ KOMMERS & MILLER, *supra* note 27, at 15.

¹¹⁶ See U.S. CONST. art. III, § 2, cl. 1 (extending judicial authority over specific legal controversies).

¹¹⁷ 568 U.S. 398, 409 (2013).

¹¹⁸ *Id.* at 412–13, 422.

¹¹⁹ *Id.* at 410–11.

¹²⁰ *Id.* at 408–09; see *Obama v. Klayman*, 800 F.3d 559, 570 (D.C. Cir. 2015) (Sentelle, J., dissenting) (rejecting plaintiffs' arguments for failure to show injury in fact) (internal quotation marks and citation omitted).

¹²¹ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (241), 2017 (Russel A. Miller trans.).

served as the basis for the Constitutional Court's review in other prominent privacy and security cases in the last decade.¹²²

This exposes several prominent features of German jurisprudence, and the Constitutional Court's *BKA-Act Case* in particular. On the one hand, generous jurisdictional standards pave the way for far-reaching judicial involvement in this highly-sensitive field of policy-making. Where the American courts play an important but restrained role in the area of security, cautiously policing the outer boundaries of executive power, the German Constitutional Court plays the crucial role of a decisive player.¹²³ On the other hand, the abstract posture of the Constitutional Court's review means that it is free to rewrite the challenged legislation without being overly burdened by concerns about implementation, or constrained by the factual limits of a specific case, or the field generally. From this abstract posture, the Constitutional Court was free to rewrite the BKA-Act to its liking.

In addition, despite the almost revolutionary nature of the new, centralized investigative competences acquired by the BKA as a result of the 2006 constitutional reform, the Constitutional Court devoted little reasoning to its summary conclusion that the new BKA-Act did not violate the Basic Law's clear and forceful commitment to federalism.¹²⁴ The Constitutional Court was satisfied that the BKA's new powers were strictly confined to the investigation of crimes and threats clearly identified in section 4a(1) of the amended law,¹²⁵ and that, in turn, section 4a was adequately aligned with the constitutional federalism reform achieved with the enactment of the Basic Law's new Article 73(1)[9a].¹²⁶ The Constitutional Court accepted these parameters as the proper limits on the federation's power in these circumstances.¹²⁷ Nor was the Constitutional Court bothered by the federalism implications of any overlap between the BKA's new powers and the traditional investigative competences of the state law enforcement authorities. The Constitutional Court dismissed this concern with the explanation that the federalism amendments to the Basic Law had anticipated the intersection of these law enforcement competences.¹²⁸

¹²² *E.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 24, 2013, 133 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 277, 2014; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 27, 2008, 120 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 274, 2009.

¹²³ *See supra* note 122 and accompanying text.

¹²⁴ *See* GRUNDGESETZ [GG] [BASIC LAW] art. 20(1) (designating Germany "a democratic and social federal state") (Russell A. Miller trans.).

¹²⁵ 141 BVERFGE 220 (263).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

On this fundamental point, too, American constitutional law might have had greater cause to hesitate. In *Bond v. United States*, for example, the U.S. Supreme Court unanimously reaffirmed the states' prerogative in criminal law, explaining that

[f]or nearly two centuries it has been clear that, lacking a police power, Congress cannot punish felonies generally. A criminal act committed wholly within a State cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.¹²⁹

Even where it could be said that federal criminal law was pursuing the federation's interstate commerce clause authority, the U.S. Supreme Court concluded that there must be outer limits on the federation's resort to criminal law.¹³⁰ In their concurring opinion in *United States v. Lopez*, for example, Justices Kennedy and O'Connor agreed on the unconstitutionality of the Gun-Free Schools Zone Act (a federal law criminalizing gun possession near schools) in part by emphasizing the risk the federal criminal law posed to the states' traditional authority over criminal law.¹³¹ Justice Kennedy reasoned that blurring this traditional allocation of state competences with an expansive federal role in law enforcement would undermine accountability and erode the states' opportunities to experiment with and improve upon policies.¹³² Especially with respect to accountability, Justice Kennedy worried that citizens would be left with uncertainty regarding which of the "two governments," state or federal, "to hold accountable for the failure to perform a given function."¹³³

In *Bond*, which involved a federal criminal prosecution based on America's obligation to implement the Chemical Weapons Convention,¹³⁴ the U.S. Supreme Court concluded that the challenged federal criminal authority would "'alter sensitive federal-state relationships,' convert an astonishing amount of 'traditionally local criminal conduct' into 'a matter for federal enforcement,' and 'involve a substantial extension of federal police

¹²⁹ *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (internal quotation marks and citations omitted).

¹³⁰ *Id.* at 2087.

¹³¹ *United States v. Lopez*, 514 U.S. 549, 576–83 (1995) (Kennedy, J., concurring).

¹³² *Id.*

¹³³ *Id.* at 576–77; see also Brandon L. Bigelow, *The Commerce Clause and Criminal Law*, 41 B.C. L. REV. 913, 920 (2000) (discussing *Lopez*).

¹³⁴ Chemical Weapons Implementation Act of 1998, 18 U.S.C. § 229(1)(a) (2012); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317.

resources.”¹³⁵ Confronted with these dangers, the U.S. Supreme Court insisted that “the principle that Congress does not normally intrude upon the States’ police power” is critically important.¹³⁶ The U.S. Supreme Court was forced to constrain what it saw as an overly expansive reading of federal criminal law in order to prevent a “dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States.”¹³⁷

It is true that the reallocation of law enforcement competences in the context of the *BKA-Act Case*—implicating many of the same federalism concerns that animated the U.S. Supreme Court’s decision in *Bond*—had been achieved by way of a constitutional amendment. In most constitutional systems, a constitutional amendment authorizing the exercise of a discrete form of state power might be the end of any discussion about the constitutionality of the competence in question.¹³⁸ But, the Nazis’ manipulation and eventual debasement of the Weimar Constitution haunted the drafters of what was to be the new, postwar West German Constitution.¹³⁹ To prevent this from happening again, the Basic Law provides a list of the values that were to animate and define the new West German state.¹⁴⁰ Moreover, in Article 79(3), the Basic Law prohibits any amendments to those core principles.¹⁴¹ This provision is sometimes referred to as the “eternity clause” because it aims to secure a fundamental set of social and political commitments, even from change by an amending supermajority, for as long as the Basic Law serves as Germany’s constitution.¹⁴² In practice, this means that the Constitutional Court can be called on to assess the permissibility of constitutional amendments by testing their conformity to the Basic Law’s fundamental principles.

After more than sixty years (and counting) of effective constitutional governance, Article 79(3) still stands as a sentinel, ensuring the security of the central aims of the Basic Law, giving them enduring—if not eternal—

¹³⁵ *Bond*, 134 S. Ct. at 2091 (citing *United States v. Bass*, 404 U.S. 336, 349–50 (1971)).

¹³⁶ *See id.* at 2082.

¹³⁷ *Id.* at 2093.

¹³⁸ *See generally* Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW* 96 (Tom Ginsburg & Rosalind Dixon eds., 2011) (discussing the feasibility of constitutional amendment).

¹³⁹ *See* Matthias Herdegen, *Art. 79*, in *MAUNZ-DÜRIG, GRUNDGESETZ KOMMENTAR*, at Margin No. 64 (Roman Herzog et al. eds., 68th ed. 2010) (referring to the “trauma of Weimar”) (Russell A. Miller trans.).

¹⁴⁰ *GRUNDGESETZ [GG] [BASIC LAW]* art. 20.

¹⁴¹ *Id.* at art. 79(3).

¹⁴² *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 123 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE]* 267 (343), 2010.

effect and meaning.¹⁴³ The principles secured by Article 79(3) include Germany's federalist structure, the supreme value of human dignity, representative democracy, a commitment to social welfare, and the rule of law.¹⁴⁴ These unamendable commitments are so fundamental to the nature and character of the German state under the Basic Law that, together, they are sometimes referred to as Germany's "constitutional identity," and at other times as the core components of Germany's "free democratic basic order."¹⁴⁵

This distinct constitutional framework, providing for unamendable constitutional amendments, might have given the Constitutional Court scope to consider the federalism elements of the BKA-Act's dramatic assignment of new law enforcement powers to the federation's BKA.¹⁴⁶ Criminal law enforcement is a core prerogative of the states in Germany's federalism scheme,¹⁴⁷ and the Basic Law's federalism balance is among the fundamental principles meant to benefit from the protection of the eternity clause.¹⁴⁸ The preservation of the states' competences secured by Article 79(3) would extend to any constitutional amendments that—either de jure or de facto—move Germany towards a unitary, centralized state, including measures that furtively strip the states of their essential competences.¹⁴⁹ Nevertheless, the Constitutional Court expressed no concerns about the way the new BKA-Act heavily shifted responsibility for criminal law enforce-

¹⁴³ See Paul Kirchhof, *Die Identität der Verfassung*, in HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND: BAND II: VERFASSUNGSSTAAT § 21 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2004) (discussing the "identity" of the German constitution and its provisions, especially Articles 1–20). See generally Michael Brenner, *Möglichkeiten und Grenzen grundrechtsbezogener Verfassungsänderungen*, 32 DER STAAT 493 (1993) (discussing the prospects of and restrictions on constitutional amendment in Germany); Günter Dürig, *Zur Bedeutung und Tragweite des Art. 79 Abs. 3 des Grundgesetzes*, in FESTGABE FÜR THEODOR MAUNZ 41 (Hans Spanner et al. eds., 1971) (discussing the legal significance and scope of Article 79(3)).

¹⁴⁴ GRUNDGESETZ [GG] [BASIC LAW], arts. 1–20, 79(3); see HANS JARASS & BODO PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR 497–554 (13th ed. 2014).

¹⁴⁵ 123 BVERFG 267 (340) (remarking that the principles that are codified in Article 79(3) of the Basic Law are the "identity of the constitution") (Russel A. Miller trans.).

¹⁴⁶ See generally Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CONST. L. 460 (2006) (comparing Indian and Irish judicial systems and their approach to judicial review of constitutional amendments); Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657 (2013) (discussing various governments' approaches to permitting and limiting constitutional amendment); Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT'L J. CONST. L. 655 (2015) (arguing that "[a]mendment rules are fundamental to constitutionalism" as a means to righting social wrongs and remaining relevant, but also that unofficial methods of constitutional interpretation can obscure the importance of formal amendment).

¹⁴⁷ CONRADT & LANGENBACHER, *supra* note 30, at 300–01.

¹⁴⁸ See Michael Sachs, *Art. 79*, in GRUNDGESETZ KOMMENTAR 1628, 1638 (Michael Sachs ed., 7th ed. 2014) (discussing the constitutional protections against amending Article 79).

¹⁴⁹ *Id.* at 1642.

ment towards the federation. This could be the case because, as one commentator remarked, “New Article 73(1)[9a] is only one of many exceptions to the fundamental principle recognizing the states’ sovereignty over law enforcement In fact, the Basic Law itself grants the federation a number of law enforcement responsibilities.”¹⁵⁰

With these preliminary issues settled, the Constitutional Court was free to engage directly and expansively with the amended BKA-Act. It would not be limited to a discrete set of facts arising from a concrete application of the BKA’s new investigative powers. Indeed, the Constitutional Court set about reviewing and recasting the provisions of the new law in exacting detail.

B. Constitutionality of Specific Provisions Granting the BKA New Investigative Powers

The Constitutional Court’s examination of the BKA’s new investigative powers followed its canonical proportionality analysis that requires the Constitutional Court to determine whether the challenged acts (in this case, the mere statutory authorization to act) serve a “legitimate aim,” and whether the measures undertaken are “suitable, necessary and . . . proportionate.”¹⁵¹ This formalized structure for the Constitutional Court’s review of all exercises of public authority is not a mere (discretionary) interpretive device, as are the U.S. Supreme Court’s disputed “levels of scrutiny.”¹⁵² Instead, the Constitutional Court has ruled that proportionality analysis itself—and the restraint it necessarily imposes on state power—is part of the Basic Law’s commitment to the rule of law.¹⁵³ In the *BKA-Act Case*, as I suggested earlier, this analysis can be reduced to three general steps that will frame my description of the Constitutional Court’s decision: (1) a discussion of the significance of the basic right that has been infringed by the challenged measure; (2) a discussion of the nature of the state interest justifying the infringement upon the basic right; and (3) a discussion in which

¹⁵⁰ Rüdiger Sannwald, *Art. 73, in GG: KOMMENTAR ZUM GRUNDGESETZ 1461, 1495* (Bruno Schmidt-Bleibtreu & Franz Klein eds., 12th ed. 2011) (Russell A. Miller trans.).

¹⁵¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (265), 2017.

¹⁵² See generally Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984) (questioning the utility of the three-level system of judicial scrutiny currently employed by the Supreme Court).

¹⁵³ See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 20, 1984, 67 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 157, 1987; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 5, 1968, 23 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 127, 1972; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 3, 1954, 3 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 383, 1962.

the Constitutional Court weighs the harm produced by the rights infringement against the benefits the measure might achieve. Especially in the application of the last of these steps, often referred to as proportionality in the narrow sense, in the *BKA-Act Case* the Constitutional Court was concerned with the ways in which the harmful consequences of the BKA's new investigative powers had been minimized, in part through the establishment of procedural protections. Finally, the Constitutional Court considered the challenged provisions' respect for constitutionally mandated clarity and specificity.¹⁵⁴ These elements, on the one hand, help to protect individuals' interests by concretely limiting state power.¹⁵⁵ On the other hand, they provide protection against state authority by facilitating judicial review.¹⁵⁶

Armed with this framework, the Constitutional Court considered the constitutionality of five of the new investigative powers granted to the BKA by the amended BKA-Act.

1. Special Investigative Measures (section 20g)

Section 20g of the amended BKA-Act authorized the BKA to pursue special investigative measures in limited circumstances.¹⁵⁷ The special investigative measures included the use of: long-term observation, surveillance technology outside the home (photography, filming, and audio surveillance/recording), other technical means for observation (GPS-tracking, for example), informants, and undercover agents.¹⁵⁸ These measures could be deployed to collect personally-revealing information with respect to three classes of investigations. First, the measures applied to "those who bring about a danger,"¹⁵⁹ "those who own dangerous animals or things,"¹⁶⁰

¹⁵⁴ See generally Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 27, 2008, 120 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 274, 2009 (referring to *specificity*); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 18, 2002, 106 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 310, 2003 (referring to *clarity*); see Michael Sachs, *Art. 20*, in GRUNDGESETZ KOMMENTAR, *supra* note 148, at 842–44.

¹⁵⁵ 141 BVERFGE 220 (265).

¹⁵⁶ *Id.*

¹⁵⁷ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20g.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* § 20g(1)[1] (referring to Bundespolizeigesetz [BPolG] [Federal Police Law], Oct. 19, 1994, BUNDESGESETZBLATT [BGBl] I at 2978, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, § 17), <https://www.gesetze-im-internet.de/bpolbg/BPolBG.pdf> [<https://perma.cc/LZU4-UCFF>] (Russell A. Miller trans.).

or in circumstances involving a “present significant risk.”¹⁶¹ In each of these cases the measures were to be limited to “a threat to the foundation or survival of the state; or to the life, limbs, or freedom of an individual; or to property having meaningful value and the preservation of which is in the public interest.”¹⁶² Second, the measures applied to persons about whom facts indicate that he or she will commit the crime of “organizing for the purpose of engaging in terrorism.”¹⁶³ Third, the measures applied to the target’s “contacts or companions.”¹⁶⁴ In all three of these investigative classes the BKA’s resort to the special investigative measures was to be limited to circumstances in which “defending against dangers or preventing crimes would otherwise be hopeless or substantially more difficult.”¹⁶⁵ With limited exceptions, the special investigative measures had to be ordered by the Head of Unit (*Abteilungsleitung*) of the relevant BKA division.¹⁶⁶

In the first step of its analysis the Constitutional Court concluded that the special investigative measures anticipated by section 20g, despite the fact that they involved public conduct taking place outside the home, constituted a serious intrusion on the constitutionally-protected right to informational self-determination.¹⁶⁷ In its “classical *avant-garde*” decision in the *Census Act Case* in 1983 the Constitutional Court drew this right out of the Basic Law’s protection of the free development of personality,¹⁶⁸ insisting

¹⁶⁰ *Id.* (referring to Bundespolizeigesetz [BPolG] [Federal Police Law], Oct. 19, 1994, BGBl I at 2978, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, § 18) (Russell A. Miller trans.).

¹⁶¹ *Id.* (referring to Bundespolizeigesetz [BPolG] [Federal Police Law], Oct. 19, 1994, BGBl I at 2978, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, § 20(1)) (Russell A. Miller trans.).

¹⁶² *Id.* (referring to Bundespolizeigesetz [BPolG] [Federal Police Law], Oct. 19, 1994, BGBl I at 2978, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, § 20(1)[1]) (Russell A. Miller trans.).

¹⁶³ *Id.* § 20g(1)[2] (referring to *id.* § 4a(1)[2], which, in turn, refers to STRAFGESETZBUCH [STGB] [PENAL CODE], last amended by Gesetz [G], May 30, 2016, BGBl I at 1254) (Russell A. Miller trans.).

¹⁶⁴ *Id.* § 20g(1)[3] (Russell A. Miller trans.).

¹⁶⁵ *Id.* § 20g(1) (Russell A. Miller trans.).

¹⁶⁶ *Id.* § 20g(3).

¹⁶⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (286), 2017. The Constitutional Court concluded that other basic rights would not be infringed by the special investigative measures, including the right to telecommunications privacy (Basic Law Article 10), the inviolability of the home (Basic Law Article 13), and the right to the confidentiality and integrity of information-technology systems (Basic Law Articles 2(1) and 1(1)). *Id.*

¹⁶⁸ Antoinette Rouvroy & Yves Poullet, *The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy*, in REINVENTING DATA PROTECTION? 45 (Serge Gutwirth et al. eds., 2009). Rouvroy and Poullet used the oxymoron “classical *avant-garde*.” *Id.*; see also Paul Schwartz, *The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination*,

that the individual have decisional authority over when and within what limits facts about his or her personal life shall be disclosed.¹⁶⁹ In the *Census Act Case*, the Constitutional Court was particularly worried about the present and prospective conditions of automatic data-processing that allow for the easy storage of, access to, and combination of data, all of which facilitates the production of “partial or virtually complete personality profiles.”¹⁷⁰ These “mosaic” concerns about privacy also surfaced in this part of the Constitutional Court’s assessment of section 20g. The Constitutional Court explained that the special investigative measures would prove to be especially intrusive and intense if some or all of the measures—aided by continuing advances in technology—were bundled together in an operation against a single target, allowing the BKA to monitor and record nearly all communications and movements.¹⁷¹

Despite the severe intrusion on the right to informational self-determination that might result, in the second step of its analysis the Constitutional Court found that the special investigative measures were justified by the general avoidance of harm to legal interests, the pursuit of serious criminal activity, and the public’s interest in an effective counter-terrorism regime.¹⁷² The Constitutional Court explained that the new law’s focus on terrorist threats and related crimes was properly aligned with European Union (“E.U.”) and international law, not to mention the 2006 amendment of the Basic Law.¹⁷³ Terrorism, the Constitutional Court explained, aims to undermine the foundations of the constitutional order and society itself.¹⁷⁴ The use of effective investigative measures to defend against these threats, the Constitutional Court concluded, “constitutes a legitimate aim and is of great significance for a democratic and free basic order.”¹⁷⁵

37 AM. J. COMP. L. 675, 686–87 (1989) (discussing the “basis of a right of personality”) (internal quotation marks omitted).

¹⁶⁹ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, 65 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 1987.

¹⁷⁰ *Id.* (Russell A. Miller trans.).

¹⁷¹ 141 BVERFGE 220 (287).

¹⁷² *Id.*

¹⁷³ *Id.* at (266) (citing Council Framework Decision 2002/475/JHA of June 13 2002 on Combating Terrorism, 2002 O.J. (L 164) 3 (EC) (no longer in force)); Measures to Eliminate Int’l Terrorism: Report of the Working Grp., U.N. Doc. A/C.6/65/L.10 (2010)).

¹⁷⁴ 141 BVERFGE 220 (266).

¹⁷⁵ *Id.* (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 24, 2013, 133 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 277, 2014; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 27, 2008, 120 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 274, 2009; and Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 4, 2006, 115 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 320, 2007).

It was in the third step of the Constitutional Court's analysis that section 20g encountered constitutional difficulties. The Constitutional Court found that the regime providing for the special investigative measures only partially satisfied constitutional specificity and proportionality requirements.¹⁷⁶ In particular, the Constitutional Court objected to subtle components of sections 20g(1)[1]–[2] and 20g(3).

The Constitutional Court was generally satisfied with the circumstantial limitations built into section 20g(1)[1], which narrowed the application of the special investigative measures to situations involving the suspicion that specifically defined crimes might occur or that specifically defined threats exist.¹⁷⁷ But, in the latter case, the Constitutional Court concluded it was constitutionally inadequate for section 20g(1)[1] to refer to threats to “property of substantial value.”¹⁷⁸ It is not assured, the Constitutional Court explained, that a typical interpretation of the statute would lead to the conclusion that “property of substantial value,” in the context of counterterrorism measures, must refer to valuable, publicly important infrastructure and not just any tangible asset with value.¹⁷⁹ This probing level of judicial “supervision” is typical of the Constitutional Court's decision in the *BKA-Act Case* and its role in German law and politics more generally.¹⁸⁰ In this instance, for example, the Constitutional Court criticized the potential breadth of the legislation. But it is also dictated a narrow and particular possible interpretation of the provision that the Constitutional Court seemed to believe would have eluded the ordinary courts in their application and review of the statute. From its seat in Karlsruhe, the Constitutional Court gave exact instructions on narrow points of construction to both the legislature and the ordinary courts.

Section 20g(1)[2] permitted the use of special investigative measures concerning targets about whom facts justified the assumption that he or she would commit a terrorist crime.¹⁸¹ The Constitutional Court was not satisfied that this language adequately limited the special investigative measures

¹⁷⁶ See *id.* at (287).

¹⁷⁷ See *id.* “The provision limits the surveillance measures to the protection of sufficiently weighty legal interests.” *Id.* The Constitutional Court was particularly pleased, for example, that the law limited the application of section 20g to suspicions oriented to the crimes identified by section 129a StGB and to concrete threats arising in discrete cases (as required by § 20a(2) of the BKA-Act). *Id.* at (288).

¹⁷⁸ *Id.* at (287).

¹⁷⁹ *Id.* (citing 133 BVERFG 277).

¹⁸⁰ See KOMMERS & MILLER, *supra* note 27, at 33–41 (describing the scope of the Constitutional Court's judicial review authority).

¹⁸¹ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl. I at 3083, § 20g(1)[2].

to cases involving a greater degree of suspicion than a mere professional hunch (*Erfahrungssätze*).¹⁸² The Constitutional Court insisted that the measures be applied only on the basis of specific facts pointing towards a concrete and imminent act.¹⁸³ The Constitutional Court demanded that there be evidence of individual behavior justifying the view that there is a concrete likelihood that in the immediate future a terrorist crime will be committed.¹⁸⁴ The Constitutional Court concluded that section 20g(1)[2], which only anticipates the possible commission of a terror crime, did not require this more narrow frame.¹⁸⁵ Finally, the Constitutional Court found that the procedural requirements of section 20g(3), generally applicable to the implementation of the special investigative measures, were disproportionate and unconstitutional.¹⁸⁶

First, the regime's provision for independent, external approval was inadequate. In most cases the law permitted senior BKA authorities to order special investigative measures without any involvement from the judiciary or other independent authorities.¹⁸⁷ Only an original order authorizing the use of undercover agents (as envisioned by section 20g(2)[5]) required an external, independent order.¹⁸⁸ Otherwise, external approval was only required for an extension—beyond the originally authorized timeframe—of the special investigative measures.¹⁸⁹ Pursuing an extremely granular understanding of privacy (through its proportionality review), the Constitu-

¹⁸² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (290–91), 2017.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at (293–94).

¹⁸⁷ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20g(3).

¹⁸⁸ *Id.*

¹⁸⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (294), 2017. The Constitutional Court cited the U.S. Supreme Court when acknowledging the generally permissive nature of this regime. *Id.* (citing *United States v. Jones*, 565 U.S. 400 (2012)). In *Jones*, the U.S. Supreme Court ruled that law enforcement's use of a GPS device to track a suspect's car around-the-clock for four weeks was a violation of the 4th and 14th Amendments to the Constitution because this initiative amounted to an unreasonable seizure and because no court had issued a warrant authorizing it. *See* 565 U.S. at 430–31. This is different from the result in a similar case considered by the German Constitutional Court. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 12, 2005, 112 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 304, 2006; *see also* Russell A. Miller, *A Rose by Any Other Name? The Comparative Law of the NSA-Affair*, in *PRIVACY AND POWER: A TRANSATLANTIC DIALOGUE IN THE SHADOW OF THE NSA-AFFAIR*, *supra* note 14, at 87–90 (noting that the German court found the extensive use of GPS surveillance to be constitutional so long as it remains proportional).

tional Court objected only to the fact that this system did not also require original independent approval (instead of mere agency approval) for long-term personal observation (including photographic measures or the use of technology to facilitate observation), when non-public conversations are involved, or when informants are used.¹⁹⁰ The Constitutional Court explained that in these cases some type of independent and external authorization, beyond mere agency approval, was necessary at the outset and not only later, when an extension of the investigative measures is desired.¹⁹¹

I have used the terms “external” or “independent” to describe the authorities the Constitutional Court would interpose on the original decision to authorize special investigative measures in this marginally expanded list of circumstances because the Constitutional Court itself carefully avoids calling for a judicial role in these decisions. Instead, the Constitutional Court refers to “an independent body, such as a court.”¹⁹² With this cautious construction the Constitutional Court seems to want to avoid the suggestion that the judiciary plays a constitutionally mandated role in the protection of privacy against the state’s security-motivated intrusions. This might be necessary because Germany’s Foreign Intelligence Service (*Bundesnachrichtendienst*) also does not have to be bothered with judicial approval when pursuing strategic intelligence-gathering involving German targets. Instead, the orders for those secret operations are issued by the relevant ministries and are reviewed, in a highly-dubious process, by the G10 Commission, a *sui generis* entity that is neither a parliamentary committee nor a judicial organ.¹⁹³

Second, in a theme that is repeated throughout the decision, the Constitutional Court found that the general procedures did not provide explicit rules for the protection of the constitutionally sacrosanct “core-area for the private arrangement of one’s life.” It did not matter to the Constitutional Court that all the activities subject to the special investigative measures envisioned by section 20g would take place outside the home and in public settings. Especially in their intensity, the Constitutional Court reasoned, the

¹⁹⁰ 141 BVERFG 220 (294).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Gesetz zu Artikel 10 Grundgesetz [G-10] [Act Restricting Letters, Post, and Telecommunications Privacy], Aug. 13, 1968, BUNDESGESETZBLATT [BGBl] I at 949, last amended by Gesetz [G], Dec. 23, 2016, BGBl I at 3346, § 1, https://www.gesetze-im-internet.de/g10_2001/G_10.pdf [<https://perma.cc/LG6B-8DE6>]; see Bundesnachrichtendienstgesetz [BNDG] [Federal Intelligence Service Act], Dec. 20, 1990, BUNDESGESETZBLATT [BGBl] I at 2954, 2979, last amended by Gesetz [G], Dec. 23, 2016, BGBl I at 3346, <https://www.gesetze-im-internet.de/bndg/BNDG.pdf> [<https://perma.cc/FH7D-LJ8G>]; see also Russell A. Miller, *Intelligence Oversight—Made in Germany*, in GLOBAL INTELLIGENCE OVERSIGHT 257–88 (Zachary K. Goldman & Samuel J. Rascoff eds., 2016) (analyzing Germany’s privacy laws and the role of the G 10 Commission therein) [hereinafter Miller: *Intelligence Oversight*].

special investigative measures involved intrusions that cut perilously close to individuals' "core area of private life," which also exists in one's car, at a restaurant, or during a secluded walk.¹⁹⁴ For this reason the Constitutional Court ordered the legislature to provide clear rules ensuring the inviolability of this central privacy interest during the collection, analysis, and use of information acquired as a result of the special investigative measures.¹⁹⁵ The law, for example, must preclude the collection of information from the "core area of private life" to the degree practicable, especially with respect to information acquired from conversations conducted between highly-trusted intimates.¹⁹⁶ These limits on collection, the Constitutional Court insisted, also must include rules that require the BKA to suspend immediately all investigative measures as soon as it becomes evident that the "core area of private life" is concerned.¹⁹⁷ The Constitutional Court also demanded that, in order to protect the "core area of private life," an independent authority pre-screen all information prior to it being analyzed and used by law enforcement.¹⁹⁸ Finally, the Constitutional Court insisted that the law require the immediate deletion of highly-personal information—a procedure that must be fully documented to permit later judicial review of these actions.¹⁹⁹

2. Special Technical Investigative Measures Inside or Outside the Home (section 20h)

The investigative powers granted under section 20h of the amended BKA-Act stirred intense unease because they anticipated intrusions into the private sanctum of the home, where the BKA would be allowed to conduct audio and video surveillance.²⁰⁰ Section 20h limited these invasive measures to many of the same fundamental boundaries that served to narrow the scope of the special investigative measures identified in section 20g.²⁰¹ First, this surveillance was to be confined to circumstances involv-

¹⁹⁴ 141 BVERFG 220 (295).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at (279).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at (279–80).

¹⁹⁹ *Id.*

²⁰⁰ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20h(1); *see, e.g.*, Christian Rath, *Spähangriff im BKA-Gesetz: Kameras in Wohn- und Schlafzimmer*, TAZ.DE (Apr. 18, 2008), <http://www.taz.de/15183391/> [<https://perma.cc/H893-BYJC>].

²⁰¹ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20g, 20h.

ing “a threat to the foundation or survival of the state; or to the life, limbs, or freedom of an individual; or to property having meaningful value and the preservation of which is in the public interest.”²⁰² Second, the BKA’s resort to this surveillance was to be limited to circumstances in which “defending against dangers or preventing crimes would otherwise be hopeless or substantially more difficult.”²⁰³ Third, the surveillance was limited to targets suspected of very specific crimes or threats, including “those who bring about a danger,”²⁰⁴ “those who own dangerous animals or things,”²⁰⁵ to persons for whom facts indicate that he or she will commit the crime of organizing for the purpose of engaging in terrorism,²⁰⁶ or the target’s contacts or companions.²⁰⁷ Yet, in one respect, the general limitations applied to this intrusive form of surveillance were narrower than those applied to the special investigative measures provided by section 20g. Whereas the latter also could be implemented in circumstances involving a “present significant risk,”²⁰⁸ this open-ended possibility is not a basis for the surveillance in the home that was anticipated by section 20h.²⁰⁹ The narrowed field of application of section 20h clearly reflected the legislature’s concern for the significant privacy interests involved in this context.

The statute also provided other, more specific limitations, both as to scope and with respect to the necessary procedures. For example, it limited the scope of surveillance to the residence of the targeted suspect, except when specific facts provide the assurance that the suspect will stay in another residence and when limiting surveillance exclusively to the suspect’s residence will not lead to a defense against the threat.²¹⁰ As a matter of procedure, section 20h required judicial authorization—on an application from the BKA’s president—for these intrusive measures, except for a three-day window during which the BKA itself could authorize the surveillance in an

²⁰² *Id.* § 20h(1) (Russell A. Miller trans.).

²⁰³ *Id.* (Russell A. Miller trans.).

²⁰⁴ *Id.* § 20h(1)[1] (referring to Bundespolizeigesetz [BPolG] [Federal Police Law], Oct. 19, 1994, BGBl I at 2978, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, § 17) (Russell A. Miller trans.).

²⁰⁵ *Id.*

²⁰⁶ *Id.* § 20g(1)[2] (referring to *id.* § 4a(1)[2], which in turn refers to STRAFGESETZBUCH [StGB] [PENAL CODE], last amended by Gesetz [G], May 30, 2016, BGBl I at 1254).

²⁰⁷ *Id.* § 20h(1)[1].

²⁰⁸ *Id.* § 20g(1)[1] (referring to Bundespolizeigesetz [BPolG] [Federal Police Law], Oct. 19, 1994, BGBl I at 2978, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, § 20(1)[1]) (Russell A. Miller trans.).

²⁰⁹ *Id.* § 20h(1)[1]{a} (referring only to Bundespolizeigesetz [BPolG] [Federal Police Law], Oct. 19, 1994, BGBl I at 2978, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, §§ 17–18).

²¹⁰ *Id.* § 20h(2).

emergency.²¹¹ These were higher standards than those applying to the special investigative measures under section 20g, that, prior to the Constitutional Court's decision in the case, could be authorized by a mere BKA Head of Unit and, even after its decision in the case, were to be subjected to the review of an "independent body," but not necessarily a court.²¹² The statute required that the order authorizing this exceptional form of surveillance include a number of relevant details in writing.²¹³ The order would also limit the surveillance to one month, with the chance of an additional one-month extension so long as the necessary preconditions exist.²¹⁴ Whether in the first month or in the extended period, the statute required the cessation of these surveillance measures at any point if the necessary preconditions ceased to exist.²¹⁵

Finally, the statute provided specific limitations with a view to protecting the highly-sensitive "core area of private life." To this end, audio and video surveillance in the home was prohibited unless factual indications—especially concerning the relationship between the targeted person and the places subject to surveillance—provided assurances that the "core area of private life" would not be affected by these measures.²¹⁶ Even with these assurances, the statute required that surveillance immediately end if information from the "core area of private life" were to become implicated.²¹⁷ In the case of doubts about whether the "core area of private life" could be adequately isolated and left undisturbed, the statute permitted only automatic recording, the subsequent use and deletion of which must be decided by a court.²¹⁸ In any case, the statute prohibited the analysis of any information drawn from the "core area of private life."²¹⁹ The statute required that all information related to surveillance that might intrude on the "core area of private life" be documented for the exclusive purpose of review by data-

²¹¹ *Id.* § 20h(3).

²¹² *Id.* § 20g(3); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (294), 2017.

²¹³ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20h(4) (requiring target's name and address; clear identification of residence and rooms to be subject to surveillance; the nature, scope and duration of the surveillance; and the basis or justification for the surveillance).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* § 20h(5).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

protection authorities.²²⁰ The statute provided that this protocol may be retained only until it would no longer be of use to the data-protection authorities, or, at the latest, for one year.²²¹

The Constitutional Court objected to a number of elements in this nuanced statutory framework. In the first step of its analysis, the Constitutional Court concluded that the surveillance anticipated by section 20h of the amended BKA-Act constituted an especially weighty intrusion on the right to the inviolability of the home, as guaranteed by Basic Law Article 13(1).²²² This classical negative right²²³ is meant to protect the individual and their personal development by ensuring the protection of a living space where a person can retreat for privacy.²²⁴ The importance of the right can be deduced from two elements. First, Article 13 extends its protection to all people, and not just Germans.²²⁵ Second, Article 13 is not included among the basic rights susceptible to forfeiture if they are “abused.”²²⁶ Despite all of this, and despite the absolute terms in which the right is expressed,²²⁷ Article 13 is one of the least successfully-invoked basic rights.²²⁸ This must especially be the case after the major revision of the right undertaken in 1998.²²⁹ In five new, very detailed paragraphs, Article 13 now anticipates intrusions on residential privacy in clearly defined circumstances, including acoustical surveillance of the kind codified in section 20h of the amended BKA-Act.²³⁰ Still, the Constitutional Court found that the surveillance permitted by section 20h was particularly grave, noting that the values and interests promoted by Article 13 have a close nexus with human dignity.²³¹

²²⁰ *Id.*

²²¹ *Id.*

²²² GRUNDGESETZ [GG] [BASIC LAW] art. 13(1).

²²³ For a discussion of “negative” versus “positive” rights, see generally Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001).

²²⁴ See generally Oliver Lepsius, *Die Unverletzlichkeit der Wohnung bei Gefahr im Verzug*, 24 JURISTISCHE AUSBILDUNG 259 (2002) (analyzing constitutional protections of the privacy of one’s home, in light of a 2001 Constitutional Court decision on surveillance and data collection).

²²⁵ Compare GRUNDGESETZ [GG] [BASIC LAW] art. 13(1) (“The home is inviolable.”), with GRUNDGESETZ [GG] [BASIC LAW] art. 8 (“All *Germans* shall have the right to assemble peacefully and unarmed without prior notification or permission.”) (emphasis added).

²²⁶ Lepsius, *supra* note 224, at 260 (Russell A. Miller trans.); see also GRUNDGESETZ [GG] [BASIC LAW] art. 18 (listing the basic rights that can be forfeited).

²²⁷ GRUNDGESETZ [GG] [BASIC LAW] art. 13(1) (“The home is inviolable.”).

²²⁸ Josef Ruthig, *Die Unverletzlichkeit der Wohnung (Art. 13 GG n.F.)*, 38 JURISTISCHE SCHULUNG 506, 506 (1998).

²²⁹ See Gesetz zur Änderung des Grundgesetzes (Artikel 13) [Law Amending Basic Law], Mar. 26, 1998, BGBl I at 610.

²³⁰ GRUNDGESETZ [GG] [BASIC LAW] art. 13(2)–(6); Lepsius, *supra* note 224, at 260.

²³¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (295–96), 2017.

In the second step of its analysis, the Constitutional Court summarily concluded that the intrusive surveillance measures authorized by section 20h were justified by the general avoidance of harm to legal interests, the pursuit of serious criminal activity, and the public's interest in an effective counter-terrorism regime.²³² As it had done at this point in its analysis of section 20g, the Constitutional Court merely pointed to an abstract treatment of the legitimacy of the BKA-Act's objectives that appeared in the decision's introductory section.²³³ In this context, however, the Constitutional Court viewed Basic Law Article 13(4) as profound confirmation that these security objectives endowed the surveillance measures with constitutional legitimacy.²³⁴

The surveillance measures of section 20h nonetheless encountered constitutional difficulties in the third step of the Constitutional Court's analysis. The Constitutional Court found that the framework for specifying a target for these intrusive surveillance measures was disproportionate, and therefore unconstitutional.²³⁵ The Constitutional Court further ruled that section 20h did not provide adequate protection for the "core area of private life."²³⁶

Regarding the framework for specifying the target, the Constitutional Court explained that it was unobjectionable that the BKA-Act permitted the implementation of these surveillance measures in the homes of third parties.²³⁷ This would be tolerable, the Constitutional Court explained, if the targeted suspect will be at the third-party residence and if the same information could not be acquired by limiting the surveillance to the target's home.²³⁸ Yet the Constitutional Court recalled that, in the *Acoustical Surveillance Case*, it had imposed a number of limitations on surveillance in third-party residences to ensure the practice's proportionality: there must be a concrete suspicion that the targeted person will be in the third-party residence at the time the surveillance takes place; a professional hunch would not be enough to justify surveillance of a third-party's home; it must be very likely that surveillance of a third-party's residence will produce information that is relevant to the investigation; and there must be evidence suggesting

²³² *See id.*

²³³ *See id.*

²³⁴ *See id.* (holding that authorized surveillance of private residences was an "interference[] with fundamental rights," allowing the government "to penetrate . . . a person's private refuge," but it "does not, as implied by [Basic Law Article 13 sections 3 and 4], rule out surveillance measures") (Russell A. Miller trans.).

²³⁵ *Id.* at (297).

²³⁶ *Id.* at (299).

²³⁷ *Id.* at (297–98).

²³⁸ *Id.*

that the targeted person will engage in conversations relevant to the investigation.²³⁹ These safeguards were missing from section 20h.²⁴⁰ The Constitutional Court also concluded that surveillance in third-party residences in order to monitor a suspect's "contacts or accompanying persons," as permitted by section 20h(1)[1]{c}, was altogether too attenuated to be constitutionally proportional.²⁴¹

With respect to the "core area of private life," the Constitutional Court found that the deeply intrusive character of the surveillance measures authorized by section 20h could have an impact on the human dignity elements of the right to privacy in the home that is secured by Basic Law Article 13.²⁴² For this reason, the Constitutional Court insisted that the strictest safeguards must be applied for the protection of the "core area of private life."²⁴³ The Constitutional Court ruled that section 20h(5) failed to meet this high standard.²⁴⁴ Shortcomings were evident in the rules governing the *collection* of information via surveillance in the home.²⁴⁵ Shortcomings were also evident in the rules governing the *analysis and use* of information collected via surveillance in the home.²⁴⁶

The Constitutional Court found, for example, that section 20h(5) should have clearly established a presumption against surveillance involving conversations between especially trusted confidants or intimates (*Personen des höchstpersönlichen Vertrauens*) that take place in the home.²⁴⁷ The Constitutional Court explained that this circle of people includes marital or life partners, siblings and direct relatives—especially when they are living in the same home—some professional service providers (such as

²³⁹ 141 BVERFG 220 (297–98, 300).

²⁴⁰ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20h.

²⁴¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFG] 220 (298), 2017. The Constitutional Court explained that the surveillance of third-party residences, as a very deep intrusion into constitutionally protected privacy, must be specifically aimed at the person suspected of criminal activity or of posing a serious threat to the community. *Id.* at (298–99). The Constitutional Court conceded, however, that this narrow scope would not exclude the coincidental surveillance of third parties who happen to be in the target's home. *Id.* at (299).

²⁴² *Id.* at (299–300).

²⁴³ *Id.*

²⁴⁴ *Id.* at (299).

²⁴⁵ *Id.* at (300).

²⁴⁶ *Id.* at (301).

²⁴⁷ *Id.* at (300).

criminal defense lawyers or doctors), and very close friends.²⁴⁸ The privacy of conversations with these people in one's home must be preserved, the Constitutional Court noted, as a way of satisfying the deeply human need to express one's dreams, sensitivities, feelings, and thoughts.²⁴⁹ The presumption against surveillance of these conversations, the Constitutional Court ruled, can be overcome only if concrete evidence suggests that, with respect to a discrete conversation, criminal matters will be discussed.²⁵⁰ In these exceptional circumstances surveillance should proceed only for short periods of time and only with the use of automatic recording technology.²⁵¹

The Constitutional Court was mollified, however, by the fact that section 20h(5) required judicial approval for the implementation of these surveillance measures. The judiciary's role also properly extended to decisions concerning the analysis and use of automatically recorded surveillance content, a practice the statute required if there was any uncertainty regarding possible exposure of the "core area of private life."²⁵² But the Constitutional Court found that this arrangement improperly limited the role of independent review.²⁵³ It was not enough, the Constitutional Court explained, that independent approval is necessary for the initial authorization of surveillance in the home, on the one hand, and with respect to the analysis and use of this surveillance when the information is gathered through automatic means, on the other hand.²⁵⁴ The supervision of an independent authority is also required for the analysis and use of all information drawn from home surveillance that risks intrusions on the "core area of private life."²⁵⁵

It was an infinitely small gap, seemingly justified by the legislature's belief that it would be adequate to have judicial involvement in deciding whether to proceed with surveillance in the first instance. Instead, the Constitutional Court insisted that independent review was also necessary for the protection of core-area privacy concerning information that might slip through that initial screening and become relevant at the time the agency

²⁴⁸ *Id.* at (266–77) (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 3, 2004, 109 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 279 (321), 2004).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at (277, 300).

²⁵¹ *Id.* at (300–01).

²⁵² Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20h(5).

²⁵³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (302), 2017.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

sought to analyze or use the information.²⁵⁶ It is interesting to note that, throughout this part of the decision, the Constitutional Court took care to use the phrases “*unabhängige Sichtung*” (independent examination) and “*unabhängige Kontrolle*” (independent oversight) despite the fact that section 20h(5) refers explicitly to a “*Gericht*” (court).²⁵⁷ It seems possible that the Constitutional Court could accept a role here for a non-judicial entity, such as the G10 Commission (which controls the Federal Intelligence Service’s intelligence-gathering operations),²⁵⁸ or the Office of the Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*).²⁵⁹

3. Data-Mining (section 20j) and Online Searches of Information-Technology Systems (section 20k)

A remarkable element of the amended BKA-Act was the fact that the legislature granted investigative powers to the BKA that had recently been the subject of disapproving or cautionary decisions from the Constitutional Court. This dynamic provides some insight into the way the Constitutional Court’s detailed and far-reaching privacy and security jurisprudence is received by policy-makers. It also provides a benchmark for assessing the Constitutional Court’s progressive dynamism in this field: how far ahead of the majoritarian policy-making institutions is the Constitutional Court able to stay? The *BKA-Act Case* sent mixed signals in these respects. For example, the Constitutional Court found that the data-mining provisions of section 20j satisfied the strict proportionality standard the Constitutional Court

²⁵⁶ *Id.*

²⁵⁷ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20h(5).

²⁵⁸ See, e.g., Miller: *Intelligence Oversight*, *supra* note 193, at 264–75 (discussing the structure and function of the G10 Commission).

²⁵⁹ See Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], Jan. 14, 2003, BUNDESGESETZBLATT [BGBl] I at 66, last amended by Gesetz [G], Feb. 25, 2015, BGBl I at 162, §§ 22–26, https://www.gesetze-im-internet.de/bdsg_1990/BDSG.pdf [<https://perma.cc/SJH8-BW6N>]. The Federal Data Protection Commissioner is charged with monitoring public entities’ compliance with the Federal Data Protection Act and “other data protection provisions.” See *id.* In conjunction with changes made to the BKA-Act after the Constitutional Court’s decision, § 24 of the Federal Data Protection Act would be an adequate statutory basis for a role for the Commissioner in supervising the investigative operations of the BKA. *Id.* § 24(1). The Federal Data Protection Commissioner already plays an oversight role in the security sector, with six staff members in “Department V” monitoring data protection obligations in the police and intelligence services. Stefan Niederer, Office of the Fed. Comm’r for Data Prot. & Freedom of Info., Presentation at the U.N. Interregional Crime & Justice Research Inst. Conference: The German Federal Data Protection Authority 4 (Sept. 26, 2014), <http://soziologie.guagnin.de/profiling-project.eu/wp-content/uploads/2014/10/The-German-Federal-Data-Protection-Authority.pdf> [<https://perma.cc/Q74D-EUQ4>].

applied in its 2006 *Data-Mining Case*.²⁶⁰ But, the Constitutional Court found that elements of the online computer surveillance permitted under section 20k of the BKA-Act were unconstitutional, despite the legislature's efforts to adapt the regime to the standards the Constitutional Court had announced in the *Online Search Case* in 2008.²⁶¹ The *Online Search Case* was a ground-breaking decision issued by the Constitutional Court while the government was preparing and negotiating the enactment of the amended BKA-Act.²⁶² I focus here on the Constitutional Court's consideration of the BKA-Act's provisions authorizing the BKA to conduct online searches of information technology systems. Once again, the outcome turned on concerns about the protection owed to the "core area of private life."

The German state's desire to gain access to suspects' computer systems has produced a "never-ending, embarrassing story."²⁶³ Germans call the malware needed for such intrusions "*Staatstrojaner*" (a state Trojan horse).²⁶⁴ The Constitutional Court scrutinized the practice of using *Staatstrojaner* (in state, as opposed to federal, law enforcement actions) in its 2008 *Online Search Case*, in which the Constitutional Court approved their use but only under the demanding privacy safeguards required by a newly-announced constitutional protection aimed at preserving the confidentiality and integrity of information-technology systems.²⁶⁵ The years following the Constitutional Court's decision have seen a mess of technological and legal stumbles. In technological terms, the Federal government's attempts to custom develop the malware have produced systems that were either thought to be able to do too much, or systems that were thought to be able to do too lit-

²⁶⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (303), 2017; see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 4, 2006, 115 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 320, 2007.

²⁶¹ See generally Florian Albrecht & Sebastian Dienst, *Der verdeckte hoheitliche Zugriff auf informationstechnische Systeme—Rechtsfragen von Online-Durchsuchung und Quellen—TKÜ*, 26/5 JURPC WEB-DOK ¶ 9 (2012), <http://www.jurpc.de/jurpc/show?id=20120005> [<https://perma.cc/YB7Q-FGB2>] (arguing that the amended BKA-Act's online search provisions were closely aligned with the Constitutional Court's demands in the *Online Search Case*).

²⁶² See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 27, 2008, 120 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 274, 2009.

²⁶³ Frank Rieger, *Der Staatstrojaner Lebt*, FRANKFURTER ALLGEMEINE (Aug. 6, 2012, 2:08 PM), <http://www.faz.net/aktuell/feuilleton/debatten/staatstrojaner/rechtsbruch-wird-tradition-der-staatstrojaner-lebt-11844056.html> [<https://perma.cc/2ZJH-U98W>] (Russell A. Miller trans.).

²⁶⁴ *Id.*; Wiebke Abel, *Agents, Trojans and Tags: The Next Generation of Investigators*, 23 INT'L REV. L. COMPUTERS & TECH. 99, 100 (2009). Others refer to these systems as "remote forensic software," or RFS. *Id.*

²⁶⁵ 120 BVERFGE 274.

tle.²⁶⁶ According to some reports, the latter problem surmounted the former. It seems the BKA's malware could gain access only to online communications activities conducted via Skype and was blocked altogether by systems running Apple's Mac or the Linux operating systems.²⁶⁷

Despite the Government's declared efforts to remain faithful to the parameters outlined in the Constitutional Court's 2008 *Online Search Case*,²⁶⁸ the provisions of section 20k also stirred widespread doubts about their constitutionality. The Chaos Computer Club²⁶⁹ lodged one of the sharpest rebukes. After hacking into and then analyzing the code of a preliminary version of the software, the Club called it a "program[m]ed constitutional violation."²⁷⁰ Others expressed misgivings about the adequacy of the law's protection of the "core area of private life,"²⁷¹ or worried that the law was not properly limited to a narrow range of severe and concrete threats.²⁷²

Yet section 20k was anything but a blank check authorizing unrestricted or thinly justified intrusions into information-technology systems. Instead, the power to encroach on and extract personally-revealing information from this sphere was encased in layers of limitations relating to the following: the substantive circumstances in which such measures could be used, the implementation of strict technical conditions, the fulfillment of

²⁶⁶ See *Spähsoftware angeblich kaum brauchbar*, SPIEGEL ONLINE (Apr. 10, 2016, 10:21 PM), <http://www.spiegel.de/netzwelt/netzpolitik/bundestrojaner-spaehsoftware-angeblich-kaum-brauchbar-a-1086415.html> [<https://perma.cc/36AS-PP2M>] (questioning the usefulness of surveillance software).

²⁶⁷ *Id.*; see Hauke Gierow, *Staatstrojaner ist nicht zu gebrauchen*, ZEIT ONLINE (Apr. 10, 2016, 2:04 PM), <http://pdf.zeit.de/digital/datenschutz/2016-04/ueberwachung-bundestrojaner-staatstrojaner-ab hoeren-smartphone.pdf> [<https://perma.cc/SZ5C-YC6U>] (criticizing the German state's Trojan software as useless).

²⁶⁸ Stefan Schulz, *Der Computer steht offen wie ein Scheunentor*, FRANKFURTER ALLGEMEINE (Oct. 26, 2011, 4:39 PM), <http://www.faz.net/aktuell/feuilleton/debatten/staatstrojaner/staatstrojaner-der-computer-steht-offen-wie-ein-scheunentor-11505829.html> [<https://perma.cc/DS4F-A9UW>]. A representative of the Interior Ministry insisted that "we can exclude the possibility that we have implemented a Trojan that does not comply with the legal requirements." *Id.* (Russell A. Miller trans.).

²⁶⁹ CHAOS COMPUTER CLUB, <https://www.ccc.de/en/> (last visited Nov. 3, 2017) (a hacktivist group that asserts it is "the most influential hacker collective in Europe [that] organize[s] campaigns, events, lobbying[,] and publications" among other activities).

²⁷⁰ Schulz, *supra* note 268 (Russell A. Miller trans.).

²⁷¹ See Gerhart Baum & Peter Schantz, *Die Novelle des BKA-Gesetzes: Ein Rechtspolitische und verfassungsrechtliche Kritik*, 41 ZEITSCHRIFT FÜR RECHTSPOLITIK 137, 137-38 (2008). It must be noted, however, that Baum's commentary does not aspire to the same dogmatic and scientific neutrality that animates the work of other German legal scholars. He is the former Federal Interior Minister and privacy advocate who had advanced most of the major constitutional challenges to German security legislation in the last decades. He would play a similar role in the *BKA-Act Case*.

²⁷² See Albrecht & Dienst, *supra* note 261, ¶ 11.

extensive and precise procedural conditions, and the observation of special rules for the protection of the “core area of private life.”

For example, as a substantive matter, section 20k was limited to instances where specific facts justified the assumption that one of two kinds of dangers exist. The first danger involved threats to “an individual’s life, limbs, or freedom.”²⁷³ The second danger involved threats to “public goods, which, if imperiled, implicate either the foundation or survival of the state or the foundations of human existence.”²⁷⁴ The only exception to the narrow substantive scope of section 20k involved those circumstances in which, despite doubts about the likelihood of harm occurring in the near future, specific facts in a discrete case suggest that an identified individual poses a threat to “an individual’s life, limbs, or freedom.”²⁷⁵ Additional substantive limits applied in any case. Online searches, for example, could be undertaken only when necessary to advance the fight against international terrorism and only against “those who bring about a danger” or “those who own dangerous animals or things.”²⁷⁶ As was typical throughout the BKA-Act amendments, the online search measures were permissible only if achieving these functional aims of the surveillance would otherwise be hopeless or substantially more difficult.²⁷⁷

Alongside the substantive parameters for an online search section 20k also imposed technological limitations. For example, the information-technology systems subject to the surveillance could be changed only in ways that were vital to the collection of the target data,²⁷⁸ and any such changes were to be automatically restored.²⁷⁹ Section 20k also imposed a number of procedural requirements on the BKA’s use of its new authority to conduct online searches. For example, the measures could be implemented only on the basis of an order issued by a court in response to an application from the BKA President.²⁸⁰ The order was to be in writing, with the relevant details, including the essential justifications for conducting the surveil-

²⁷³ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20k(1)[1] (Russell A. Miller trans.).

²⁷⁴ *Id.* § 20k(1)[2] (Russell A. Miller trans.).

²⁷⁵ *Id.* § 20k(1) (Russell A. Miller trans.).

²⁷⁶ *Id.* § 20k(4) (referring to Bundespolizeigesetz [BPolG] [Federal Police Law], Oct. 19, 1994, BGBl I at 2978, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, §§ 17–18) (Russell A. Miller trans.).

²⁷⁷ *Id.* § 20k(1).

²⁷⁸ *Id.* § 20k(2)[1].

²⁷⁹ *Id.* § 20k(2)[2].

²⁸⁰ *Id.* § 20k(5).

lance.²⁸¹ The order also would limit the search to no more than three months, with the possibility of one three-month extension.

Finally, as a fundamental procedural matter, section 20k(3) imposed detailed documentary requirements on the BKA in connection with the exercise of this new investigative power. With respect to each online search undertaken by the BKA, the agency was obliged to register the following: the form and nature of the technology used to conduct the search; information about the target information-technology system and any changes made to that system in the course of the search; the information that justified the collection of information in this manner; and the division of the BKA responsible for carrying out the search.²⁸² This documentation was itself subject to strict regulation. It could be used only for judicial or independent review of online search initiatives, and it could be kept for no more than a year, at which time it must be deleted.²⁸³

In light of this comprehensive framework, it is not surprising that the Constitutional Court concluded that “if given an interpretation that conforms to the constitution, especially with respect to its general provisions, section 20k is compatible with the Basic Law.”²⁸⁴ But the Constitutional Court found that the provisions concerned with the “core area of private life” did not satisfy the constitutional requirements.²⁸⁵ This conclusion obliged the Constitutional Court to conduct its full three-step analysis regarding section 20k.

In the first step, the Constitutional Court found that the online searches anticipated by section 20k were a severe intrusion into the constitutionally protected right to the confidentiality and integrity of information-technology systems.²⁸⁶ The Constitutional Court first recognized this right in its 2008 *Online Search Case*, in which it concluded that today’s ubiquitous use of technology—and the accompanying collection of data—requires that the Basic Law account for risks to privacy arising from the ever-larger role technology plays in our lives.²⁸⁷ This was not the declaration of a fully new

²⁸¹ *Id.* § 20k(6).

²⁸² *Id.* § 20k(3).

²⁸³ *Id.*

²⁸⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (303), 2017.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 27, 2008, 120 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 274 (302), 2009. The Constitutional Court based this new privacy protection on the constitutional protection of the free development of one’s personality that is secured by Basic Law Articles 1(1) and 2(1). *See* 141 BVERFGE 220 (304) (citing 120 BVERFGE 274 (302)). The Constitutional Court gives the right to personality gapless protection, requiring the Constitutional Court to adapt and expand the constitu-

basic right,²⁸⁸ but instead an “updating and concretization of the general right to the free development of personality.”²⁸⁹ The protection is distinguished from other privacy protections codified in the Basic Law, including telecommunications privacy and the inviolability of the home.²⁹⁰

It is also distinguished from other privacy concerns addressed by the general right to the free development of personality, particularly the right to informational self-determination.²⁹¹ As formulated by the Constitutional Court in the *Online Search Case* the new privacy protection

covers systems that, alone or in their technical networking, can contain personal data of the person concerned to such a degree and in such a diversity that access to the system facilitates insight into significant parts of the life of a person or indeed provides a revealing picture of a person’s personality. Such a possibility applies for instance to access to personal computers, regardless of whether they are installed in a fixed location or are operated while on the move. It is possible as a rule to conclude not only as regards use for private purposes, but also with business use, possible characteristics or preferences from the usage pattern. Specific fundamental rights-related protection also covers for instance mobile telephones or electronic assistants which have a large number of functions and can collect and store many kinds of personal data.²⁹²

The Constitutional Court insisted, however, that not all personal uses of technology involve the right to the confidentiality and integrity of information-technology systems.²⁹³ Some technology, such as discrete household appliances, “only contains data with a partial connection to a certain area of

tional protection in response to progress and developments in technology and society. The *Online Search Case* is an example of this jurisprudence. See Alexander Roßnagel & Christoph Schnabel, *Das Grundrecht auf Gewährleistung der Vertraulichkeit und Integrität informationstechnischer Systeme und sein Einfluss auf das Privatrecht*, 60 NEUE JURISTISCHE WOCHENSCHRIFT 3534, 3534–35 (2008).

²⁸⁸ See Anika D. Luch, *Das neue “IT-Grundrecht”*: Grundbedingung einer “Online-Handlungsfreiheit,” 13 MULTIMEDIA UND RECHT 75, 76 (2011) (explaining that no new, distinct fundamental right has been created).

²⁸⁹ Roßnagel & Schnabel, *supra* note 287, at 3534 (Russell A. Miller trans.).

²⁹⁰ GRUNDGESETZ [GG] [BASIC LAW], arts. 10(1), 13(1); see Luch, *supra* note 288, at 77 (the specifically articulated protections secure privacy in one’s telecommunications acts and in one’s home).

²⁹¹ GRUNDGESETZ [GG] [BASIC LAW], arts. 1(1), 2(1); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, 65 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 1987; Luch, *supra* note 288, at 75.

²⁹² 120 BVERFGE 274 (314) (Russel A. Miller trans.).

²⁹³ *Id.* at (202)

life of the person concerned,” and therefore does not risk the privacy intrusion that could result from access to a broad spectrum or mosaic of one’s private data.²⁹⁴ The protection is primarily concerned with the quantity, character, and diversity of the data that the state accesses.²⁹⁵ Anika Luch distilled the new right to three points: it applies to intrusions into a person’s complex information-technology systems (integrity), if those systems produce or contain large quantities of personally-revealing data (confidentiality), and the intrusion undermines a person’s sovereignty over the data he or she creates and stores (confidentiality).²⁹⁶

The Constitutional Court, in the *BKA-Act Case*, endorsed this framework and expanded it to cover the privacy interests people have in data held and stored by others as a result of the use of the internet and social media.²⁹⁷ The Constitutional Court explained that these information-technology systems, and the data stored there, also are owed protection despite the fact that they do not involve one’s personal information-technology systems.²⁹⁸ These data, the Constitutional Court concluded, can be of a highly-personal character—especially when combined—and are at risk of being manipulated, read, or captured from contexts in which individuals have the justified expectation of confidentiality.²⁹⁹ In light of all of this the Constitutional Court found that the provisions of section 20k constituted an especially intense intrusion into the basic rights.³⁰⁰

In the second step in its analysis the Constitutional Court summarily concluded that section 20k was adequately limited to surveillance aimed at protecting a preeminently important legal interest.³⁰¹ This included concrete threats to “an individual’s life, limbs, or freedom,”³⁰² concrete threats to “public goods, which, if imperiled, implicate either the foundations or survival of the state, or the foundations of human existence,”³⁰³ and less well-

²⁹⁴ *Id.*

²⁹⁵ Luch, *supra* note 288, at 76.

²⁹⁶ *Id.*; see Dietrich Murswiek, *Art. 2, in GRUNDGESETZ KOMMENTAR, supra* note 148, at 142.

²⁹⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (304), 2017.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at (304–05) (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 27, 2008, 120 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 274 (326–28), 2009).

³⁰² Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20k(1)[1] (Russell A. Miller trans.).

³⁰³ *Id.* § 20k(1)[2] (Russell A. Miller trans.).

substantiated threats in discrete cases suggesting that an identified individual poses a threat to “a person’s life, limbs, or freedom.”³⁰⁴

In the third step of its analysis, the Constitutional Court found that section 20k was proportional, especially because it limited the use of online search measures to very narrow substantive circumstances, it imposed necessary technological preconditions on the searches, and it imposed adequate procedural safeguards on the searches.³⁰⁵ As noted earlier, however, the Constitutional Court concluded that section 20k did not satisfy the constitutional standard of protection with respect to the “core area of private life.”³⁰⁶ This part of the Constitutional Court’s ruling focused on the provisions of section 20k(7) that assigned to internal BKA agents the responsibility for reviewing the data collected from online searches in order to exclude information involving the “core area of private life.”³⁰⁷

First, the Constitutional Court emphasized that online searches involved the “core area of private life” because the large amount of personally-revealing data that might be accessed exceeds even the personal exposure that might result from intrusions into the sacrosanct sphere of the home.³⁰⁸ The Constitutional Court explained that the information-technology data exposed in these searches are not fleeting but can be stored for long periods, and the searches are not limited by space but can be carried out from almost anywhere.³⁰⁹ Second, despite the fact that online searches involve this uniquely troubling totality of personal privacy, the Constitutional Court was satisfied with the law’s formal prohibition on the collection of information from the “core area of private life,” and with the law’s demand that a technological filter be employed to enforce that prohibition.³¹⁰ Third, the Constitutional Court nevertheless insisted that technological filters would not be able to perfectly isolate and exclude information touching on the “core area of private life.” To this degree, then, a likelihood remained that highly-confidential information would be captured through online searches, even if only on the margins of the initiatives. Fourth, the Constitutional Court expressed dismay that, in response to this residual but real risk, section 20k(7) called on BKA

³⁰⁴ *Id.* § 20k(1) (Russell A. Miller trans.).

³⁰⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (305–06), 2017.

³⁰⁶ *Id.* at (306–07).

³⁰⁷ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20k(7).

³⁰⁸ 141 BVERFGE 220 (306–07).

³⁰⁹ *Id.*

³¹⁰ *See, e.g., id.* at (303, 307–09) (discussing various provisions’ constitutionality with respect to their prevention of collecting information from the “core area of life”).

agents to review all information collected through online searches in order filter-out information touching on the “core area of private life.”³¹¹

Only an independent authority, the Constitutional Court concluded, would adequately minimize the harm to privacy that online searches risked.³¹² The point of this control, the Constitutional Court explained, is that it should identify and exclude information from the “core area of private life” before it falls into the hands of the BKA.³¹³ The Constitutional Court insisted that the control and review be conducted by independent authorities external to the BKA: “Yet the actual carrying out and decision-making responsibility must remain in the hands of persons who are independent with regard to the Federal Criminal Police Office.”³¹⁴ Again, it seems possible that the Constitutional Court had the Office of the Federal Commissioner for Data Protection and Freedom of Information in mind for this role.

Almost as a post-script, the Constitutional Court noted that the documentation regime created by section 20k(7) also contributed to the provision’s shortcomings as regards the protection owed to the “core area of private life.”³¹⁵ The Constitutional Court summarily concluded that the required one-year retention of the information concerning online searches, after which the details about the search measures was to be deleted,³¹⁶ was excessively short and, therefore, constitutionally inadequate.³¹⁷ The Constitutional Court explained that the BKA’s activities are to be documented in such a way as to facilitate subsequent review and control of those activities.³¹⁸ Retaining that information for one year, the Constitutional Court concluded, did not fulfill this necessity.³¹⁹

4. Telecommunications Surveillance (section 20l) and Collection of Telecommunications Metadata (section 20m)

The amended BKA-Act also authorized the BKA to conduct telecommunications surveillance (section 20l) and collect telecommunications

³¹¹ *Id.* at (307–09).

³¹² *Id.* at (301, 307, 308–09).

³¹³ *Id.*

³¹⁴ *Id.* at (308–09).

³¹⁵ *Id.* at (303–09).

³¹⁶ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20k(7).

³¹⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (309), 2017.

³¹⁸ *Id.* at (279–80).

³¹⁹ *See id.* at (309).

metadata (section 20m).³²⁰ Although these distinct forms of intrusions into protected privacy were governed by separate statutory provisions, the similarities between them led the Constitutional Court to combine its analysis of the two surveillance measures.³²¹ The Constitutional Court explained that the limits on the collection of telecommunications metadata are essentially similar to those governing telecommunications surveillance.³²² Applying the same standards and analysis the Constitutional Court found that both provisions failed to fulfill the proportionality principle in subtle ways.³²³ Except for these deficiencies that it shared with section 20l, the Constitutional Court ruled that section 20m was otherwise constitutional. The convergence of the Constitutional Court's analysis concerning these two measures allows me to focus, in the following discussion, on the provisions of and the Constitutional Court's analysis respecting section 20l.

Section 20l of the amended BKA-Act authorized the BKA to conduct secret telecommunications surveillance.³²⁴ The authority, however, was specifically limited to "a person" (*eine Person*),³²⁵ a qualification that seemingly would have excluded strategic surveillance or non-targeted surveillance of whole telecommunications networks.³²⁶ The targets of this surveillance were to be similar to those against whom the amended BKA-Act permitted the other investigative measures I have discussed,³²⁷ including people identified by sections 17 and 18 of the Federal Police Law who pose particularly grave threats,³²⁸ and people about whom specific facts justify the assumption that they may commit the crimes codified in section 4a(1)[2] of the amended BKA-Act.³²⁹ But section 20l went further, extending to two atten-

³²⁰ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, §§ 20m, 20l.

³²¹ 141 BVERFG 220 (316).

³²² *Id.*

³²³ *Id.*

³²⁴ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20l.

³²⁵ *Id.* § 20l(1) (Russell A. Miller trans.).

³²⁶ *See id.*

³²⁷ *See id.* §§ 20g(1)[1]–[2], 20h(1)[1]{a}–{b}, 20k(1)[1]–[2].

³²⁸ *Id.* § 20l(1)[1] (including "those who bring about a danger" or "those who own dangerous animals or things."). This class of targets was further limited to those posing only the most serious threats. The same language used elsewhere in the amended BKA-Act was used here, including concrete threats to "a person's life, limb or freedom," or concrete threats to "public goods, which, if imperiled, implicate either the foundations or endurance of the state or the foundations of human existence." *Id.*

³²⁹ *Id.* § 20l(1)[2] (covering "international terrorism" and the related crimes codified in § 129a of the Criminal Code).

uated classes of targets: (1) people for whom the facts justify the assumption that they will accept or transfer the telecommunications of someone covered by sections 17 and 18 of the Federal Police Law, and (2) people for whom the facts justify the assumption that they will use the telecommunications connection or device of someone covered by sections 17 and 18 of the Federal Police Law.³³⁰

As is common throughout the amended BKA-Act, these measures were limited to those circumstances in which the law's counter-terrorism aims would otherwise be hopeless or substantially more difficult.³³¹ The law anticipated that telecommunications surveillance might require technological intrusions into information-technology systems. In these instances, the technological and documentary provisions of section 20k were to apply.³³² Technological intrusions of this kind were also to be limited to circumstances in which it could be certain that only running telecommunications would be recorded,³³³ and in any case, only when such intrusions are necessary (for example, because they help to capture telecommunications in an unencrypted form).³³⁴ The surveillance measures were to be ordered by a court on the basis of an application from the BKA President.³³⁵ The order authorizing the telecommunications surveillance was to include all relevant information and, as with other measures authorized by the amended BKA-Act, would limit the surveillance to a three-month period with one possible extension.³³⁶ The law also required the full cooperation of telecommunications service providers in the implementation of the surveillance measures, with the parameters of this assistance outlined in the Telecommunications Act (*Telekommunikationsgesetz*) and the Rules of Procedure for Telecommunications Surveillance (*Telekommunikations-Überwachungsverordnung*).³³⁷ Finally, section

³³⁰ *Id.* § 20l(1)[3]–[4].

³³¹ *Id.* § 20l(1).

³³² *Id.* § 20l(2) (citing *id.* § 20k(2)–(3)).

³³³ *Id.* § 20l(2)[1]. The statute refers to “*laufende Telekommunikations*” (running telecommunications acts), which encompass ongoing telecommunications exchanges and not “passive” telecommunication acts (such as posts to blogs or wiki-sites) or telecommunications acts that have been stored or recorded for processing and subsequent transmission. *Id.*

³³⁴ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20l(2)[1]–[2].

³³⁵ *Id.* § 20l(3). The provision granted the BKA authority to order telecommunications surveillance without court approval in emergency conditions. *Id.*

³³⁶ *Id.* § 20l(4).

³³⁷ *Id.* § 20l(5); see Telekommunikationsgesetz [TKG] [Telecommunications Act], June 22, 2004, BUNDESGESETZBLATT [BGBl] I at 1190, last amended by Gesetz [G], May 24, 2016, BGBl I at 1217, https://www.gesetze-im-internet.de/tkg_2004/TKG.pdf [<https://perma.cc/U288-UXQ6>]; Telekommunikations-Überwachungsverordnung [TKÜV] [Rules of Procedure for Telecommunications Surveillance], Nov. 3, 2005, BUNDESGESETZBLATT [BGBl] I at 3136, last

20I(6) imposed strict limits on telecommunications surveillance in order to ensure respect for the “core area of private life.”³³⁸ These limits included the familiar protections, such as: a formal ban on surveillance implicating the “core area of private life”; a presumption against surveillance if there are doubts about risks to the “core area of private life”; oversight by a court that would be responsible for reviewing and excluding from analysis and use any information derived from the “core area of private life”; and a duty on the part of the BKA to carefully document all actions relating to the protection of the “core area of private life.”³³⁹ Testing the provision against the protection provided by Basic Law Article 10, the Constitutional Court concluded that section 20I was only partially compatible with the Basic Law.³⁴⁰

In the first step in its analysis, the Constitutional Court found that section 20I authorized an especially serious encroachment on Basic Law Article 10, which provides that “the *privacy* of correspondence, posts and telecommunications shall be inviolable.”³⁴¹ The Constitutional Court has applied Article 10 to “synchronized communication between two or more people by telephone,” but also to most contemporary forms of electronic communication, such as email and smart phone usage.³⁴² Due to the immense challenges arising from rapid technological developments and social change, the Constitutional Court has taken a progressive and dynamic approach to interpreting Article 10,³⁴³ not the least because it has ruled that the free and unhindered communication of information between individuals with the help of telecommunications devices is a component of human dignity.³⁴⁴

amended by Gesetz [G], Dec. 25, 2008, BGBl I at 3083, art. 4, https://www.gesetze-im-internet.de/tk_v_2005/TKÜV.pdf [<https://perma.cc/B9RM-JZ3G>].

³³⁸ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20I(6).

³³⁹ *Id.*

³⁴⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (309), 2017.

³⁴¹ GRUNDGESETZ [GG] [BASIC LAW] art. 10(1) (emphasis added); 141 BVERFGE 220 (310).

³⁴² Thomas Schwabenbauer, *Kommunikationsschutz durch Art. 10 GG im digitalen Zeitalter*, 137 ARCHIV DES ÖFFENTLICHEN RECHTS 1, 11 (2012) (Russell A. Miller trans.).

³⁴³ *Id.* at 41. As an example of the ever-evolving field to which Article 10 must be applied, § 20I(2) authorized the BKA to conduct telecommunications surveillance by way of manipulation of the involved technological devices or their software. This differs from more traditional methods of surveillance that involve only the interception of running acts of telecommunication without affecting their technological sources. The Constitutional Court applied Article 10 to the former, novel form of surveillance. See 141 BVERFGE 220 (309) (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 27, 2008, 120 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 274 (309), 2009).

³⁴⁴ 141 BVERFGE 220 (309); Schwabenbauer, *supra* note 342, at 9.

In the second step in its analysis the Constitutional Court nevertheless found that the surveillance permitted by section 20I is a justified counter-terrorism measure.³⁴⁵ After all, what the Basic Law gives with one hand, it takes away with the other. Article 10(2) permits intrusions into the right to telecommunications privacy “[i]f the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a *Land*.”³⁴⁶

Once again, in the third step of its analysis, the Constitutional Court found deficiencies in the limiting parameters that section 20I established for these surveillance measures.³⁴⁷ Some of the terms used by section 20I were not specific enough to produce the necessary delimitation of the surveillance measures.³⁴⁸ In other ways, the shortcomings in the limiting terms caused section 20I to be disproportionate.³⁴⁹ Finally, the Constitutional Court found that section 20I(6) did not provide the protection necessary for the “core area of private life.”³⁵⁰

The Constitutional Court ruled that section 20I(1)[2] lacked the requisite specificity and was, therefore, disproportionate.³⁵¹ This provision authorized the BKA to undertake telecommunications surveillance against targets for whom facts justified the mere assumption that the target was preparing to engage in terrorist activities.³⁵² This provision mirrored section 20g(1)[2] (authorizing special investigative measures outside the home) and suffered from the same constitutional shortcomings. The Constitutional Court point-

³⁴⁵ 141 BVERFGE 220 (310).

³⁴⁶ GRUNDGESETZ [GG] [BASIC LAW] art. 10(2).

³⁴⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (310), 2017. Article 10(2) requires some limits. GRUNDGESETZ [GG] [BASIC LAW] art. 10(2). For example, intrusions must be authorized by a statute, and the resulting measures must be subject to some form of external, independent review. *Id.* With respect to the latter requirement, Article 10(2) speaks of the possibility that the external review be carried out by “agencies and auxiliary agencies appointed by the legislature.” *Id.* Paragraph 20I(3) left this review in the hands of the courts. Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKA-TerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20I(3). But, in the case of the *Bundesnachrichtendienst* (Federal Intelligence Service), the parliament established an auxiliary agency known as the G10 Commission to review the agency’s intelligence-gathering operations. Gesetz zu Artikel 10 Grundgesetz [G-10] [Law Restricting Letters, Post, and Telecommunications Privacy], Aug. 13, 1968, BGBl I at 949, last amended by Gesetz [G], Nov. 17, 2015, BGBl I at 1938, § 15.

³⁴⁸ 141 BVERFGE 220 (310).

³⁴⁹ *Id.* at (310, 315–16).

³⁵⁰ *Id.* at (315–16).

³⁵¹ *Id.* at (310).

³⁵² *Id.*

ed to its analysis of section 20g(1)[2],³⁵³ in which it insisted that the measures be applied only on the basis of specific facts pointing towards a concrete and imminent act, and not on a mere professional intuition.³⁵⁴ To this end, the Constitutional Court demanded that there be evidence of individual behavior justifying the view that there is a concrete likelihood that, in the immediate future, a terrorist crime will be committed.³⁵⁵ The Constitutional Court concluded that section 20l(1)[2]—just as it had with respect to section 20g(1)[2]—did not adequately limit telecommunications surveillance to those narrow circumstances.³⁵⁶

Other nuanced deficiencies in the law rendered section 20l disproportionate.³⁵⁷ For example, the Constitutional Court noted that there was no obligation to include the grounds justifying the surveillance in the Constitutional Court-approved order.³⁵⁸ The Constitutional Court concluded that this shortcoming could not be remedied by giving the provision an interpretation that conforms to the Basic Law.³⁵⁹ In light of the fact that other provisions in the amended BKA-Act contained such an obligation,³⁶⁰ the Constitutional Court explained that it could not dismiss the possibility that the absence of that obligation in this instance was intentional.³⁶¹

Finally, the Constitutional Court offered a differentiated interpretation of the protection owed to the “core area of private life” in the context of telecommunications surveillance.³⁶² On one the hand, the Constitutional Court insisted that telecommunications surveillance poses the risk of a particularly grave intrusion into the “core area of private life” because it inherently involves the capture of the content of the communications.³⁶³ On the other hand, the Constitutional Court acknowledged that telecommunications surveillance is less threatening to the “core area of private life” than online

³⁵³ *Id.*

³⁵⁴ *Id.* at (291).

³⁵⁵ *Id.* at (290–91).

³⁵⁶ *Id.* at (310).

³⁵⁷ *Id.* at (312–13).

³⁵⁸ *Id.* at (312).

³⁵⁹ *Id.*; see KOMMERS & MILLER, *supra* note 27, at 68–69 (noting that constitutional interpretation in Germany is “a zero-sum game,” requiring that all constitutional values “be preserved in creative unity”).

³⁶⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (312), 2017 (citing Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, §§ 20g(3)[6], 20h(4), 20k(6)).

³⁶¹ *Id.* at (312).

³⁶² *Id.*

³⁶³ *Id.*

searches or investigative measures that intrude into the home.³⁶⁴ The Constitutional Court explained that online searches represented a more odious encroachment on privacy because they have the potential to expose discrete bits of data that can be stored by information-technology systems for long periods of time, and that reflect an extremely wide-range of personal behaviors and interests.³⁶⁵ The Constitutional Court distinguished its concern for this kind of mosaic intrusion into privacy from telecommunications surveillance, which the Constitutional Court saw as limited to a less-revealing technology (essentially telephones and not the Internet) and to the discrete telecommunications acts that can be intercepted.³⁶⁶ The consequence of this distinction is that the most strict scrutiny, which is meant to ensure the protection of the “core area of private life,” would not apply to section 20I, thereby leaving the legislature with some discretion to establish the required safeguards.

The Constitutional Court found that, for the most part, section 20I(6) provided adequate protection, including: a prohibition on the collection and use of information implicating the “core area of private life”; independent assessment prior to and after surveillance to ensure respect for this prohibition; the resort to automatic surveillance and recording systems in the event that there is any uncertainty regarding the exposure to information from the “core area of private life”; the immediate deletion of any information from the “core area of private life” that is, despite these precautions, captured by surveillance; and careful documentation of the measures the BKA takes regarding the protection of the “core area of private life.”³⁶⁷ Even at the level of storage and use of the information acquired from telecommunications surveillance, the Constitutional Court was satisfied that section 20I(6) met the applicable standards.³⁶⁸ The one constitutional shortcoming that would have to be corrected, the Constitutional Court insisted, was the fact that the documentation concerning the steps the BKA had taken to protect the “core area of private life” could be deleted after only one year.³⁶⁹ As with the other uses of this rule throughout the amended BKA-Act, the Constitutional Court explained that this excessively short time period was constitutionally inadequate because it would impede the *ex post* judicial challenges needed

³⁶⁴ *Id.* at (312–13).

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* at (314).

³⁶⁸ *Id.* at (314–16).

³⁶⁹ *Id.* at (315–16).

to hold the BKA accountable for violations of the protection owed to the “core area of private life.”³⁷⁰

C. Constitutionality of the BKA-Act’s General Procedural Protections

The amended BKA-Act imposed discrete safeguards on the implementation of the various, newly-introduced investigative powers. The preceding section outlined many of these safeguards and the Constitutional Court’s assessment of them. In most cases, the Constitutional Court found that these discrete precautions and limits satisfied constitutional demands for specificity, clarity and proportionality. Still, a number of the provisions—especially those related to the “core area of private life”—were found to be unconstitutional. But this tailored regime for the protection of privacy was not the complete extent of the BKA-Act’s safeguards. The complainants also challenged the quality, or utter absence of, general privacy protections that were to be implemented with each exercise of any of the BKA’s new investigative powers. Four of these procedures attracted the Constitutional Court’s attention, including: the BKA-Act’s lack of a specific statutory prohibition on comprehensive or total surveillance actions;³⁷¹ the privacy protection the BKA-Act extended to privileged professional relationships (section 20u);³⁷² the BKA-Act’s provisions relating to transparency (section 20w), judicial review (section 20v), and oversight;³⁷³ and the BKA-Act’s provisions relating to the deletion of the collected data and related records.³⁷⁴ Here, too, the law was largely found to be constitutionally acceptable. But the Constitutional Court nonetheless identified a handful of violations and ordered that they be corrected by the deadline in the summer of 2018. In the following sections, I present the Constitutional Court’s analysis with respect to each of these four concerns.

1. Statutory Prohibition on Comprehensive Surveillance (*Rundumüberwachung*)

The complainants argued that the amended BKA-Act suffered from the unconstitutional omission of a specific statutory provision prohibiting comprehensive surveillance.³⁷⁵ Such a prohibition would protect against the massive encroachment on privacy that would result from the cumulative applica-

³⁷⁰ *Id.* at (309).

³⁷¹ See *infra* notes 375–380 and accompanying text.

³⁷² See *infra* notes 381–390 and accompanying text.

³⁷³ See *infra* notes 391–426 and accompanying text.

³⁷⁴ See *infra* notes 427–437 and accompanying text.

³⁷⁵ 141 BVERFGE 220 (248).

tion of the new investigative powers over a long period of time, leading to the “nearly gapless registration of a target’s movements and life-expressions,” and permitting the state to develop a comprehensive personality profile of its target.³⁷⁶ In its 2004 *Acoustical Surveillance Case*, the Constitutional Court found that these conditions would amount to a violation of human dignity and were, therefore, constitutionally prohibited.³⁷⁷ But, as it had done in previous cases, the Constitutional Court refused to characterize the omission of an explicit prohibition of total surveillance as a violation of the Basic Law.³⁷⁸ The Constitutional Court concluded that constitutional proportionality review—especially as it requires the Constitutional Court to weigh the intrusion’s aims against the severity of the harm it does to privacy—would be an adequate bulwark against this risk.³⁷⁹ The Constitutional Court was also reassured that the manageable size of and limiting structures within the BKA justified the legislature’s confidence in leaving the matter of the prohibition on comprehensive surveillance to general investigative regulations.³⁸⁰

2. The Protection Owed to Privileged Professional Relations (section 20u)

Section 20u of the amended BKA-Act provided general protections against the collection and use of information that is drawn from interactions with privileged professionals.³⁸¹ Relying on elements of the Code of Criminal Procedure that identify those who can refuse to testify in a criminal proceeding, section 20u recognized two classes of professionals that were owed two distinct kinds of protection. On the one hand, section 20u(1) prohibited any investigative measures that would develop information from members of the clergy, criminal defense counsel, or parliamentarians.³⁸² On the other hand,

³⁷⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 3, 2004, 109 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 279 (232), 2004.

³⁷⁷ *Id.*

³⁷⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (317), 2017.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20u. This provision closely followed § 160a of the Code of Criminal Procedure. See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], last amended by Gesetz [G], Apr. 23, 2014, BUNDESGESETZBLATT [BGBl] I at 410, § 160a; Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20u.

³⁸² Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense

section 20u(2) only provided proportionality protection against surveillance involving other privileged professionals, such as attorneys and pregnancy or drug counselors.³⁸³

Except for one detail, the Constitutional Court found no constitutional violation with this arrangement.³⁸⁴ The Constitutional Court objected to the distinction the statute drew between criminal defense counsel (given a strict prohibition on surveillance by section 20u(1)) and attorneys advising clients in other matters (whom section 20u(2) only protects with the application of proportionality review).³⁸⁵ The Constitutional Court explained that this distinction could not be justified in light of the fact that the newly-authorized powers were designed to permit investigations into general threats and not just the narrower field of criminal investigations.³⁸⁶

The Constitutional Court was not troubled by other constitutional challenges the complainants raised against section 20u.³⁸⁷ The Constitutional Court concluded, for example, that the exclusion of other professions from the protections provided by section 20u, such as journalists or media representatives, did not violate the Basic Law's guarantees of freedom of the press, professional freedom, or equality.³⁸⁸ The Constitutional Court insisted that these constitutional rights permitted the legislature to tailor the intensity of privacy protection to specific circumstances and that the legislature has considerable discretion in making these decisions.³⁸⁹ In any case, other professional relationships would be protected by the application of the proportionality analysis. And, in cases such as those involving psychological treatment, the privacy of other professional relationships would be secured by the heightened protection owed to the "core area of private life."³⁹⁰

3. Transparency (section 20w), Judicial Review, and Oversight

The complainants challenged a range of provisions in the amended BKA-Act, arguing that they failed to fulfill the constitutional mandate for

Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20u(1) (referring to STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], last amended by Gesetz [G], Apr. 23, 2014, BGBl I at 410, § 53 para. 1, sentence 1–2, 4[4].)

³⁸³ *Id.* § 20u(2) (referring to STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], § 53, para. 1, sentence 3, 5).

³⁸⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (318–19), 2017.

³⁸⁵ *Id.* at (319).

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*; see GRUNDGESETZ [GG] [BASIC LAW], arts. 3(1), 5(1)[2], 12(1).

³⁸⁹ 141 BVERFGE 220 (319).

³⁹⁰ *Id.*

transparency, judicial review, and oversight.³⁹¹ In previous decisions, the Constitutional Court had found that these concerns were rooted in the proportionality principle and enjoyed constitutional status.³⁹² The Constitutional Court found that the BKA-Act largely satisfied these requirements.³⁹³ Still, it identified two general privacy protections that were constitutionally inadequate.³⁹⁴

The BKA's duty to report on the implementation of its new investigative powers, as outlined in section 20w of the amended BKA-Act,³⁹⁵ survived the Constitutional Court's scrutiny.³⁹⁶ In varying constellations, depending on the nature of the investigative measures and the depth of their intrusion on privacy, section 20w required the BKA to report on its surveillance activities to the targets and to others who would be affected by the measures.³⁹⁷ Unsurprisingly, this duty would be triggered only when reporting would not undermine the investigation.³⁹⁸ More controversially, however, the provision allowed the BKA to suspend the duty to report if exposing its operations would pose a risk to "the survival of the state, to a person's life, limbs, or freedom, or to property having meaningful value and the preservation of which is in the public interest."³⁹⁹ A suspension of the duty to report was not to last longer than one year, a period of time that could be extended only with a court order.⁴⁰⁰ The duty to report could expire altogether, however, if it were suspended for more than five years.⁴⁰¹

The Constitutional Court was satisfied that the reporting regime established by section 20w could be given a constitutional interpretation.⁴⁰² The Constitutional Court insisted that, when applying section 20w, the ordinary courts must not accept a mere abstract possibility of the impairment of an

³⁹¹ *Id.* at (245–46).

³⁹² *E.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 24, 2013, 133 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 277 (365), 2014.

³⁹³ *See infra* notes 395–411 and accompanying text.

³⁹⁴ *See infra* notes 412–426 and accompanying text.

³⁹⁵ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20w.

³⁹⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (319), 2017.

³⁹⁷ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20w(1)[1]–[10].

³⁹⁸ *Id.* § 20w(2).

³⁹⁹ *Id.* (Russell A. Miller trans.).

⁴⁰⁰ *Id.* § 20w(3).

⁴⁰¹ *Id.*

⁴⁰² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (320), 2017.

investigation as grounds for suspending the duty to report.⁴⁰³ The Constitutional Court also found the expiration of the duty to report after five years to be acceptable, explaining that it was satisfied with the BKA's representation during the proceedings in the case that it was the agency's practice to delete (and therefore not make further use of) the results of its investigations prior to the five-year deadline.⁴⁰⁴

The Constitutional Court also found that the BKA was subject to constitutionally adequate means allowing targets to request and obtain information about the agency's investigations and to use that information in judicial processes to secure a remedy for abuses.⁴⁰⁵ The Constitutional Court explained that section 19 of the Federal Data Protection Act (*Bundesdatenschutzgesetz*) empowers a data subject to request and obtain "information on 1. stored data concerning him, including any reference in them to their origin, 2. the recipients or categories of recipients to whom the data are transmitted, and 3. the purpose of the storage."⁴⁰⁶ The Constitutional Court reasoned that this right is fully applicable to the BKA (including the information generated by the implementation of the new investigative powers) because it is not among the provisions of the Federal Data Protection Act that were explicitly excluded with respect to the operations of the BKA.⁴⁰⁷ The Constitutional Court insisted on the constitutional adequacy of the Federal Data Protection Act's disclosure requirement despite the fact that the law's liberal national security exception would allow the agency to refuse disclosure in most cases involving the exercise of its new investigative powers.⁴⁰⁸ Citing a similar explanation offered in the *Counter-terrorism Database Case*,⁴⁰⁹ the Constitutional Court accepted that such exceptions are unavoidable for the BKA's effective realization of its mandate and are, therefore, constitutionally tolerable.⁴¹⁰ The Constitutional Court was also satisfied that the jurisdiction of the administrative law courts and private law courts provided the constitutionally required fora

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], Jan. 14, 2003, BGBl I at 66, last amended by Gesetz [G], Feb. 25, 2015, BGBl I at 162, art. 19(1), § 19.

⁴⁰⁷ 141 BVERFG 220 (320–21); see Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 37.

⁴⁰⁸ See Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], Jan. 14, 2003, BGBl I at 66, last amended by Gesetz [G], Feb. 25, 2015, BGBl I at 162, art. 19(4).

⁴⁰⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFG 220 (320–21), 2017.

⁴¹⁰ *Id.*

for challenging the BKA's operations and, when appropriate, obtaining remedies for abuses of its investigative powers.⁴¹¹

In other ways, however, the amended BKA-Act did not provide the constitutionally required transparency and oversight.⁴¹² The Constitutional Court reasoned that effective oversight has even greater importance in this context because of the practical barriers (such as the secrecy of the operations) that stand in the way of a robust application of individual control through judicial review.⁴¹³ With this in mind, the Constitutional Court identified two shortcomings in the amended BKA-Act.⁴¹⁴

First, the law did not provide for the necessary supervision by an independent authority.⁴¹⁵ The Constitutional Court explained that an effective system of supervision has two central elements: the existence of an independent entity with effective competences; and the careful documentation of all agency actions associated with personally-revealing information, including collection, storage, analysis, use, transfer, reporting, and deletion.⁴¹⁶ The Constitutional Court insisted, "Technical and organizational measures must ensure that the data is available to the Federal Data Protection Commissioner in such a way that it can be evaluated in a practicable manner."⁴¹⁷

The Constitutional Court concluded that the amended BKA-Act was deficient in both of these respects. Although the Federal Data Protection Office would have the necessary authority to review the BKA's operations,⁴¹⁸ the Constitutional Court found that the amended BKA-Act did not require routine oversight by the data protection authorities on at least a biennial schedule.⁴¹⁹ The Constitutional Court also found that the amended BKA-Act lacked a comprehensive regime for documenting the agency's handling of personally-revealing information.⁴²⁰ It is true that some of the discrete provisions establishing the BKA's new investigative powers contained their own terms for documenting the implementation of the measures.⁴²¹ But the Con-

⁴¹¹ *Id.* at (321).

⁴¹² *Id.* at (284–85, 321–22).

⁴¹³ *Id.* at (284).

⁴¹⁴ *Id.* at (284–85, 322).

⁴¹⁵ *Id.* at (284–85).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 24, 2013, 133 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 277 (370), 2014.

⁴¹⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (321), 2017.

⁴²⁰ *Id.* at (321–22).

⁴²¹ *Id.* (citing Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the

stitutional Court found that even these provisions were incomplete and unclear and, for this reason, departed from the general standards for record-keeping as they relate to data-protection issues.⁴²² One example of these deficiencies was the lack of an obligation in section 20w to document the decision to suspend the duty to report on surveillance to those affected by the measures.⁴²³ The Constitutional Court explained that the highly-detailed level of documentation demanded by the Basic Law in this context was partially justified by the fact that the new investigative measures could be deployed as part of operations to monitor and protect against threats, and not only as part of a concrete criminal law investigation that would be accompanied by the thorough safeguards of ordinary criminal procedure.⁴²⁴

Second, the new law did not require the BKA to make regular reports to parliament and the public.⁴²⁵ The Constitutional Court explained that a general duty to report on its operations is necessary to enable public discussion and to promote democratic control.⁴²⁶

4. General Requirements Regarding Deletion of Information (section 20v(6))

Finally, among the general procedures for the protection of privacy that the Constitutional Court considered, the deletion provisions of section 20v(6) of the amended BKA-Act also were found essentially to be constitutional.⁴²⁷ Still, the Constitutional Court identified two subtle problems here.⁴²⁸

Section 20v(6) required that any personally-revealing data collected by the BKA through the implementation of its new investigative powers be deleted as soon as storage of the data is no longer necessary to promote the aims that it was originally collected for, or for use in a judicial review of the agency's operations.⁴²⁹ The law required that the deletion of data was to be documented and that this protocol, in turn, was to be deleted one year after the deletion.⁴³⁰ In the event that the information was retained to facilitate

Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, §§ 20k, 20w).

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.* at (322).

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.* at (323)

⁴²⁹ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20v(6).

⁴³⁰ *Id.*

judicial review, then the data-subject's permission was not required for any access to the data that could be used only for the specific purpose of judicial review proceedings.⁴³¹ The Constitutional Court found this regime, as a general matter, to be constitutionally acceptable.⁴³² Nevertheless, the Constitutional Court held that the provisions fell short of the constitutional standard in two ways. First, the Constitutional Court ruled that the timeframe for deleting the deletion protocol was too short.⁴³³ The one-year deletion schedule for the deletion protocol, the Constitutional Court explained, might produce documentary gaps in the biennial external audits the Constitutional Court demanded in its assessment of the amended BKA-Act's oversight regime.⁴³⁴ Second, the Constitutional Court objected to the sentence of section 20v(6) that waived the deletion requirement "to the degree that the data are necessary for the prosecution of crimes."⁴³⁵ This provision was unconstitutional, the Constitutional Court explained, because the amended BKA-Act did not generally anticipate the use of the information collected pursuant to the new investigative powers for the support of criminal prosecutions.⁴³⁶ Instead, the new measures were meant to support the BKA's efforts to monitor and prevent serious threats.⁴³⁷

*D. Constitutionality of the BKA-Act's Provisions for New
Use of Investigative Information*

The final constellation of BKA activities that the Constitutional Court scrutinized as part of its painstaking assessment of the amended BKA-Act involved the adequacy of the limits on the use to which the agency could put the information it had acquired from the implementation of its new investigative powers. The Constitutional Court approached this constitutional concern from three angles. First, it considered the terms the law established for the BKA's use of information it had obtained, including the agency's use

⁴³¹ *Id.*

⁴³² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (322–23), 2017; *see* Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20j(3).

⁴³³ 141 BVERFGE 220 (323).

⁴³⁴ *Id.*

⁴³⁵ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20v(6) (Russell A. Miller trans.).

⁴³⁶ 141 BVERFGE 220 (323).

⁴³⁷ *Id.*

of information beyond the specific circumstances that originally justified its collection.⁴³⁸ Second, it considered the terms governing the BKA's transfer of information it had obtained to other German law enforcement and security authorities.⁴³⁹ Third, it considered the terms under which the statute permitted the BKA to transfer information to foreign, non-E.U. public authorities.⁴⁴⁰ Relying particularly on its decision in the *Counter-terrorism Database Case*, the Constitutional Court asserted two general principles as fundamental guides to its analysis.⁴⁴¹ On the one hand, the Constitutional Court recognized a substantial difference between two scenarios: a new use of the information that is nonetheless in pursuit of the same objectives that justified the original investigative operation; and use of the information oriented to altogether new objectives.⁴⁴² The latter circumstances, the Constitutional Court explained, required much stricter limitations than the former.⁴⁴³ On the other hand, the Constitutional Court insisted that the use and transfer of information gathered from encroachments upon especially private interests (such as the inviolability of the home or the confidentiality and integrity of information-technology systems) should be subject to the strictest limitations.⁴⁴⁴ Responding to criticism from the dissenting justices that characterized the majority's analysis as activist, the Constitutional Court called its new articulation of this framework a "consolidation of a long line of jurisprudence developed by both of Senates of the Federal Constitutional Court" that "does not constitute an intensification of the standards."⁴⁴⁵ Nevertheless, the Constitutional Court outlined extensive changes to the BKA-Act that would be necessary to ensure its conformity with the Basic Law.

Before turning to a description of the Constitutional Court's holding and reasoning with respect to the three distinct questions it addressed in this part of its decision, I offer a fuller explanation of the general principles it applied. This is justified by the strong practical interest Germany's security partners likely have in a clear understanding of the limits the Constitutional

⁴³⁸ See *infra* notes 446–476 and accompanying text.

⁴³⁹ See *infra* notes 477–501 and accompanying text.

⁴⁴⁰ See *infra* notes 502–562 and accompanying text.

⁴⁴¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (220–21, 324–25, 326–27), 2017. See generally Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 24, 2013, 133 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 277, 2014 (*Counter-terrorism Database Case*).

⁴⁴² 141 BVERFGE 220 (220–21, 324–25, 326–27).

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* at (278).

⁴⁴⁵ *Id.* at (329).

Court imposed on transfers of the fruits of the BKA's expansive new investigative powers to foreign, non-E.U. authorities.

1. General Framework for the Use and Transfer of Information

The Constitutional Court explained that the legislature may authorize additional use of information gathered by the BKA, beyond the use that originally justified its collection.⁴⁴⁶ But the additional use of the information requires an independent legal justification.⁴⁴⁷ The Constitutional Court identified two distinct classes of "additional use" of information, each having a distinct standard for the required independent legal justification.⁴⁴⁸ The first class involves a new use of the information but for the same objectives.⁴⁴⁹ In these circumstances, the Constitutional Court explained, the constitution requires "adequate links" (*Zweckbindung*) between the subsequent use and the original legal justification for the collection of the information.⁴⁵⁰ The second class involves a use of information for altogether new purposes, for which the Basic Law requires that the new use satisfy the criteria the Constitutional Court referred to as a "hypothetical re-collection of data" (*hypothetische Datenerhebung*).⁴⁵¹ The second of these classes is more dubious and its accompanying standard for an independent legal justification is stricter. The criteria of a "hypothetical re-collection of data" will be satisfied only if the data could be collected, as if in the first instance, using the same intrusive measures for the wholly new objectives.⁴⁵² That is, the new use of the information is to be treated as a new (hypothetical) search in its own right. The point of this standard is clear: subsequent use of information is not to serve as a backdoor around constitutional safeguards, thereby permitting the analysis and use of information for purposes that would not justify its collection.

The Constitutional Court, in its doctrinal framing of this regime, outlined the two classes of "additional use" in some depth. First, with respect to a new use of information *for the same objectives*, the Constitutional Court explained that the "adequate links" requirement is meant to be more permissive.⁴⁵³ There must be some *Spielraum* ("scope") for the thorough use of information the BKA has collected within constitutional parame-

⁴⁴⁶ *Id.* at (324).

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* (Russell A. Miller trans.).

⁴⁵¹ *Id.* at (327–28).

⁴⁵² *Id.*

⁴⁵³ *Id.* at (324) (Russell A. Miller trans.).

ters.⁴⁵⁴ The Constitutional Court even accepted the possibility that the information might be used after its initial collection as the “starting point” of a new investigation.⁴⁵⁵ If the new use is adequately linked to the original justification for the surveillance measures, then the information can serve as the requisite evidentiary basis for another concrete operation.⁴⁵⁶ But the Constitutional Court insisted that this liberal standard does not permit unbounded new use of information.⁴⁵⁷ In particular the Constitutional Court warned the BKA against gaming the standard from the outset by asserting abstract or broadly defined objectives (as justifications for the initial surveillance) that would then leave ample space for a wide range of subsequent uses.⁴⁵⁸ Instead, the “adequate links” with the original objectives, the Constitutional Court explained, consist of a new use by the same agency that is exercising the same responsibility in pursuit of the same legal interests.⁴⁵⁹ Finally, the Constitutional Court noted that the “adequate links” standard must be tightened if the information that is to be put to a new use was drawn from highly-intrusive surveillance of the home or online searches of information-technology systems.⁴⁶⁰ In these sensitive circumstances, the additional use also must be essential to the BKA’s response to an imminent, discrete threat or danger.⁴⁶¹

Second, the Constitutional Court allowed that the legislature could permit a new use of information *for new objectives*, but it insisted that the intensity of the encroachment used to collect the information must be aligned with the new objectives.⁴⁶² The data collection standard requires that this kind of additional use, for wholly new purposes, be treated as an altogether new intrusion into constitutionally protected basic rights.⁴⁶³ The new use, in these circumstances, must be proportional, weighing the intensity of the original investigative measure against the new objectives.⁴⁶⁴ Ap-

⁴⁵⁴ *Id.* at (325).

⁴⁵⁵ *Id.* at (325–26). The Constitutional Court noted, for example, that security officials could not hope to develop an appreciation for secretive terrorist infrastructures and operations if they were obliged to work exclusively from disembodied, disaggregated, and discrete bits of information. The BKA, the Constitutional Court explained, must be able to reconstruct these links and webs within the legal boundaries of its mandate. The Constitutional Court insisted, however, that those outer legal limits mean that the BKA does not have a blank check. *See id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* at (324).

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.* at (324, 326) (Russell A. Miller trans.).

⁴⁶⁰ *Id.* at (326) (Russell A. Miller trans.).

⁴⁶¹ *Id.*

⁴⁶² *Id.* at (326–27).

⁴⁶³ *Id.* (citing *Weber & Saravia v. Germany* (No. 54934/00), 2006-XI Eur. Ct. H.R. 1173).

⁴⁶⁴ *Id.* at (327).

plying the traditional understanding of proportionality to this scenario means that information originally collected pursuant to intensive intrusions into privacy can only be used later if the new purposes to which it will be applied also are very important. The new use of the information, the Constitutional Court explained, must serve a legal good or interest in investigation of criminal actions that would justify the constitutional collection of the information with equally-aggressive measures.⁴⁶⁵ The Constitutional Court acknowledged that the “hypothetical re-collection of data” standard narrowed the previous, less demanding approach.⁴⁶⁶ But, it pointed to the emergence of the new standard across its more recent cases, including the *Data Stockpiling Case* and the *Counter-terrorism Database Case*.⁴⁶⁷

Armed with these general principles, the Constitutional Court assessed several provisions of the BKA-Act that authorized “additional uses” of previously acquired information.

2. The BKA’s Additional Use of Information (section 20v(4))

Section 20v of the amended BKA-Act established a number of procedural protections to limit the effects of the BKA’s new investigative powers.⁴⁶⁸ At subparagraph 4, for example, the provision formally identified and limited the ways that the BKA could use the information it collected.⁴⁶⁹ This provision raised questions about the BKA’s authority to make “additional use” of information beyond the purposes that originally justified the surveillance. Section 20v(4) authorized the BKA to use the information in order to realize the agency’s responsibilities concerning threats to national security, as defined by section 4a(1)[1] of the amended BKA-Act.⁴⁷⁰ This is the general statutory authority under which the BKA would make “additional use” of the information it collects pursuant to its new investigative powers.

⁴⁶⁵ *Id.* at (327–28).

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 24, 2013, 133 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 277, 2014 (*Counter-terrorism Database Case*); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 2, 2010, 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 260 (333), 2010 (*Data Stockpile Case*).

⁴⁶⁸ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20v. The protections included the availability of ex-post judicial review (§ 20v(1)), coherent and consistent record-keeping (§ 20v(3)), and the deletion of the information (§ 20v(6)). *Id.*

⁴⁶⁹ *Id.* § 20v(4).

⁴⁷⁰ *Id.* § 20v(4)[2]. In a second sub-paragraph the provision empowers the BKA to use the information to fulfill its responsibilities regarding the protection of public officials and witnesses. *See id.*

The Constitutional Court ruled that, for the most part, this provision was constitutional.⁴⁷¹ The Constitutional Court found that the statute effectively limited the information's use to a narrow and concrete range of purposes (such as combatting the threat posed by international terrorism) so that any "additional use" was clearly aimed at the same objectives.⁴⁷² This meant that section 20v(4) represented the first category of "additional use" (a new deployment of the information for the same objectives) and was only subject to the less-strict "adequate links" standard. The provision was adequately specific so that the Constitutional Court was not worried about an application of the information to wholly new purposes. This was the case, said the Constitutional Court, despite the provision's awkward features.⁴⁷³ Nor was the provision's general character (orienting the new investigative powers to the broadly construed "threats from international terrorism") imprecise.⁴⁷⁴ The Constitutional Court was satisfied that the statute properly limited additional use of collected information to the protection of legal interests that were just as significant as those that had originally justified the surveillance.⁴⁷⁵ The Constitutional Court only objected to the fact that section 20v(4) did not adequately limit the ways that the BKA might use information collected from the surveillance of homes or from online searches of information-technology.⁴⁷⁶

3. The Transfer of Information to Other German Authorities (section 20v(5))

The Constitutional Court gave some facets of section 20v(5) of the amended BKA-Act more exacting scrutiny because they involved the more

⁴⁷¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (330–31), 2017.

⁴⁷² *Id.*

⁴⁷³ *Id.* at (331). It is curious because § 4a(1)[1]–[2] of the amended BKA-Act seem to draw a distinction between operations aimed at investigating non-criminal threats on one hand, and criminal investigations on the other. See Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 4a(1)[1]–[2]. Section 20v(4) aims to limit the use of the information collected pursuant to the agency's new investigative powers only to the former context. See Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20v(4). But the Constitutional Court noted that the kinds of "threats" that animate the BKA's new powers also include particularly serious crimes. 141 BVERFGE 220 (331). The Constitutional Court concluded that this misunderstanding could be resolved, within constitutional law parameters, through statutory interpretation. See *id.*

⁴⁷⁴ 141 BVERFGE 220 (331).

⁴⁷⁵ *Id.* at (332).

⁴⁷⁶ *Id.* at (333).

dubious category of “additional use,” that is, a new use of information for altogether new objectives.⁴⁷⁷ The Constitutional Court concluded that the transfer of information to other agencies would open a “double door” for the flow of information that creates the opportunity for the new use of the information for new purposes.⁴⁷⁸ The Constitutional Court ruled that a number of these elements of the provision were unconstitutional because they did not satisfy the “hypothetical re-collection of data” standard.⁴⁷⁹

Section 20v(5) authorized the BKA to transfer information to law enforcement and other authorities in Germany.⁴⁸⁰ The transfer would have to be necessary, however, to facilitate one of three objectives: (1) to promote the BKA’s duty of mutual cooperation with other security agencies, as defined by section 4a(2)[3] of the BKA-Act; (2) to protect against grave threats to public security or to prevent a terrorist crime, as defined by section 129a of the Criminal Code, except that transfers of information collected pursuant to BKA-Act sections 20h, 20k, and 20l would be permitted only for actions to defend against urgent threats to public security that involve the community or a danger to life; and (3) to contribute to the prosecution of crimes in cases where a subpoena ordering the collection of the information would be warranted, except that transfers of information collected pursuant to BKA-Act sections 20h, 20k, and 20l would be permitted only for the prosecution of serious crimes.⁴⁸¹

The Constitutional Court found no constitutional violation with respect to the first of these options (section 20v(5)[1]). In this context the Constitutional Court resorted to the more permissive “adequate links” standard because it concluded that “the transfer of data for the purpose of mutual understanding and coordination does not itself implicate a change in purpose.”⁴⁸² The Constitutional Court was satisfied that the provision could be narrowly interpreted to ensure that the transfers were limited to helping facilitate the internal operations arising from the BKA’s inter-agency cooperation and would not involve new substantive uses of the information by the receiving agencies.⁴⁸³ For this reason, the Constitutional Court explained,

⁴⁷⁷ *Id.* at (333–34).

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.* at (334).

⁴⁸⁰ Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office’s Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, § 20v(5).

⁴⁸¹ *Id.*

⁴⁸² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (334), 2017 (Russell A. Miller trans.).

⁴⁸³ *Id.* at (334–35).

the information's new use (via transfer) was still strictly and formally associated with the objectives that originally justified the BKA's original collection of the data.⁴⁸⁴

The Constitutional Court ruled that the second of the transfer options, section 20v(5)[1]{2}, was constitutionally flawed.⁴⁸⁵ The Constitutional Court focused on the provision's distinct clauses. The first authorized transfers of information to help combat grave dangers to public security.⁴⁸⁶ Although this might create the possibility of new uses of the information for new purposes, the Constitutional Court was satisfied that the law met the stricter "hypothetical re-collection of data" standard and was, therefore, constitutional.⁴⁸⁷ This was the case, the Constitutional Court explained, even as this part of the law authorized transfers of information collected pursuant to the BKA's most intrusive new investigative powers (surveillance in homes, online searches of information-technology systems, and telecommunications surveillance).⁴⁸⁸ The Constitutional Court found, however, that the provision's second clause was unconstitutional because it did not meet the "hypothetical re-collection of data" standard.⁴⁸⁹ This element of the law authorized transfers to help defend against criminal acts and the Constitutional Court ruled that it was disproportionately broad.⁴⁹⁰ The Constitutional Court explained that the underlying criminal law provisions did not demand the same degree of suspicion (especially as to concreteness) as would be necessary for the use of the BKA's most intrusive new investigative powers.⁴⁹¹ Transferring information for use in these less-weighty circumstances, the Constitutional Court reasoned, involved the kind of "changed objectives" that merited the stricter standard and more rigorous limitations.⁴⁹²

Finally, the Constitutional Court ruled that the last of the transfer options, section 20v(5)[1]{3}, was unconstitutional.⁴⁹³ The Constitutional Court explained that transfers of information collected pursuant to the BKA's invasive new powers for the purpose of supporting criminal prosecu-

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* at (336–37).

⁴⁸⁷ *Id.* at (335–36).

⁴⁸⁸ *Id.* (citing Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt [BKATerrAbwG] [Act for the Federal Criminal Police Office's Role in the Defense Against the Threat of International Terrorism], Dec. 25, 2008, BGBl I at 3083, §§ 20h, 20k, 20l).

⁴⁸⁹ *Id.* at (336–37).

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.* at (337).

tions constituted a new use for altogether new purposes.⁴⁹⁴ But, the provision did not meet the stricter “hypothetical re-collection of data” standard.⁴⁹⁵ The Constitutional Court found that the law would permit transfers of this information (even when it was the product of intrusive measures) for use in the prosecution of a broad range of crimes, including many minor crimes.⁴⁹⁶ But, if the transfer were treated (hypothetically) as a first-instance application of the BKA’s new powers, then the Constitutional Court concluded that the measures would not be permissible, especially for the minor crimes potentially covered by the law.⁴⁹⁷ The Constitutional Court reached the same conclusion when considered the portion of this provision that sought to limit the transfer of information gathered with the BKA’s most intrusive measures—home surveillance, online searches of information-technology systems, and telecommunications surveillance—for use in the prosecution of only serious crimes, which the law defined as crimes carrying a possible prison term of five years or more.⁴⁹⁸ Following the logic of the “hypothetical re-collection of data” standard, the Constitutional Court concluded that this class of crimes would not have been serious enough to justify the application of the most intrusive of the new powers in the first instance.⁴⁹⁹ Thus, these crimes could not justify a transfer at a later time.⁵⁰⁰ Finally, the Constitutional Court found that the portions of the provision that authorized the transfer of information to Germany’s domestic intelligence services also failed to fulfill the “hypothetical re-collection of data” standard because the law did not limit the use of the information by the receiving agencies only to the fulfillment of their responsibility to protect the public.⁵⁰¹

4. The Transfer of Information to Non-E.U. Public Authorities (section 14)

The Constitutional Court wrapped-up its analysis of the BKA-Act’s provisions that provide for “additional use” of the agency’s surveillance information with an assessment of section 14, which authorized the BKA to share personally-revealing information with “foreign, non-E.U. police and justice officials, as well as foreign, non-E.U. public agencies responsible for

⁴⁹⁴ *Id.* at (337–38).

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.* at (339–40).

protecting against or prosecuting criminal activities.”⁵⁰² The Constitutional Court focused only on transfers to foreign, non-E.U. authorities because the complainants did not challenge the separate provision of the amended BKA-Act governing transfers to agencies or institutions in E.U. member states.⁵⁰³ Section 14, permitting the BKA to transfer information to foreign, non-E.U. intelligence authorities, was never going to be the most popular measure in a broad statutory scheme that stirred antipathy among many Germans. But, by the time the Constitutional Court published its decision in May 2016, the prospect of German intelligence cooperation with foreign services had become the scandalous backdrop to the *BKA-Act Case*. Edward Snowden’s leaks,⁵⁰⁴ which laid bare America’s voracious intelligence-gathering operations in Germany and Europe, prompted rigorous scrutiny of Germany’s intelligence services.⁵⁰⁵ A parliamentary inquiry committee exposed the breadth and troubling character of the German intelligence services’ cooperation with (some might prefer the term “subservience to”) America’s intelligence agencies, including the NSA.⁵⁰⁶ This story became a major headache for Chancellor Merkel’s government. Although the Constitutional Court never mentions it, the messy NSA-Affair, if only as a matter of political atmosphere, clearly informed the Constitutional Court’s review of section 14.

Section 14 of the BKA-Act limited foreign, non-E.U. transfers of surveillance data to circumstances where doing so would be necessary to promote one of two aims.⁵⁰⁷ First, foreign transfers were envisioned if they were necessary to fulfill the BKA’s responsibilities, to facilitate internation-

⁵⁰² 141 BVERFGE 220 (341–51); Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BUNDESGESETZBLATT [BGBl] I at 1650, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, § 14(1), https://www.gesetze-im-internet.de/bkag_1997/BKAG.pdf [<https://perma.cc/A9ZV-GFLW>] (Russell A. Miller trans.).

⁵⁰³ See Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BGBl I at 1650, § 14a(1)–(2). The BKA-Act has a separate regime governing transfers of information to the law enforcement and intelligence agencies of E.U. Member States. See *id.*

⁵⁰⁴ See generally GREENWALD, *supra* note 14 (recounting the NSA-Affair).

⁵⁰⁵ See *Untersuchungsausschuss (“NSA”)*, DEUTSCHER BUNDESTAG, <https://www.bundestag.de/ausschuesse18/ua/1untersuchungsausschuss> [<https://perma.cc/229G-6LJ2>]; see, e.g., Chris Cottrell, *German Spy Agency Systematically Broke the Law: Report*, DEUTSCHE WELLE (Sept. 1, 2016), <http://www.dw.com/en/german-spy-agency-systematically-broke-the-law-report/a-19521787> [<https://perma.cc/7CWE-YMM8>]; *Merkel to Testify Before German Parliament Panel Probing NSA*, BLOOMBERG (Feb. 10, 2017, 8:47 AM), <https://www.bloomberg.com/news/articles/2017-02-10/merkel-to-testify-before-german-parliament-panel-probing-nsa> [<https://perma.cc/G645-F8GJ>].

⁵⁰⁶ See Andrew Boerne, “*We’re in This Together*”: Reframing E.U. Responses to Criminal Unauthorized Disclosures of U.S. Intelligence Activities, in *PRIVACY AND POWER: A TRANSATLANTIC DIALOGUE IN THE SHADOW OF THE NSA-AFFAIR*, *supra* note 14, at 257; Benjamin Wittes, *Privacy, Hypocrisy, and a Defense of Surveillance*, in *PRIVACY AND POWER: A TRANSATLANTIC DIALOGUE IN THE SHADOW OF THE NSA-AFFAIR*, *supra* note 14, at 180.

⁵⁰⁷ Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BGBl I at 1650, § 14(1)[1]–[2].

al criminal law proceedings, or, in discrete cases, to promote public security in the face of a serious threat.⁵⁰⁸ As I explain below, the Constitutional Court applied the stricter “hypothetical re-collection of data” standard to this range of “additional use” of the BKA’s surveillance information and found that the last of these possibilities was unconstitutional.⁵⁰⁹ Second, the law permitted foreign, non-E.U. transfers if they were necessary for a response to evidence that a serious crime was going to be committed.⁵¹⁰ As I explain below, the Constitutional Court again applied the stricter “hypothetical re-collection of data” standard and found this provision unconstitutional. In both circumstances, the Constitutional Court further tightened the already strict “hypothetical re-collection of data” standard out of respect for additional concerns linked specifically to the transfer of the BKA’s investigative data to foreign states. Finally, the Constitutional Court condemned section 14 for lacking adequate procedural safeguards, including obligations to report on foreign transfers, to document foreign transfers, and to submit foreign transfers to oversight.

To begin its analysis, the Constitutional Court addressed the complexity of applying the Basic Law to the transfer of surveillance information for use by foreign, non-E.U. authorities, which is not governed by the Basic Law and, therefore, not subject to its protection of basic rights.⁵¹¹ The Constitutional Court explained, however, that this gap in rights coverage does not fundamentally preclude transfer of information to foreign, non-E.U. states.⁵¹² The Constitutional Court found that this transfer may be part of the Basic Law’s command that Germany participate in systems of international cooperation,⁵¹³ even when the receiving state’s legal system does not conform to the high-level of rights protection secured by the Basic Law.⁵¹⁴ The difficulty lies, the Constitutional Court explained, in fulfilling the requirement that German public authority remain bound by the Basic Law’s essential rights, despite the fact that the receiving state’s public authority is only bound by its legal regime.⁵¹⁵

⁵⁰⁸ *Id.* § 14(1)[1].

⁵⁰⁹ See *infra* notes 551–562 and accompanying text.

⁵¹⁰ Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BGBL I at 1650, § 14(1)[2].

⁵¹¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (341–42), 2017.

⁵¹² *Id.*

⁵¹³ 141 BVERFGE 220 (341–42); see GRUNDGESETZ [GG] [BASIC LAW], arts. 1(2), 9(2), 16(2), 23–26, 59(2).

⁵¹⁴ 141 BVERFGE 220 (341–42).

⁵¹⁵ *Id.*

In this situation, the Constitutional Court insisted that the legislature ensure the enjoyment of constitutional protections, to the degree possible, on both sides of the transfer.⁵¹⁶ The Constitutional Court ruled that the law authorizing foreign, non-E.U. transfers of information must have two features. On the one hand, it should carefully limit transfers due to concerns for privacy and, on the other hand, it should limit the use of that information by the receiving state even if a transfer is allowed.⁵¹⁷ In both respects—*transfer*, and the receiving state’s *use* of information—the Constitutional Court emphasized that the law must be guided by the interest in promoting human rights.⁵¹⁸ Transfer to and use of information by foreign, non-E.U. states must be excluded if the receiving state has a questionable human rights record or if there are concerns that the receiving state might violate fundamental elements of the rule of law.⁵¹⁹ Above all, the Constitutional Court insisted, German state authority cannot lend a hand to human rights violations.⁵²⁰ The Constitutional Court explained that the legislature can navigate the potentially competing demands of international cooperation and respect for basic rights by enacting the following principles in clear and specific terms: (1) limit the transfer of personally-revealing information to circumstances involving adequately weighty objectives that would satisfy the stricter “hypothetical re-collection of data” standard; and (2) require assurances that the receiving state’s use of transferred information—formally and practically—will respect the rule of law.⁵²¹

The first of these demands is merely an application—to the context of foreign, non-E.U. transfers—of the framework developed for circumstances in which collected information would be used for altogether new objectives. Here, as in the case of domestic transfers of information, the “hypothetical re-collection of data” standard requires that the transfer is justified by security concerns that are as weighty as those that justified the original surveillance measures.⁵²² The Constitutional Court insisted that, at a minimum, the suspicion of a security threat or criminal activity that serves as the basis for the transfer must be concrete enough to justify measures for the defense against mid-level crimes or mid-level threats to legal interests.⁵²³ Finally, the Constitutional Court again demanded that a stricter standard must apply

⁵¹⁶ *Id.* at (342–43).

⁵¹⁷ *Id.*

⁵¹⁸ *Id.*

⁵¹⁹ *Id.*

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Id.*

to transfer of information gathered from surveillance of the home or from online searches of information-technology.⁵²⁴

The Constitutional Court had to develop more fully the second of its demands, which was unique to the context of foreign, non-E.U. transfers. The Constitutional Court explained that the requisite assurance that a foreign legal system will respect the rule of law does not mean that the foreign legal system must be identical to Germany's.⁵²⁵ The Constitutional Court instead insisted that "[a] transfer of data to third countries requires that the data will be handled in the third country in sufficient conformity with rule-of-law standards."⁵²⁶ The receiving state cannot subvert the human rights protection owed to personally-revealing information.⁵²⁷ To the contrary, its legal regime must guarantee a measured, material data-protection standard that is applicable in the receiving state and that accounts for the following essential privacy safeguards: linking the use of surveillance information to the objectives for which it is gathered, a duty to eventually delete the information, and fundamental arrangements for oversight and data-security.⁵²⁸ The Constitutional Court emphasized that the receiving state's legal regime, in order to meet this standard, must make particular guarantees that the transferred information is not used for political persecution and does not contribute to inhumane or degrading treatment.⁵²⁹ A receiving state's satisfaction of this standard, the Constitutional Court explained, should be determined by reference to the local law and the receiving state's international law commitments, both in formal and practical terms.⁵³⁰ But this determination need not be made on a case-by-case basis. The law could permit the BKA to make a general assessment of conditions in specific states, with such a general assessment continuing in force as long as it is not called into question by developments in specific circumstances.⁵³¹ In reaching a conclusion about the integrity of a receiving state's legal system, however, the Constitutional Court insisted that the BKA's assessment is not merely a political question.⁵³² Instead, it must be a substantive legal decision based on regularly updated information.⁵³³ Finally, the Constitutional Court required that the BKA thoroughly document its decision about a foreign, non-E.U.

⁵²⁴ *Id.*

⁵²⁵ *Id.* at (344–45).

⁵²⁶ *Id.* at (344) (Russel A. Miller trans.).

⁵²⁷ *Id.* at (344–45).

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ *Id.* (citing Case C-362/14, *Schrems v. Data Prot. Comm'r*, 2015 E.C.R. 650).

⁵³¹ *Id.* at (346).

⁵³² *Id.*

⁵³³ *Id.*

state's fitness to receive transferred information so that it can be subject to review by data-protection and judicial authorities.⁵³⁴

In articulating this standard, the Constitutional Court drew inspiration from recent decisions of the Court of Justice of the European Union (the "CJEU") and the European Court of Human Rights (the "ECtHR"), thereby joining its privacy jurisprudence to a thickening data-protection regime operating across various jurisdictions in Europe's complex system of multi-level governance.⁵³⁵ In *Schrems v. Data Protection Commissioner*, for example, the CJEU held that the European Commission's finding that American law provided an "adequate level of protection" to personally-revealing information did not live up to the demands of Article 8 of the E.U.'s Charter of Fundamental Rights.⁵³⁶ American law was supposed to provide a "safe harbor" for the protected transfer to the United States of personally-revealing information that originated in Europe.⁵³⁷ The CJEU, as the Constitutional Court did in the *BKA-Act Case*, acknowledged that the receiving state cannot be required to guarantee a level of protection that is identical to the E.U.'s legal order.⁵³⁸ Instead, effectively resorting to a tautology, the CJEU explained that an "adequate level of protection" is achieved if the "third country in fact [ensures], by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union."⁵³⁹ The CJEU was skeptical of the self-certification approach at the

⁵³⁴ *Id.*

⁵³⁵ *Id.* at (344–45).

⁵³⁶ *Schrems*, 2015 E.C.R. ¶ 107. See generally Loïc Azoulay & Marijn van der Sluis, *Institutionalizing Personal Data Protection in Times of Global Institutional Distrust: Schrems*, 53 COMMON MKT. L. REV. 1343 (2016) (discussing how *Schrems* reveals the ongoing legal struggle to balance personal privacy rights with security and anti-terrorism initiatives in the international arena); Mark D. Cole & Annelies Vandendriessche, *From Digital Rights Ireland and Schrems in Luxembourg to Zakharov and Szabó/Vissy in Strasbourg: What the ECtHR Made of the Deep Pass by the CJEU in the Recent Cases on Mass Surveillance*, 2 EUR. DATA PROT. L. REV. 121 (2016) (discussing the significance of CJEU decisions in shaping a framework for data privacy jurisprudence in Europe); Russell A. Miller, *Schrems v. Commissioner: A Biblical Parable of Judicial Power*, VERFASSUNGSBLOG (Oct. 7, 2015), <http://verfassungsblog.de/schrems-v-commissioner-a-biblical-parable-of-judicial-power-2/> [<https://perma.cc/9QE2-99PC>] (cautioning against relying on unfettered judicial power to resolve issues of protecting data privacy).

⁵³⁷ See Issuance of Safe Harbor Principles and Transmission to European Commission; Procedures and Start Date for Safe Harbor List, 65 Fed. Reg. 56534, 56534–35 (Dep't Comm. 2000); Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45666, 45668 (Dep't Comm. 2000); Commission Decision 2000/520/EC of 26 July 2000 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the Safe Harbour Privacy Principles and Related Frequently Asked Questions Issued by the US Department of Commerce, 2000 O.J (L 215) 7, 9 (EC).

⁵³⁸ *Schrems*, 2015 E.C.R. ¶ 73.

⁵³⁹ *Id.*

center of the American regime.⁵⁴⁰ But, the CJEU was decidedly disturbed by the casual manner in which national security concerns could be invoked to derogate from whatever protections the American law afforded.⁵⁴¹

In any case, the protections provided by American law were too weak. The CJEU concluded that the Commission's Decision did not identify in the American regime the minimum required data-protection safeguards.⁵⁴² The shortcomings included: (1) the U.S. Federal Trade Commission's exclusive focus on commercial data-protection issues to the neglect of intrusions by public authorities; (2) the absence of rules limiting the use of information to purposes that originally justified its transfer to the United States; (3) the concern that U.S. intrusions on privacy can take the form of general surveillance and access without differentiation, limitation, or narrow exceptions; (4) the U.S. authorities' access on a generalized basis to surveillance content; and (5) the absence of adequate judicial review for remedies and the eventual erasure of the transferred information.⁵⁴³ For these reasons the CJEU ruled that the Commission's Decision was invalid with the result that the U.S. "safe harbor" was suddenly closed to billions of dollars' worth of data transfers from the E.U.

The Constitutional Court also cited the decision *Zakharov v. Russia* as support for the requirement that the BKA be assured that a foreign, non-E.U. state would not use transferred information in ways that undermine human rights and the rule of law.⁵⁴⁴ A Grand Chamber of the ECtHR issued *Zakharov* in December 2015, ruling unanimously that a Russian telecommunications surveillance regime was incompatible with Article 8 of the European Convention on Human Rights.⁵⁴⁵ The ECtHR found that Article 8 imposed two demands.⁵⁴⁶ First, in the context of secret surveillance, the ECtHR acknowledged that the usual requirements of accessibility and foreseeability cannot be strictly enforced without contradicting the internal logic of *secret* surveillance.⁵⁴⁷ It would be enough, the ECtHR explained, if an E.U. Member State's surveillance law gives adequate notice regarding when, and with what justifications, surveillance is permitted.⁵⁴⁸ Second, the

⁵⁴⁰ *Id.* ¶ 81.

⁵⁴¹ *Id.*

⁵⁴² *Id.*

⁵⁴³ *Id.* ¶¶ 79–98.

⁵⁴⁴ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (344–45), 2017.

⁵⁴⁵ *Zakharov v. Russia* (No. 47143/06), 2015 Eur. Ct. H.R. 1204, ¶ 233; see Lorna Woods, *Introductory Note to Zakharov v. Russia* (*Eur. Ct. H.R.*), 55 *ILM* 207, 209 (2016).

⁵⁴⁶ *Zakharov*, 2015 Eur. Ct. H.R. ¶¶ 229, 231.

⁵⁴⁷ *Id.* ¶ 229.

⁵⁴⁸ *Id.* ¶¶ 230–232.

ECtHR identified a sweeping catalogue of minimum safeguards necessary in a democratic society that limit the effects of these encroachments on Article 8.⁵⁴⁹ These safeguards include: (1) specific and grave crimes or threats as a basis for surveillance; (2) discrete classes of people who can be subject to surveillance; (3) limits on the duration of surveillance measures; (4) established rules governing the storage, analysis and use of personally-revealing information; (5) precautions to be followed with transferring information; (6) the circumstances either allowing or requiring the deletion of information; (7) a role for independent and impartial judges in authorizing surveillance measures; and (8) *ex post* notice to subjects of surveillance in order to facilitate review and provide remedies for abuses.⁵⁵⁰

The Constitutional Court applied its nuanced regime—with its obvious debts to the jurisprudence of the CJEU and ECtHR—to the BKA-Act and concluded that the law’s provisions for the transfer of information to foreign, non-E.U. authorities was unconstitutional.⁵⁵¹ First, the Constitutional Court ruled that section 14(1)[1]{1} and {3} did not meet the stricter “hypothetical re-collection of data” standard.⁵⁵² These sub-paragraphs authorized foreign transfers for the most general of purposes: the fulfillment of the BKA’s responsibilities or, in discrete cases, to promote public security in the face of a serious threat.⁵⁵³ But these vague purposes, the Constitutional Court worried, might involve aims that fall short of those that originally justified the surveillance measures.⁵⁵⁴ The Constitutional Court also found that sub-paragraph 3 (authorizing foreign transfers to promote public security in the face of a serious threat) did not limit the transfer of information taken from home surveillance or online searches of information-technology systems.⁵⁵⁵ The Constitutional Court insisted that information gathered pur-

⁵⁴⁹ *Id.* ¶ 231.

⁵⁵⁰ *Id.* In *Zakharov*, the ECtHR was building on the jurisprudence it had been developing since its review of Germany’s telecommunications surveillance regime after its enactment in 1968 and after the law survived German constitutional law scrutiny in the German Constitutional Court’s 1970 *Surveillance Case*. See Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses [G10] [Act Regarding Limitations on the Privacy of Postal Communications and Telecommunications], Aug. 15, 1968, BGBl I at 949, last amended by Gesetz [G], Nov. 17, 2015, BGBl I at 1938, § 15; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 7, 1970, 30 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 1972.

⁵⁵¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (347–49), 2017.

⁵⁵² *Id.* at (347–48).

⁵⁵³ Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BUNDESGESETZBLATT [BGBl] I at 1650, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818, § 14(1)[1]{1}, {3}, https://www.gesetze-im-internet.de/bkag_1997/BKAG.pdf [<https://perma.cc/A9ZV-GFLW>].

⁵⁵⁴ 141 BVERFGE 220 (347–48).

⁵⁵⁵ *Id.*

suant to these extreme intrusions could be transferred only in response to the most imminent and grave threats.⁵⁵⁶ Second, the Constitutional Court ruled that section 14(1)[2] did not meet the “hypothetical re-collection of data” standard.⁵⁵⁷ This sub-paragraph authorized the foreign transfer of information in response to evidence that a serious crime was going to be committed.⁵⁵⁸ The Constitutional Court found that the law failed to account for the distinctly intrusive character of some of the BKA’s new investigative powers, which could be justified only by the most grave threats or crimes.⁵⁵⁹ Once again, the Constitutional Court had telecommunications surveillance, home surveillance, and online searches of information-technology systems in mind.⁵⁶⁰ The Constitutional Court also ruled, with respect to both of the challenged provisions (section 14(1)[1] and [2]), that the law did not limit the transfer of information to circumstances where evidence established an adequately concrete suspicion of a security threat or crime.⁵⁶¹ Finally, the Constitutional Court found that section 14(1) was unconstitutional because it did not provide adequate oversight and reporting requirements, including the duty to document thoroughly the transfer of information.⁵⁶²

CONCLUSION: A PANTOMIME OF PRIVACY

The *BKA-Act Case* was welcomed by many as a clarion privacy manifesto for our digital age.⁵⁶³ This view builds on a common perception of Germany’s “exceptional” privacy jurisprudence. But the *BKA-Act Case* specifically, and the Constitutional Court’s approach to privacy more generally, prompt at least two critiques. The first is that the Constitutional Court’s detailed, painstaking approach to the *BKA-Act Case* and other judgments in this area of the law involved the justices too deeply in delicate national security policy matters. The judgment’s two dissenting justices objected to the majority’s judicial activism at the expense of more democratically-

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.* at (348–49).

⁵⁵⁸ Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BGBl I at 1650, § 14(1)[2].

⁵⁵⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 20, 2016, 141 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 220 (348–49).

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ See, e.g., Gudula Geuther, *Wert des Rechts in Zeiten der Bedrohung*, DEUTSCHLANDFUNK (Apr. 20, 2016), <http://blogs.deutschlandfunk.de/berlinbruessel/2016/04/20/wert-des-rechts-in-zeiten-der-bedrohung/> [<https://perma.cc/ZH2N-ZFBB>] (lauding the decision as a landmark advance in privacy jurisprudence).

accountable institutions. The second is the more fundamental criticism that the Constitutional Court has pursued a mere pantomime of privacy that does not live up to the hopes of today's privacy advocates. Instead the Constitutional Court articulated a privacy jurisprudence writ small, where precise deletion deadlines and careful documentation of surveillance count for more than "the right to be let alone."⁵⁶⁴

The positive responses to the *BKA-Act Case* suggest that the Constitutional Court, from its bucolic seat in Karlsruhe, has accurately divined the country's mood concerning privacy and security, especially in the wake of the NSA-Affair. Green Party Parliamentarian Renate Kunast made the link between the Constitutional Court's decision and the NSA-Affair explicit, praising the Constitutional Court for drawing a sharp contrast with what she believes to be the lawless regime under which the American Intelligence Community operates. "The Constitutional Court has in mind a model other than the NSA," Kunast exulted.⁵⁶⁵ "It attends to the protection of the core of basic rights and has even demanded independent oversight."⁵⁶⁶ The German Pirate Party's Representative for Data-Protection called the decision "Karlsruhe's answer to the NSA."⁵⁶⁷ What an answer.

The BKA-Act, in one sweeping gesture, granted to the BKA all the various investigative and surveillance powers Germany's other law enforcement and intelligence services had been accumulating—sometimes in piecemeal reforms—over decades. It also regulated some altogether new territory in the field, especially regarding the transfer of information within Germany and to foreign, non-E.U. security entities. The BKA-Act, in this respect, was a state-of-the-art compendium of the German security community's investigative competences. It was security law's Big Bang. But the BKA-Act was not an uninhibited "*wünsch mir was*" ("wish list") for the BKA. The law clearly sought to give the BKA immense investigative capacity. But it also sought to frame those powers within the myriad and com-

⁵⁶⁴ Warren & Brandeis, *supra* note 20, at 193; Marcel Fürstenau, *Pragmatic BKA Ruling for Defense Against Terrorism*, DEUTSCHE WELLE (Apr. 20, 2016), <http://www.dw.com/en/opinion-pragmatic-bka-ruling-for-defense-against-terrorism/a-19201691> [<https://perma.cc/GJSU-GQ2G>] (describing it as a "groundbreaking verdict"); Geuther, *supra* note 563 (calling the decision a "milestone of data-protection") (Russell A. Miller trans.).

⁵⁶⁵ Geuther, *supra* note 563 (Russell A. Miller trans.).

⁵⁶⁶ Markus Böhm & Angela Gruber, *Urteil zum BKA-Gesetz: Was sich jetzt bei der Online-Überwachung ändert*, SPIEGEL ONLINE (Apr. 20, 2016, 8:56 PM), <http://www.spiegel.de/netzwelt/netzpolitik/bka-gesetz-was-das-urteil-fuer-computernutzer-bedeutet-a-1088215.html> [<https://perma.cc/S54L-TB6G>] (Russell A. Miller trans.).

⁵⁶⁷ Patrick Breyer, *Bundesverfassungsgericht Bremst Internationale Datenwäsche durch BKA und BND*, PIRATENPARTEI DEUTSCHLAND (Apr. 20, 2016), <https://www.piratenpartei.de/2016/04/20/piraten-bundesverfassungsgericht-bremst-internationale-datenwaesche-durch-bka-und-bnd/> [<https://perma.cc/5CJV-GPBT>] (Russell A. Miller trans.).

plex limits imposed by the basic rights as they had been interpreted by the Constitutional Court over the years. It was a terrible mess of a statute that struggled, in long and extremely detailed provisions, to find a functional compromise between the conflicting demands of liberty and security.

The Constitutional Court's painstaking assessment of the BKA-Act's many provisions necessarily involved a survey of the Constitutional Court's extensive jurisprudence in the area of privacy and security, including the interpretation the Constitutional Court had given to explicit privacy protections such as Basic Law Article 10 (telecommunications privacy) and Article 13 (inviolability of the home). But, it also required the Constitutional Court to apply its jurisprudence regarding implicit privacy protections rooted in Basic Law Articles 1 and 2, including the absolute protection owed the "core area of private life," the venerable right to informational self-determination, and the freshly minted right to the confidentiality and integrity of information-technology systems.

The Constitutional Court found that the vast majority of the BKA-Act's provisions succeeded in striking the right balance between the increasing demands for security and the abiding commands of the Basic Law. If the amended BKA-Act represented an ominous shift towards a surveillance state, as many critics agonized, then the Constitutional Court's decision from April 2016 was by no means a clear repudiation of that development. Instead, the Constitutional Court only took exception with the details of some of the law's provisions. The law was not specific enough at some points. The law had not always demanded the most reliable form of suspicion as the basis for undertaking surveillance. Sometimes the law did not draw the scope of permissible surveillance narrowly enough. Many of the procedures established to assure that the BKA would not abuse its new powers did not quite hit the mark. New tests had to be articulated for the novel issue of foreign transfers of information. Above all, the law too often failed to show the required respect for the sacrosanct "core area of private life."

Still, most of the provisions of the BKA-Act survived the Constitutional Court's scrutiny. This is an indication of the restraint that was built into the law from the start, including special limits for measures implicating the inviolable "core area of private life." The "Special Technical Investigative Measures Inside or Outside the Home" authorized by section 20h of the BKA-Act, for example, were permitted only in very narrow circumstances (not the same broad circumstances in which section 20g measures could be applied), were limited only to the investigative target's home (and not other residence where he or she might be found), and were subject to judicial ap-

proval.⁵⁶⁸ And, where those measures might constitute an intrusion on the “core area of private life,” the statute imposed additional safeguards: prohibiting surveillance in the target’s home unless evidence showed that there was no risk of infringing the “core area of private life”; requiring immediate cessation of surveillance if the “core area of private life” was nevertheless implicated by the investigative measures; requiring the use of automatic, technological recording systems (as opposed to manual, human surveillance); insisting that all decisions about the authorization of these measures—or the use and deletion of any information acquired from these measures—be taken by a court; and demanding that the entire spectrum of activities potentially involving information drawn from the core area of private life be documented in a protocol that must be maintained for as long as necessary to facilitate oversight.

In the face of such legislative caution, the Constitutional Court could only tinker on the margins. With respect to the protections provided by section 20g for the “core area of private life,” for example, the Constitutional Court agonized that the law did not establish a presumption against surveillance involving conversations between intimates or professionals. This less-than-breathtaking achievement was typical of the modest *Handwerk* (“craftsmanship”) the Constitutional Court’s decision pursued. Other examples include the Constitutional Court’s insistence that, in order to ensure protection of the “core area of private life,” independent authorities outside the BKA must review information collected through online searches (measures taken pursuant to section 20k of the BKA-Act). The BKA-Act, however, allowed BKA agents to conduct this review. Perhaps the most humdrum of the Constitutional Court’s achievements was its demand that the documentary protocol, which the BKA was statutorily obliged to maintain regarding surveillance measures that might involve the “core area of private life,” be kept for longer than the one-year deletion period prescribed by the BKA-Act.

Despite the fawning reception it was given, the Constitutional Court’s decision must surely have disappointed those most animated by concerns over privacy and data-protection. The Brazil-based American journalist Glenn Greenwald and the German novelist and privacy advocate Juli Zeh are representative.⁵⁶⁹ Fearing the incremental but steady erosion of privacy rights, and agonizing as much over the chilling effects produced by perva-

⁵⁶⁸ Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Act], July 7, 1997, BUNDESGESETZBLATT [BGBl] I at 1650, last amended by Gesetz [G], July 26, 2016, BGBl I at 1818,] § 20h, https://www.gesetze-im-internet.de/bkag_1997/BKAG.pdf [<https://perma.cc/A9ZV-GFLW>].

⁵⁶⁹ See *infra* notes 570–585 and accompanying text.

sive surveillance and data-collection as over any tangible privacy abuses, these advocates could find little relief from the Constitutional Court's measured and minimal response to the BKA-Act.

In his book *No Place to Hide*,⁵⁷⁰ which documented and explicated Snowden's disclosures from Greenwald's firsthand perspective as one of former NSA contractor's trusted media handlers, Glenn Greenwald fulminated against the chilling effects that would be triggered by any surveillance regime—even one constrained as the Constitutional Court insisted in the *BKA-Act Case*. Just being aware that they are being watched, Greenwald explained, will lead people to radically change their behavior.⁵⁷¹ A system of ubiquitous surveillance aims at more than collection of information. Instead, Greenwald argued, its mere existence (however it might be limited) very potently puts people in fear and cultivates a sense of hopelessness.⁵⁷² According to Greenwald, mass surveillance, through collective coercion and chilling effects, has the capacity to kill dissent in the mind.⁵⁷³ The threat posed by intrusive measures taking place at all and in any form, Greenwald demanded, is more than just an abstract, conjectural, or unspecified threat to everyone's liberty.⁵⁷⁴ From this perspective, it is hard to imagine Greenwald being reassured by anything less than a categorical prohibition of the very practices authorized by the BKA-Act and, ultimately, endorsed by the Constitutional Court.

Juli Zeh would agree. Sometimes referred to as the “Joan of Arc of the digital age,”⁵⁷⁵ Zeh has organized an international coalition of authors in protest against state surveillance and the state's failure to offer adequate protection against private data-harvesting and intimate monitoring for commercial value.⁵⁷⁶ But, with her petitions to Chancellor Merkel, Zeh is not calling for the Constitutional Court's proportional protection against the public and private institutions that covet our data. She is worried about a gradual slide into totalitarianism that is accompanied by a broad and general loss of freedom.⁵⁷⁷ In her open petition to Chancellor Merkel, penned in the

⁵⁷⁰ See generally GREENWALD, *supra* note 14 (documenting the NSA-Affair).

⁵⁷¹ *Id.* at 173.

⁵⁷² *Id.* at 177.

⁵⁷³ *Id.* at 178.

⁵⁷⁴ *Id.* at 196.

⁵⁷⁵ Enno Stahl, *Schriftstellerin Julie Zeh: Die Bewahrerin*, TAZ.DE (Feb. 16, 2014), <http://www.taz.de/15048946/> [<https://perma.cc/SB6E-32ZH>] (Russell A. Miller trans.).

⁵⁷⁶ Tilman Steffen, *Warten auf das “digitale Fukushima,”* ZEIT ONLINE (Dec. 10, 2013, 4:30 PM), <http://www.zeit.de/kultur/literatur/2013-12/schriftsteller-ueberwachung-aufruf> [<https://perma.cc/4Q3B-K8B2>].

⁵⁷⁷ Karin Janker, *Juli Zeh über das Generali-Modell: “Wir werden manipulierbar und unfrei,”* SÜDDEUTSCHE ZEITUNG (Nov. 26, 2014, 4:55 PM), <http://www.sueddeutsche.de/kultur/juli-zeh->

weeks following Edward Snowden's revelations, Zeh inveighed over the collection and use of metadata that "captures our friendships and relationships" and renders "our political orientation, a profile of our activities—yes, even our daily moods—transparent for the security services."⁵⁷⁸ This, Zeh concluded, has made the "glass human" a reality.⁵⁷⁹ In the face of this dystopia, in part confirmed by the intrusive powers the BKA-Act granted the BKA, Zeh succumbs to the Orwellian cliché: "Big brother is watching you."⁵⁸⁰ She concluded her 2009 book, *Angriff auf die Freiheit* ("Attack on Freedom"), with a visit to Orwell's North London home.⁵⁸¹ The pages leading up to that moment document and criticize an assault on our freedom and privacy that is being perpetrated by a cynical and manipulative political class.⁵⁸² Although Zeh clearly hopes for an engaged and sustained political movement to resist this development, in the meantime she is counting on the basic rights that are enshrined in the Basic Law and enforced by the Constitutional Court as a last bulwark of freedom.⁵⁸³ Where will surveillance and data-collection meet their limits? Zeh pleads for "a specific constitutional protection against surveillance and data-collection."⁵⁸⁴ But Zeh is not calling for the balanced, minimalist, and proportional jurisprudence of the Constitutional Court's *BKA-Act Case*. She expects the Constitutional Court to categorically enforce a basic right to privacy, which has a "fully new, central meaning for the survival of democratic society."⁵⁸⁵

In *Captain America: Civil War*, BKA agents arrest the American super soldier, but are not able to keep him in their high-tech detention center in Ber-

ueber-das-generalmodell-wir-werden-manipulierbar-und-unfrei-1.2232147 [https://perma.cc/PYZ2-UKNB].

⁵⁷⁸ Juli Zeh, *Angemessene Reaktion auf die NSA-Affäre*, CHANGE.ORG (July 27, 2013), <https://www.change.org/p/bundeskanzlerin-angela-merkel-angemessene-reaktion-auf-die-nsa-aff%C3%A4re> [https://perma.cc/82KL-A74S] (Russell A. Miller trans.).

⁵⁷⁹ *Id.* Zeh uses the term "glass human" to convey the fact that people's lives, down to the most mundane minutiae, are widely-accessible through technological advancements in data collection. *Id.*

⁵⁸⁰ See ILIJA TROJANOW & JULI ZEH, ANGRIFF AUF DIE FREIHEIT: SICHERHEITSWAHN ÜBERWACHUNGSSTAAT UND DER ABBAU BÜRGERLICHER RECHTE 131 (2009). See generally *id.* (criticizing German laws that grant stronger investigative powers as a thinly-veiled, and unacceptable, intrusion on personal freedom). Trojanow and Zeh agonized, *inter alia*, over data-mining, telephone surveillance, and online searches. *Id.* at 55–58. They referred specifically to the BKA-Act, which was enacted in the months prior to the book's publication. Among the concerns they raised, they devoted special attention to the Act's provisions authorizing online searches. *Id.* at 100–01.

⁵⁸¹ *Id.* at 131–32.

⁵⁸² *Id.* at 91–94. Trojanow and Zeh tar all the German political parties, save the Free Democrats, with this broad brush. *Id.*

⁵⁸³ *Id.* at 101–02.

⁵⁸⁴ *Id.* at 132 (Russell A. Miller trans.).

⁵⁸⁵ *Id.* at 25 (Russell A. Miller trans.).

lin. The hero's escape is aided in part by a decidedly humble antique VW Beetle.⁵⁸⁶ The *BKA-Act Case*, on the other hand, tells the story of the BKA-Act's auspicious escape from the most rigorous, privacy-respecting constitutional limits. Its escape is abetted by a timorous Constitutional Court.

⁵⁸⁶ CAPTAIN AMERICA: CIVIL WAR, *supra* note 1; see Kelsey Adams, *Five Things I Would Never Have Said About Marvel Movies in 2008*, CNET (May 11, 2016, 4:00 AM), <https://www.cnet.com/news/five-things-i-would-never-have-said-about-the-mcu-in-2008/> [<https://perma.cc/6RT3-3C4S>] (reviewing *Captain America: Civil War*).