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THE FUTURE OF LIBERAL DEMOCRACIES IN A TIME OF TERROR: A COMPARISON OF THE IMPACT ON CIVIL LIBERTIES IN THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED STATES

Shawn Boyne[†]

I. INTRODUCTION

This paper explores the major legislative packages enacted by the U.S. and Germany within the past decade to combat terrorism. Although the September 11th attacks struck the United States, the fact that several of the terrorists lived in Germany prior to the attacks, demonstrates that both countries face similar threats from terrorist organizations. In addition to sharing a similar external threat, both Germany and America share commitments to a democratic form of government where government power is bound by institutional checks and balances and subject to the confidence of the electorate.

While the fact that America helped shape the post-war construction of Germany's political institutions and legal system led to some convergence between the two systems, there are clear points of divergence as well. The German conception of fundamental values, expressed in the Basic Law, accords a central role to the value of human dignity. Germany's constitutional jurisprudence reflects the German preference for building a legal system around clearly articulated, objectively ordered principles. In contrast, while the Bill of Rights articulates a host of fundamental values such as free speech and the right to privacy, during the first half of America's existence, courts primarily protected property related rights.

In addition to diverse traditions of constitutional jurisprudence, Germany and the U.S. view terrorism and national security differently. Although for the first time in recent history, Germany deployed troops abroad to support the U.S. effort in Afghanistan,

Germany staunchly opposed American intervention in Iraq.¹ The most critical difference between the two countries is that America has framed the fight against terrorism in terms of a war, while Germany has not.² President Bush has used a state of emergency and the support of the American people to invoke wartime powers, enact sweeping legislative change, and create a new cabinet level department of homeland security. In contrast, Germany, which has a longer experience with terrorism on its own soil, strengthened its ability to detect and investigate terrorists, while improving cooperative investigative efforts within the European Union (EU).

Against the backdrop of the American decision to deploy military forces to combat terrorism and Germany's preference for non-military options lie differences in the magnitude of the loss experienced by the United States at the hands of the al Qaeda network. In addition to the more than 3,000 casualties suffered on September 11th, al Qaeda's campaign of bombing Americans around the world has injured thousands of individuals and resulted in several deaths.³ Those numbers far exceed the casualties suffered by German citizens at the hands of extremists in the 1970s, which led Germany to declare a state of emergency and revise its criminal codes.⁴ These points of

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1. While Germany did send troops to Somalia and Bosnia during the decade of the 1990s, those troops were part of an international peacekeeping effort.

2. PETER J. KATZENSTEIN, SEPTEMBER 11TH IN COMPARATIVE PERSPECTIVE: THE ANTI-TERRORISM CAMPAIGNS OF GERMANY AND JAPAN 3 (Oct. 2001), available at <http://www.einaudi.cornell.edu/9-11/content/pdf/pkatzenstein.pdf> (last visited Nov. 5, 2003).

3. Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559, 560 (1999).

4. MIKLOS K. RADVANYI, ANTI-TERRORISM LEGISLATION IN THE FEDERAL REPUBLIC OF GERMANY 24-34 (1979).

divergence suggest differing perspectives about the nature of threat posed by terrorism as well as each country's perception of its role in the world arena.

It is tempting to cast the German and American legislative responses to terrorism solely within the context of these differences in international outlook. To do so, however, would oversimplify the role and construction of law. Irrespective of these differences in international outlook, the unique political, historical, and cultural traditions of each country profoundly shaped the law-making and implementing processes. By studying and comparing how these factors have influenced anti-terrorism legislation, we can begin to understand different, and perhaps better, ways of balancing security and human rights interests that do not bear the heavy footprint of short-term political considerations.

This paper aims to begin to forge this understanding by identifying similarities and differences between the anti-terrorism legislation in both states. This article suggests that the points of divergence in legal policy have been shaped by differences in historical and social experience, the structure of political institutions, and finally by diverse conceptions of fundamental values.⁵ The broader question that this paper only begins to address is whether or not the legislation enacted in both countries serves the interests of liberal democratic societies in the twenty-first century. There is a more fundamental question. Does the threat and nature of terrorism justify a new wartime legal order that curbs civil liberties or can democracies protect themselves and their constitutional values with more measured legal reforms? Exploring origins of difference can highlight the strengths and weaknesses in the legal strategy that each country has chosen to combat terrorism.⁶ To that end, this paper examines the balance struck between security interests and the core principles at the heart of both societies in both states' recent anti-terrorism legislation.

5. David Nelken, *Legal Transplants and Beyond: Of Disciplines and Metaphors*, in *COMPARATIVE LAW IN THE 21ST CENTURY* 19, 24 (Andrew Harding & Esin Orücü eds., 2002).

6. See, e.g., Martha C. Nussbaum, *Introduction to Comparative Constitutionalism*, 3 *CHI. J. INT'L L.* 429 (2002) (describing the benefits of the study of comparative constitutionalism).

II. A BRIEF HISTORY OF THE RECENT ANTI-TERRORISM LEGISLATION

A. Germany

1. The First Anti-Terrorism Package

The repeated broadcasts of the September 11th attacks moved public sentiment not only in the U.S., but also in Germany. One day after September 11th, Germany's Minister of the Interior, Otto Schily, called for a review and strengthening of Germany's existing legislation related to state security.⁷ The powerful televised images of the attack fueled support for a legislative response. Despite the fact that Germany had been fighting terrorism within its borders for nearly thirty years, German lawmakers perceived the September 11th attacks as a new form of terrorist threat that required a heightened response.⁸

As a result of Germany's experience with domestic terrorism, Germany possesses a rich record of legislative efforts designed to improve the state's ability to combat terrorism. In the decades of the 1970s and 1980s groups such as the *Rote Armee Fraktion* (RAF), the June 2nd Movement, and the Socialist Patients' Collective engaged in violent activities that included bombings, kidnappings, assassinations and armed raids of government buildings that threatened Germany's legal order. Although the government arrested and convicted the most prominent leaders of these terrorist groups, components of the enacted German legislation provoked criticism within Germany and abroad, and spurred constitutional challenges in Germany's Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*).⁹ Critically, these legislative measures sparked an ongoing discussion within Germany about the relationship between civil liberties and the right to security.¹⁰ While ensuring state security became a basic state right in the 1970s, the relationship of this right to other basic rights stimulated ongoing political and scholarly debate.¹¹ Recently, the

7. See OLIVER LEPSIUS, THE RELATIONSHIP BETWEEN SECURITY AND CIVIL LIBERTIES IN THE FEDERAL REPUBLIC OF GERMANY AFTER SEPTEMBER 11 (2002), at <http://www.aicgs.org/publications/PDF/lepsiusenglish.pdf> (last visited Nov. 5, 2003).

8. *Id.* at 2.

9. *Id.* at 1 (citing BVerfGE 46, 1 (prohibition of contact, no interim order); BVerfGE 46, 160 (Schleyer kidnapping); BVerfGE 49, 29 (statute of prohibition of contact); BVerfGE 65, 1 (Census)).

10. LEPSIUS, *supra* note 7, at 1-2.

11. *Id.* at 2.

EU's Schengen Agreement, which called for member states to relax border controls, also caused Germany to reevaluate security procedures within its borders.

In the initial aftermath of September 11th, German legislators ignored the ongoing debate and additionally failed to question whether an intelligence lapse permitted the attacks.¹² At the time, most German politicians believed that Islamic terrorists threatened democracy, in a qualitatively different way than any group before them. Moreover, that threat required Germany to change the legal rules of the game. During the debate about Germany's "second security package," Interior Minister Shily stated:

We have to be aware what place was attacked: New York is the most international city in the world. The United Nations has its headquarters there. More than eighty nations had citizens among the victims. New York—a symbol for the desire for freedom in this world, for democracy in this world—was the chosen point of attack. Many of those who were persecuted under the terror regime of the National Socialists or under the rule of other totalitarian systems had sought refuge in New York. This is deeply rooted in the historical consciousness of humanity.¹³

Given that Germany has been fighting terrorism within its borders for several decades and that regions within Europe, such as Northern Ireland and the Basque region of Spain, have kept terrorism at the forefront of European consciousness, it is perhaps surprising that Germany's ruling coalition treated this new threat as a qualitatively different one. Yet while the terrorist attacks of the 1970s were the work of a limited number of individuals, because the new attacks were committed by members of a world-wide network of Islamic terrorists, as well as the devastating number of the casualties, elevated the nature of the threat.¹⁴

While Germans interpreted the September 11th attacks as an attack on Western democracy, Germany did not view the attacks as a prelude to war and rejected the American characterization of the appropriate response, a declaration of war.¹⁵ Although it is an open question how Germany would have responded to the attacks had they occurred on German soil, it is not clear that Germany's preference for

12. *Id.*

13. *See id.*, at 3 (quoting Otto Schily in the German Bundestag, 14th electoral period, session number 209, *BT-Plenarprotokoll* 14/209, 20758 (B) (Dec. 12, 2001)).

14. *Id.* at 4.

15. *Id.*

law and order would have spurred Germany to battle terrorism on a broad worldwide front.¹⁶ These differences cannot be attributed solely to differences in military capabilities. While Germany's military capabilities do not compare to the United States' worldwide network of military bases, as a NATO member Germany can appeal to NATO to reinforce its military needs. To understand the differences between the U.S. and German outlook one must search more deeply through historical and political factors.

This difference in perspective reflects, in part, Germany's aversion to war in the aftermath of massive destruction and carnage of World War II. While the loss suffered on September 11th was grave, the massive destruction and partitioning of Germany in the aftermath of the war has perhaps made Germans and Europeans more sensitive to the costs of war. Moreover, Europe possesses a history of civil wars, terrorist acts, and cross-border organized crime that many Americans cannot appreciate. As a result of these differences, Germans framed September 11th as a heightened terrorist threat, rather than a war.¹⁷ From a policy-making perspective, this framing denied Germany the opportunity to rationalize its legislative response as a justifiable wartime response and narrowed the possible legal scope of that response.

Germany subsequently enacted two pieces of "security" or "anti-terrorism" legislation, the first in October 2001, and the second in January 2002. The first security package expanded the reach of penal statutes to foreign terrorists and tightened the eligibility of provisions in the law governing associations, which had given religious organizations a protected legal status. It also implemented security checks of airline personnel.

In addition, changes to Germany's Criminal Code made it easier for the state to criminally punish foreign terrorist organizations operating in Germany by criminalizing membership in, or support given to, a foreign terrorist organization. Prior to these changes, in order to be punished under §§ 129 and 129a of the Criminal Code (StGB), a foreign terrorist organization needed to have a sub-organization in Germany before the state could punish its members or

16. In 1998 Germany refused to admit the Kurdish leader Abdullah Ocalan who had used terroristic tactics on behalf of the Kurdish independence movement into the country because of fears that his arrest in Germany would disrupt domestic law and order. See Ralph Atkins, *Bonn Will Not Seek Ocalan Extradition*, FIN. TIMES (London), Nov. 28, 1998, cited in Wedgewood, *supra* note 3, at 561.

17. LEPSIUS, *supra* note 7, at 4.

supporters.¹⁸ Enacted in the 1970s as a response to the terrorist attacks of the Baader-Meinhof Gang and its successor group, the Red Army Faction (RAF), § 129a StGB, was originally designed to improve public safety by criminalizing the planning of illegal activities and punishing such activity with stiff sentences.¹⁹ Its companion section, §88a StGB, was highly controversial at the time of enactment, because it appeared to criminalize mere intent by outlawing “propagation of anti-constitutional action.”²⁰ Public criticism led to the repeal of § 88a StGB in 1981; however, §129a StGB remained in force.²¹

The provisions of the new law apply without restriction to any organization located within a member country of the EU.²² For organizations that primarily operate outside of the EU, the German criminal law will apply if there is some personal or geographic connection to Germany.²³ In addition, the legislation added a new offense, 129b StGB. This new section allows the state to prosecute terrorist organizations that are organized in an EU member state other than Germany, if the suspect is German or resides in Germany. Prior to the enactment of this new section, the ability of German authorities to prosecute terrorist organizations with foreign ties was constrained because § 129a StGB applied only to German terrorist organizations. Under § 129b StGB, individuals who are members of European and other foreign terrorist organizations such as al Qaeda may be prosecuted simply for being members of, or providing support to, those organizations.

Prior to the September attacks, the reach of §129a StGB had recently stimulated renewed political debate. Germany made a commitment to punish criminal organizations that operated within Germany, regardless of the location of an organization’s base of operations or criminal acts as part of an EU initiative to counter regional terrorist activity within Europe. However, some

18. § 129 StGB (Formation of Criminal Organizations); § 129a StGB (Formation of Terrorist Organizations).

19. LEPSIUS, *supra* note 7, at 5.

20. Erhard Blankenburg, *Changes in Political Regimes and Continuity of the Rule of Law in Germany*, in COURTS, LAW & POLITICS 249, 294 (Erhard Blankenburg et. al eds., 1996).

21. *Id.*

22. *New Law Designed to Step Up Fight Against International Terrorism*, DIE BUNDESREGIERUNG, May 2, 2002, at http://eng.bundesregierung.de/dokumente/Artikel/ix_78475_475.htm (last visited Nov. 5, 2003).

23. *Id.*

parliamentary factions sought to repeal the statute, because it made providing support to an organization that had participated in terrorist acts a strict liability crime.²⁴ The debate centers on the fact that an individual can be prosecuted for providing financial support to an organization that is primarily engaged in humanitarian activities, if that organization also sponsors violent activities.

A second initiative that sought to improve the government's ability to fight terrorist organizations with foreign ties was the tightening of the eligibility for the "religious privilege" found within §§ 9 and 14 of the Association Act. These changes aimed to prevent German-based organizations from supporting groups that promoted violence. Prior to these changes, the government lacked the power to ban extremist religious groups that used religion as a cover for criminal activities, if those organizations promoted public religious practices.²⁵ While this measure was passed after September 11th, prior to that date, there was a growing consensus that this was a significant problem. The final key provision in the first anti-terrorism package was a regulation issued on October 8, 2001 that improved security checks of airline personnel.

2. The Second Anti-Terrorism Package

The primary goal of the Second Anti-Terrorism Package, enacted on January 1, 2002, was to enhance the state's ability to detect terrorism and prevent terrorist attacks. To support this aim, the legislature enlarged the responsibilities of Germany's key agencies entrusted with protecting state security: the Federal Office of the Protection of the Constitution (*Bundesamt für Verfassungsschutz, BfV*), the Military Counterespionage Service (*Militärischer Abschirmdienst, MAD*), the Federal Intelligence Service (*Bundesnachrichtendienst, BND*), and the Federal Criminal Police Office (*Bundeskriminalamt, BKA*).²⁶ The second security package included new security laws and amended nearly 100 acts including the Federal Constitution Protection Act, the Federal Office of Criminal Investigation Act, the Federal Border Guard Act, the Aliens Act, the Asylum Procedure Act, the Aliens Central Register Act, the

24. LEPSIUS, *supra* note 7, at 5.

25. *Id.* at 6.

26. *Id.* at 7

Security Checks Act, the Civil Aviation Act, the Passport and Personal ID Card Acts and the Associations Act.²⁷

The new legislation enhanced the authority of the *BfV* and *BND* to gather data and information on individuals involved in terrorist activities. Germany has now authorized the *BfV* to monitor organizations that pose a threat to international peace and granted it the authority to gather information on suspected terrorists.²⁸ This legislation is designed to identify individuals involved in terrorist networks by improving the flow of information between the Federal Office for the Recognition of Foreign Refugees and Foreign Authorities, as well as between the German Federal Government and the Federal Länder.²⁹ In addition, the legislation permits the Federal Office for the Recognition of Foreign Refugees to transmit data to the *BfV* when necessary to protect state security.

As a result of this new legislation, Germany's Military Counterintelligence Service is also now authorized to gather information on individuals who threaten world peace. However, the government more narrowly circumscribed *MAD's* ability to request data than it did the *BfV*. *MAD* can only request telecommunications usage.³⁰ Germany also amended its Security Clearance Check Act, *Sicherheitsueberprüfungsgesetz*, to allow the government to conduct background investigations on individuals employed, or about to be employed, in security sensitive positions vital to national defense and the functioning of the public welfare system.³¹

In the second legislative package, Germany authored the deployment of armed air marshals employed by the Federal Border Police on German aircraft and strengthened airport security checks. In addition to expanding the Federal Border Police's deployment, this legislation increased the authority of border police to question

27. Federal Ministry of the Interior, *Cornerstones of Germany's Second Anti-Terror Package*, May 11, 2001, at http://www.eng.bmi.bund.de/dokumente/Pressemitteilung/ix_64084.htm (last visited Nov. 5, 2003) [hereinafter *Cornerstones*]. The amendments to the Federal Constitution Protection Act, the Federal Intelligence Service Act, the Military Counterintelligence Service Act, the Security Checks Act, and § 7, ¶ 2 of the Federal Office of Criminal Investigation Act will expire in five years.

28. The legislation authorized the agency to gather information from banks, financial services companies, postal services providers, aviation companies, and telecommunication companies.

29. See *Cornerstones*, *supra* note 27.

30. *Id.*

31. *Id.*

individuals. Prior to the second package's enactment, the Federal Border Police could only stop and question individuals who were located within a specified range of Germany's borders who could provide information directly relevant the Border Police's specific mandate to protect the borders. The Border Police can now request that an individual produce identification and require individuals to answer questions and provide information, regardless of whether or not the information is related to a border security question.³²

The Federal Criminal Police Office, which functions as Germany's federal police force, acquired original investigative jurisdiction over cyber-crime that poses a threat to state security or could trigger critical consequences for the population.³³ The legislation also lifted a critical check on the scope of *BKA* investigations. Prior to this legislation's enactment, the *BKA* could not proceed with the investigation of a case until they verified whether or not any of the *Länder* already possessed similar information.³⁴

Amendments to the Act governing Passports and Identity Cards (*Pass- und Personalausweisgesetz*) will enable Germany to add biometric data to passports and identity cards.³⁵ Special legislation to be enacted at a future date, will limit the types of biometric data that can be encoded on identification information and bars the government from centrally storing these new data records.³⁶ The primary purpose of these amendments is to restrict the use of fake identification information.

In the Holocaust's aftermath, one of the ways in which Germany sought to protect religious freedom was the enactment of laws that prevented the government from banning any group that described itself as faith-based.³⁷ After September 11th, when it became evident that some groups were using religion as a shield to perpetrate violence, Germany lifted those protections in a two-step process. First, the initial legislative package more narrowly circumscribed the religious "privilege" accorded to all faith-based groups in the Law governing Private Associations (*Vereingengesetz*). The second package strengthened the state's ability to ban religious groups, ideological

32. *Id.*

33. *Id.*

34. *Id.*

35. *Cornerstones, supra* note 27.

36. *Id.*

37. See KATZENSTEIN, *supra* note 2, at 18.

associations, and fundamentalist-Islamic religious groups, when those groups foster intolerance and promote terrorism.³⁸

Germany has tightened some security precautions related to foreigners; however, it has been unable to secure the necessary political consensus to enact new immigration laws that balances the state's security and labor needs.³⁹ Although Germany has been at times eager to attract foreign workers to the country, it has been difficult for those workers to subsequently obtain citizenship. Germany possesses a large population of southern Europeans who came to Germany in large numbers in the 1950s and 1960s to help the country rebuild and remained thereafter. In addition, many skilled foreigners who entered Germany within the past five years remain in Germany after having lost their jobs in the recent economic downturn.

As a result of the government's inability to achieve a consensus on immigration policy, Germany has been left with a patchwork of legislative enactments. After September 11th, amendments to the Foreigners Act (*Ausländergesetz*) banned the entry into Germany of individuals who threaten state security and expanded deportation provisions.⁴⁰ Despite these enhancements, individuals may not be denied entry, detained indefinitely, or deported simply on the basis of a suspicious hunch. As a result of amendments to the Asylum Procedure Act (*Asylverfahrensgesetz*), individuals seeking asylum in Germany may be required to provide a voice recording for identification purposes that will enable the state to determine their region of origin.⁴¹ The state must inform foreigners in advance that their voice is being recorded and the recording must be made outside of a formal asylum hearing. Germany is also seeking to acquire the capability to crosscheck the fingerprints of asylum seekers with crime scene fingerprints. Finally, Germany is also taking a number of steps to improve the government's ability to track and determine whether or not a foreigner is residing in Germany legally. Amendments to the Act governing the Central Aliens Register (*Ausländerzentralregistergesetz*) will upgrade computer files containing visa applications and improve the clearance process of individuals entering Germany.

38. *Cornerstones*, *supra* note 27.

39. *Germans Reject Sweeping Immigration Law*, DEUTSCHE WELLE, June 20, 2003, at http://www.dw-world.de/english/0,3367,1432_A_898151_1_A,00.html (last visited Nov. 5, 2003).

40. *Cornerstones*, *supra* note 27.

41. *Id.*

3. Recent Legislative Activity

In the spring of 2002, the German government considered further anti-terrorism measures, including a provision banning individuals within Germany from raising funds and facilitating logistical planning for foreign terrorist organizations.⁴² Debate about the definition of a terrorist and concern that the law could erode support for legitimate national liberation movements initially stalled this legislation.⁴³ The revelation that there was a possible German connection to an explosion outside a synagogue in March 2002, as well as the upcoming national elections in September, muted those concerns.

In the Spring of 2002 Germany enacted the Act on the Management and Limitation of Immigration (*Gesetz zur Steuerung and Begrenzung der Zuwanderung*), but the Federal Constitutional Court subsequently struck the Act down on a procedural technicality.⁴⁴ This legislation proposed broad changes in Germany's post-war immigration policy⁴⁵ liberalized Germany's immigration laws, actively promoted immigration,⁴⁶ as well as sought to institute compulsory language and citizenship classes.⁴⁷ Although many key political groups such as unions, the federation of employers, and churches supported the Act, the Act faced stiff conservative opposition in the Bundesrat, its higher legislative chamber, where the Schröder

42. Lucian Kim, *Germany Ramps Up Legislation*, CHRISTIAN SCI. MONITOR, Apr. 25, 2002, at W7.

43. *See id.*

44. *Id.* While the bill passed the Bundestag, it encountered problems in the Bundesrat, where the representatives from Brandenburg did not reach a consensus on the bill. Because Article 51(3) of the Basic Law requires each Land to cast its votes as a unit in the Bundesrat, this split ultimately created a constitutional rule concerning the validity of the Bundesrat's endorsement of the bill. After the German President certified the bill, six Länder challenged the Bundesrat's approval of the bill on the grounds that Brandenburg had not voted as a bloc. As a result of this challenge, the Federal Constitutional Court struck the Act down on procedural grounds on December 18, 2002. *Id.*

45. Nina Arndt & Rainer Nickel, *Federalism Revisited: Constitutional Court Strikes Down New Immigration Act For Formal Reasons*, 4 GERMAN L.J. (2003), available at http://www.germanlawjournal.com/current_issue.php?id=228 (last visited Nov. 5, 2003).

46. *Id.*

47. *Germans Reject Sweeping Immigration Law*, *supra* note 39.

government does not hold a majority.⁴⁸ In June 2003, the Bundesrat rejected the resubmitted bill, despite the fact that Germany's overburdened pension and welfare system could benefit from the influx of working immigrants as the German population continues to age.⁴⁹ Because strong conservative political opposition to the bill currently exists, the modernization and liberalization of Germany's immigration policy is at a standstill.⁵⁰ The bill has been sent to a parliamentary working group to hammer out a compromise between the conservative parties and the Social Democrat and Green parties.⁵¹

B. *United States*

1. Antiterrorism and Effective Death Penalty Act of 1996

In the aftermath of the first World Trade Center bombing in 1993 and the bombing of the Oklahoma City federal building in 1995, Congress attempted to comprehensively respond to the terrorist threats with the Antiterrorism and Effective Death Penalty Act of 1996.⁵² The primary impact of the Act was to increase the President's authority to fight terrorism and to prohibit the financing of terrorist organizations. The Act also revised immigrant deportation procedures and improved regulations covering explosives, as well as chemical and biological weapons.⁵³ Foreshadowing the increase in executive power that followed September 11th, the Act affirmed the President's power to "use all necessary means, including covert action and military force, to destroy international infrastructure used by international terrorists."⁵⁴ Given this provision's latitude, it is

48. Arndt & Nickel, *supra* note 45. The Christian Democratic Union and its Bavarian sister party, the Christian Social Union, currently hold the majority in the Bundesrat.

49. *Germans Reject Sweeping Immigration Law*, *supra* note 39.

50. Arndt & Nickel, *supra* note 45.

51. *Germans Reject Sweeping Immigration Law*, *supra* note 39. Germany also had to wrestle with its fellow European Union members regarding EU provisions that allow citizens of EU countries the right to work anywhere in the EU. As the EU plans to admit a host of new eastern European members in 2004, Germany negotiated provisions that grant citizens in new member countries the right to work throughout the EU only after a five to seven year period. *Id.*

52. DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION 2* (2002). See also, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

53. HARRY HENDERSON, *GLOBAL TERRORISM: THE COMPLETE REFERENCE GUIDE 7* (2001).

54. *Id.* at 73.

arguable whether or not President Bush needed additional congressional authorization to use military force in Afghanistan. The legislation also amended the Foreign Assistance Act of 1961 to allow the President to withhold foreign aid to governments that aid terrorist states.⁵⁵

The Act expanded the government's authority to combat terrorism by cutting off sources of financial support. The Act authorized the Secretary of State to designate organizations as "terrorist organizations" if the organization is engaged in terrorist activity that threatens the security of the U.S. or U.S. citizens.⁵⁶ While the previously enacted Export Administration Act had prohibited individuals from engaging in financial transactions with terrorist organizations, the 1996 Act expanded that prohibition to include humanitarian assistance other than medicine or religious materials.⁵⁷ The Act required financial institutions that became aware that they possessed funds belonging to a terrorist organization to notify the Secretary of State.⁵⁸

While the Act granted the Immigration and Naturalization Service (INS), the power to bar members of terrorist organizations from becoming citizens and prohibited most terrorists from seeking asylum in the U.S., the impact of these provisions on individual rights was dwarfed by the provision that created special courts to conduct removal proceedings. Under Title IV of the Act, Congress directed the Chief Justice to designate five district court judges from five of the U.S. judicial districts to create a court to conduct removal proceedings.⁵⁹ This provision allowed any single judge in these special removal proceedings to consider testimony presented *ex parte* and *in camera* in reaching a determination regarding removal.⁶⁰

While it is clearly reasonable for the government to prohibit individuals intent on committing violent acts in the U.S. from entering the country, the statute's breadth raised the specter that guilt by association would guide exclusion decisions. While Congress passed legislation in 1990 that removed many ideological grounds for exclusion, under the 1996 Act, the government regained the ability to bar individuals on the account of their association with particular

55. *Id.*

56. *Id.* at 72.

57. *Id.* at 72-73.

58. *Id.* at 72.

59. HENDERSON, *supra* note 53, at 73.

60. *Id.*

groups whether or not an individual had committed any illegal acts.⁶¹ Similarly, Congress had twice refused to enact legislation to allow the INS to use secret evidence in immigration proceedings during the prior Bush Administration.⁶² The Act increased the federal penalties for specified terrorism crimes and expanded the scope of the weapons and actions covered by a host of existing federal statutes.⁶³

Indicative of the unique role that tort litigation and money damages play in the U.S. as a source of deterrence of future harm, the Act stripped foreign governments, who perpetrate a terrorist act or support to terrorists, of sovereign immunity protection. The Act allows victims of foreign terrorism to sue a foreign government for money damages "for personal injury or death caused by an act of torture, extra judicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources to terrorists."⁶⁴

It is important to note that the Attorney General may circumscribe this right to sue when it would compromise a criminal investigation, prosecution or national security operation.⁶⁵ The Act also broadened federal provisions to compensate American residents who are victims of terrorist acts abroad.⁶⁶

2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001⁶⁷

The attack on the World Trade Center's twin towers on September 11th shocked the national psyche and created a sentiment of vulnerability that perhaps had not been stirred since the assassinations of Robert Kennedy and Martin Luther King in the 1960s. In contrast to Japan's attack on Pearl Harbor, this attack was perpetrated by an enemy much more difficult to locate. Given the destructive impact of the attack, the breadth and speed of the legislative response was unsurprising.

One week after the September 11th attacks, Attorney General John Ashcroft submitted an omnibus anti-terrorism proposal that granted the government far ranging powers to fight the war the

61. COLE & DEMPSEY, *supra* note 52, at 108-09.

62. *Id.* at 109.

63. HENDERSON, *supra* note 53, at 71.

64. *Id.* at 71 (citing Antiterrorism Act of 1996, title II (B) (1996)).

65. *Id.* at 72.

66. *Id.*

67. USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

President had declared on terrorism. Although Congress did not meet the Bush Administration's demand that they enact the legislation within three days, the legislature subjected the legislation to minimal scrutiny, deliberation, or debate, and the President signed the bill into law on October 26, 2001.⁶⁸

The key objective of the Patriot Act is to improve domestic security by enhancing the government's intelligence-gathering powers and strengthening the government's capability to detect terrorist activity. The Act centralizes law enforcement authority regarding terrorist acts into the Justice Department, and empowers the department to investigate all federal crimes related to terrorism.⁶⁹ Prior to this consolidation, the Justice Department, the Secret Service, the Bureau of Alcohol, Tobacco, and Firearms, as well as the Coast Guard shared responsibility for investigating related federal crimes of violence.

Simultaneously, the Act transfers responsibility to set requirements and priorities for the collection and dissemination of foreign intelligence under the Foreign Intelligence Surveillance Act of 1978, from the Attorney General to the Director of the Central Intelligence Agency.⁷⁰ The operational authority for implementation will continue to reside with the Federal Bureau of Investigation.

As well as consolidating investigative authority, the Act amended the criminal code to expand the legal definition of terrorism. While 18 U.S.C. §2331 previously only defined "international terrorism," the Patriot Act amended the code to include a class of activities defined under the rubric of "domestic terrorism." Those activities:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion;
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

68. AMERICAN CIVIL LIBERTIES UNION, *INSATIABLE APPETITE: THE GOVERNMENT'S DEMAND FOR NEW AND UNNECESSARY POWERS AFTER SEPTEMBER 11 3-4* (October 2002), at <http://aclu.org/files/openfile.cfm?id=10403> (last visited Nov. 5, 2003).

69. John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1088 (2002).

70. *Id.* at 1091.

(C) occur primarily within the territorial jurisdiction of the United States.⁷¹

The Act enlarges the government's power to conduct searches, electronic surveillance as well as intelligence-gathering.⁷² Key provisions of the Act that relate to intelligence gathering include: *Section 213* which grants law enforcement the authority to delay notice of the execution of a warrant. This provision authorizes law enforcement to covertly enter and search a residence without notifying the occupant until an undefined "reasonable" date after law enforcement has completed the search where "providing immediate notice would have an adverse result . . .";⁷³ *Section 216* which authorizes the government to install technological devices that can intercept all forms of internet activity, including email activity, web page activities, and internet telephone activity of customers within a particular internet service provider network and to convert information relating to the target into human-readable form;⁷⁴ *Section 218* which allows federal law enforcement officers to monitor private phone conversations without a warrant if the officer claims that a "significant purpose" of the investigation is to gather foreign intelligence; and ⁷⁵ *Section 416* which provides immediate funding to implement a monitoring program of all foreign students enrolled or participating in exchange programs with educational institutions, air flight schools, and language training schools.⁷⁶

Key final areas of reform are the provisions relating to immigration. The Act prohibits aliens who have solicited funds or members, or provided material support to certified terrorist organizations, from admission to the country and states that those activities are grounds for removal.⁷⁷ The Act granted the Attorney

71. USA Patriot Act of 2001, § 802(a)(5)(A)-(C).

72. Sheetal Asrani, *Security versus Liberty: Striking the Right Balance. A Comparison of Anti-Terror Provisions in India and the United States*, 4 GERMAN L.J. 1 (2002), available at http://www.germanlawjournal.com/current_issue.php?id=186 (last visited Nov. 5, 2003).

73. *The Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, H.R. 3162 Section-By-Section Analysis*, Patrick Leahy, United States Senator, at <http://www.senate.gov/~leahy/press/200110/102401a.html> (last visited Nov. 5, 2003) [hereinafter *Uniting and Strengthening America*].

74. See Asrani, *supra* note 72.

75. *Uniting and Strengthening America, supra* note 73.

76. *Id.*

77. USA Patriot Act of 2001 § 411.

General the power to take into custody any alien whom he had “reasonable grounds to believe” was engaged in any activity that endangered national security.⁷⁸ While section 412 of the Act authorizes the government to hold suspected aliens for seven days upon the Attorney General’s certification, the Attorney General may approve additional six-month periods of detention if an individual’s release threatens national security, community safety, or any person.⁷⁹

Both Germany and the United States have passed similar legislative packages to enable their respective governments to respond to the threat posed by terrorism. The bulk of these changes aim to improve the ability of both governments to detect terrorists. In addition, both countries have enlarged their definition of terrorism. Germany has also moved to restrict protections previously awarded to fundamentalist religious associations in an effort to prevent those organizations from serving as refuges for terrorists. Although there are strong similarities between these legislative packages, the role that each country assigns to law and courts in its response to terrorism may affect the societal impact of this legislation.

III. THE ROLE OF LAW AND COURTS

A. *Counterweights to Preserve Constitutional Values*

When both Germany and America responded to September 11th by enacting broad legislative packages to combat terrorism, it sparked debate about whether the new legislation usurped constitutional freedoms. While much debate occurred in Germany between the political parties during the law making process, there was little political debate during the Patriot Act’s enactment in the United States. To the extent that there is a debate in America about the legislation, it is spearheaded not by the political parties, but rather interest groups, such as the American Civil Liberties Union and the Center for Constitutional Rights, as well as law professors, who have filed lawsuits and *amicus curiae* briefs in pending cases. Although politics delayed the enactment of the Homeland Security Bill, the focus of that debate was not on how the bill infringed constitutional rights, rather on the provisions in the bills that undercut the bargaining power of unions.

78. USA Patriot Act of 2001 § 412.

79. Emmanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C.J. INT’L L. & COM. REG. 1, 11 (2002).

To determine how this legislation will affect civil liberties in both societies, we must not only consider the legislations' content, but also what role courts will play in shaping the scope of the legislations' implementation. Most importantly, the critical inquiry is whether or not courts in both societies, if necessary, can act as counter-weights to efforts to catch terrorists at any cost and preserve constitutional values. To this end, this section briefly reviews the courts' evolving role in both countries.

B. Germany

Although courts have historically not played a prominent policy-making role in many civil law systems, Germany's turbulent political history, distinct domestic legal tradition, and the mandate of its Federal Constitutional Court to preserve a federal democratic state, has ensured that the Federal Constitutional Court plays a unique role in Germany's political system. While most scholarly attention has been focused on the Federal Constitutional Court, Germany's other federal high courts and their accompanying specialized senates, function as policymakers as well.⁸⁰ In order to understand what role Germany's judicial system has played in the war on terrorism to date, as well as to predict whether it can and will act as an effective counterweight to legislative initiatives that sacrifice civil liberties, we must first consider the history of the role of law in the modern German state.

When twenty-five separate sovereign states formed the German Empire in 1871, there was a systematic effort to adopt uniform codes of criminal law, civil and criminal procedure, private law, and commercial law, which culminated with the codification of the commercial law in 1897.⁸¹ This codification established an apolitical rule of law in Germany, as well as placed the regulation of the bar and judiciary under the tight control of the ministries of justice.⁸² While the original conception of the rule of law in Germany separated the role of law from politics, most judges possessed anti-democratic values and civil rights did not play a prominent role in jurisprudence. Despite these anti-democratic beginnings, the Weimar Constitution of 1919 created a central judicial body known as the *Staatsgerichtshof*. While this body did not resolve constitutional questions or issues involving basic rights, it did create a precedent for resolving

80. See Blankenburg, *supra* note 20, at 264.

81. *Id.* at 251.

82. *Id.*

interstate disputes.⁸³ Between 1918 and 1933, there was a growing debate between pro and anti-democratic attorneys and scholars concerning the role of judicial review in a constitutional state.⁸⁴ When the Nazis suspended the Constitution in 1933 and subverted the law to the instrumental pursuit of political goals with the aid of a complicit judiciary, it suspended this debate.

During the post-war period, law played a far different role in East and West Germany. In Western Germany, the Germans restored the judicial institutions of the Weimar Period as well as the basic codes with some modifications.⁸⁵ Laws and judicial decisions which furthered racist or fascist ideals were rescinded and purged and viewed as "false law" (*Unrecht*) which was inconsistent with the rule of law.⁸⁶ In addition, a new court for constitutional review, the Federal Constitutional Court, was created.

In East Germany, the communists added lay judges to the judicial decision-making process and the party played a strong role in guiding the administration of justice. The East German professional judiciary was small in size and litigation played a far less prominent dispute-resolution role. Many petty offenses and disputes with government decisions were handled in informal disciplinary proceedings, workplace committees, or neighborhood "societal courts."⁸⁷

In contrast, Western Germany developed a sizeable bar and a large judiciary that handled high caseloads in the area of criminal law, debt collection, civil and labor lawsuits, as well as complaints against government bureaucracies.⁸⁸ While litigation played an integral role in regulating West Germany's capitalist economy and welfare state, in the east the court played a less visible role. Although some Western commentators have suggested that perhaps the court's most visible role was to suppress political opposition and punish individuals who sought to cross the border illegally, the majority of East German citizens were unaware of these prosecutions.⁸⁹ After

83. Alfred Rinkin, *The Federal Constitutional Court and the German Political System*, in CONSTITUTIONAL COURTS IN COMPARISON: THE U.S. SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT 55, 58 (Ralph Rogowski & Thomas Gawron eds., 2002) [hereinafter CONSTITUTIONAL COURTS].

84. See Blankenburg, *supra* note 20, at 252.

85. *Id.*

86. *Id.* at 253.

87. *Id.* at 275.

88. *Id.* at 278.

89. *Id.* at 279.

reunification, West Germany's law and judicial institutions displaced the East German model and law professors, judges, and prosecutors had to reapply for their positions.⁹⁰ The government only reinstated about half of those who reapplied.⁹¹

For our purposes, there are several distinctive features of Germany's legal culture that are relevant. These features include: attitudes towards crime, the prosecution of political extremists, and the modern role of the Federal Constitutional Court. With regards to crime, Germany possesses a lower incidence of violent crime than the United States.⁹² While evidence suggests that Germany's increased ethnic and cultural heterogeneity have caused crime rates and fear of crime to increase, neither the public nor the judiciary have responded with widespread demands for increasingly punitive sentencing.⁹³ When directly compared to American sentencing, German criminal sentencing appears to be more profoundly oriented towards rehabilitation rather than punishment. Perhaps a more accurate explanation of the differences in the sentencing systems, however, is that while retribution is a prominent rationale underlying sentencing in the U.S., in Germany the sentence must fit the "guiltiness" of the perpetrator.⁹⁴ According to the German Criminal Code, each sentence must balance the need to impose a punishment commensurate with the crime, with the need to orient the perpetrator to be rehabilitated back into society.⁹⁵

90. Blankenburg, *supra* note 20, at 279.

91. *Id.*

92. *Id.* at 280.

93. *Id.*

94. § 46 StGB.

95. GG art. 103. *See also* § 46 StGB.

Section 46 Principles for Determining Punishment

(1) The guilt of the perpetrator is the foundation for determining punishment. The effects which the punishment will be expected to have on the perpetrator's future life in society shall be considered.

(2) In its determination the court shall counterbalance the circumstances which speak for and against the perpetrator. In doing so consideration shall be given in particular to:

- the motives and aims of the perpetrator;
- the state of mind reflected in the act and the willfulness involved in its commission;
- the extent of breach of any duties;
- the manner of execution and the culpable consequences of the act;

Germany has not hesitated to impose criminal sanctions on individuals who operate outside the permissible bounds of political action.⁹⁶ While support for radical groups on the left and right has never risen to the point where those groups would be entitled to representation in Germany's national legislative bodies, extremist groups have threatened the public order through demonstrations and acts of terrorism. Criminal investigations and prosecutions in the United States have played roles in containing groups such as the communist party, anti-war protestors, and the civil rights movement,⁹⁷ in Germany, "criminal prosecution has been given a permanent task of guarding the borderline of the acceptable political spectrum."⁹⁸

During the 1970s, when the Baader-Meinhof group engaged in criminal activities such as bank robberies, kidnapping, politically motivated murder, and terrorism, the state's response was not limited only to criminal sanctions against the perpetrators, but included new legislation expanding the search and seizure authority of the police, and limiting the rights of suspects in criminal cases.⁹⁹ These new rules extended the grounds for pretrial detention, restricted the activities of terrorist defendants in pre-trial proceedings, regulated attorney-client communications, and in some cases, prevented defense counsel from representing terrorists.¹⁰⁰ The government implemented these rules as a swift response to the increased domestic security threat. Defense attorneys play a far different role in Germany's inquisitorial system of justice, which places the fact-finding burden on the court. In the *Contact Ban Case*, the Federal Constitutional Court

the perpetrator's prior history, his personal and financial circumstances; as well as his conduct after the act, particularly his efforts to make restitution for the harm caused as well as the perpetrator's efforts to achieve mediation with the aggrieved party.

(3) Circumstances which are already statutory elements of the offense may not be considered.

96. Blankenburg, *supra* note 20, at 292-93.

97. MICHAEL LINFIELD, *FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR* 69-156 (1990).

98. Blankenburg, *supra* note 20, at 293.

99. *Id.*

100. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 235 (2d ed. 1997).

held that the provision governing defense attorneys lacked adequate standards for enforcement.¹⁰¹

A number of abuses that occurred during the application of these laws drew corrective responses by the higher courts, as well as the Bundestag.¹⁰² The government's use of previously private information had both positive and negative consequences for German residents. On the positive side, by combining several public and private databases and crosschecking data, the German federal police were able to locate terrorists that belonged to the Red Brigades Faction.¹⁰³ However, during this period, the "constitutional protection service" also conducted widespread surveillance of leftist sympathizers. Both the government and large companies refused to hire anyone who had demonstrated any support for the radical leftist opposition.¹⁰⁴ However, of the 1.5 million applicants for public service jobs between 1972 and 1980, this screening process only barred 1078 individuals from such a job.¹⁰⁵ The government eventually terminated these restrictive measures when it became evident that it was counterproductive to marginalize leftists who were law-abiding.¹⁰⁶ This experience with the government's use of data to monitor the population led Germany to develop the strictest data protection laws in the EU. In 1977, the legislature enacted the Federal Data Protection Law, which was amended in 1994 and 1997, "to protect the individual against violations of his personal right (Persönlichkeitsrecht) by handling person-related data."¹⁰⁷

A final distinctive character of Germany's legal culture is the role of the Federal Constitutional Court itself. Although the Federal Constitutional Court is a coequal branch of the federal government, its function is not to resolve specific legal disputes, but rather to act

101. BVerfGE 49, 24.

102. See KOMMERS, *supra* note 100.

103. Faye Bowers and Peter Grier, *Why the Pentagon Will Watch Where You Shop*, CHRISTIAN SCI. MONITOR, Dec. 3, 2002, at <http://www.csmonitor.com/2002/1203/p01s01-usgn.html> (last visited Nov. 5, 2003).

104. Blankenburg, *supra* note 20, at 293.

105. See *id.* at 293 n.52 (citing SEBASTIAN COBLER, LAW, ORDER, AND POLITICS IN GERMANY (1976)).

106. *Id.* at 293.

107. PRIVACY INTERNATIONAL, PRIVACY AND HUMAN RIGHTS 2002, AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS 183 (2002), available at <http://www.privacyinternational.org/survey/phr2002/phr2002-part2.pdf>.

as the final arbiter of the Constitution.¹⁰⁸ Claims challenging the constitutionality of a federal or state statute can reach the court in a variety of ways. Many constitutional claims arrive at the court when one of Germany's other courts request the court issue a decision on the constitutionality of a statute relevant to their case.

In relatively rare circumstances, political disputes in the legislature regarding a statute's constitutionality may come before the court, when at least one-third of the members of the national parliament (*Bundestag*) or any of the federal or state governments challenge a statute and request that the court intervene to decide the issue.¹⁰⁹ Through the German process of *abstract judicial review*, the Federal Constitutional Court may review the constitutionality of legislative acts, decrees, and Federation and state by-laws that are not case-specific.¹¹⁰ Through this objective process, the Court reviews, not only the particular claim brought forth in a specific petition, but all constitutional aspects of a legislative act. In addition, the court plays an informal, consultative role when the parliament is considering new legislation. Both of those later functions stand in stark contrast to American legal norms regarding the role of courts, given the case and controversies requirement and the role of courts within the separation of powers scheme. In addition, the Federal Ministry of Justice, which is responsible for reviewing the constitutionality of government legislation, has strong ties to the court.¹¹¹

Many of the most interesting and controversial issues that the court considers are the result of citizen complaints filed with the court. Through the procedure of constitutional complaint, any citizen may petition the Federal Constitutional Court and allege that their basic constitutional rights have been violated. Through this procedure, each citizen has the power to challenge government action that restricts their basic rights and petition the court to overturn that public authority.¹¹² As a practical matter, there are several requirements, such as the requirement that individuals must exhaust all other remedies before filing a constitutional complaint, which

108. See ANTONIO VERCHER, *TERRORISM IN EUROPE: AN INTERNATIONAL COMPARATIVE LEGAL ANALYSIS* 325 (1992).

109. Blankenburg, *supra* note 20, at 309.

110. See Rinkin, *supra* note 83, at 64.

111. Blankenburg, *supra* note 20, at 309.

112. Rinkin, *supra* note 83, at 68.

restrict its use.¹¹³ Nevertheless, the fact that 117,528 constitutional complaints were filed between 1951 and 1998 shows that citizens view this channel as an avenue to check government action.¹¹⁴

While the closely divided nature of the U.S. Supreme Court along political fault lines and the increasingly contentious nature of the selection process have made each new selection to the Court an important political event in Germany, except in rare cases, the selection process is less publicly political. The nomination process of candidates to the Federal Constitutional Court, which mandates that some candidates be drawn from the federal high courts and others nominated by the parties represented in parliament, as well as the importance of professional selection criteria, tends to ensure that judges' party affiliations do not dominate the court's jurisprudence.¹¹⁵ Since the conservative Christian Democratic Party (CDU) dominated the political mainstream and Parliament for decades, many of Germany's judges are conservative. The fact that the Green Party (*die Grünen*), as the coalition partner of the Social Democratic Party, (*Sozialdemokratische Partei Deutschlands*), recently nominated a candidate to the Federal Constitutional Court is a noteworthy development. Given the size of the Federal Constitutional Court, this development is unlikely to drastically affect the court's decision-making.

A starting point for understanding the role of the Federal Constitutional Court in relationship to Germany's democratic institutions is to acknowledge that the Court possesses the power to exercise control over the legislative, executive, and judiciary to protect the Constitution.¹¹⁶ At the same time, one must recognize this power is not unfettered and is limited by German doctrinal concepts which are similar to the concepts of the political question doctrine and judicial self-restraint in the United States. Despite those caveats, the Court's role in protecting the Constitution, as well as the state, has led to the development of several doctrines that have no comparative equivalent in American jurisprudence.

One example is the concept of "militant democracy." Through militant democracy, the Federal Constitutional Court may declare that a political party which endangers the state or is a threat to the free democratic basic order, is unconstitutional. Throughout the

113. *Id.*

114. *Id.*

115. Blankenburg, *supra* note 20, at 252.

116. Rinkin, *supra* note 83, at 75.

Court's fifty plus year history, the Federal Constitutional Court has banned two parties, the Socialist Reichs Party and the Communist Party. In order to be considered as a threat to the democratic order, the Court did not require that the parties pose an actual, imminent threat to the state. In the case of the Court's action against the Communist Party, the party need not have undertaken any illegal action or specific steps against the democratic order to be found unconstitutional.¹¹⁷ The Court issued both of these decisions during the height of the cold war in the 1950s. Since that time, the Court's tolerance of extremist political activity has increased.¹¹⁸ However, the rise of a number of extremist groups during the 1990s, that have directed violence towards foreign residents, led the federal government and Bundesrat in 1993 to petition the Court to declare the Free Democratic Workers Party (*Freiheitliche Deutsche Arbeiterpartei*) unconstitutional.¹¹⁹ The Hamburg senate filed a similar petition against the National List (*National Liste*), a local neo-Nazi party. In 1994, the Court denied both of these petitions, ruling that the parties did not qualify as parties, due to their lack of electoral participation.¹²⁰

The government, with the blessing of the Federal Constitutional Court, does actively monitor some political parties. In 1999, the Federal Constitutional Court held that the government could conduct surveillance on political parties, if the parties pose a threat to the constitution and the information cannot be obtained by public means.¹²¹ The 2001 report issued by the Federal Office for the Protection of the Constitution stated that the office was currently monitoring an estimated 33,000 members of right-wing organizations as well as 32,900 members of left-wing groups.¹²²

In addition to giving the Federal Constitutional Court the power to ban political parties that threaten the democratic order, the Federal Administrative Tribunal, one of Germany's specialized courts, possesses the authority to ban associations that violate the

117. SABINE MICHALOWSKI & LORNA WOODS, *GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES* 19 (1999).

118. KOMMERS, *supra* note 100, at 236.

119. *Id.*

120. *Id.*

121. PRIVACY INTERNATIONAL, *supra* note 107, at 185.

122. *Number of Foreign Extremists Living in Germany Climbs*, DEUTSCHE WELLE, May 24, 2002, at http://dw-world.de/english/0,3367,1432_A_542849_1_A,00.html (last visited Nov. 16, 2003).

constitutional order.¹²³ In the *Wehrsportgruppe Hoffman Case*, the Federal Administrative Court dissolved a military sports group that did not believe that governments should be democratically elected. In the Court's decision, the Court stated that:

It is not important that the association attempts to realize its anti-constitutional goals by violent acts or other illegal behaviour. It is rather essential that the activities of the association are directed against the constitutional order in a militant aggressive manner, i.e. that the association continuously intends to undermine this order. This is why the prerequisites for a prohibition can even be fulfilled where, at the time of the prohibition, there is no realistic prospect that the association will achieve its objectives in the foreseeable future. If the goals and the activities of the association demonstrate the intent to undermine the constitutional order of the Federal Republic of Germany, the point in time at which the goal will in fact, or according to the imagination of the association, be achieved is without legal significance.¹²⁴

In drawing distinctions between the role of the Federal Constitutional Court and the U.S. Supreme Court, a key difference is that there is no equivalent doctrine to the "political question" doctrine in Germany, which allows the Court to refuse to rule on highly political issues.¹²⁵ Moreover, while the Basic Law granted the court the power of judicial review, it has used judicial interpretation to expand its influence.¹²⁶ In conclusion, in many ways, the Federal Constitutional Court has broken through the restraints imposed by the country's civil law tradition and exercised increasing influence on the political system as well as an increasing tolerance towards "anti-democratic" groups.

C. *United States*

At one level, the question of whether or not the Supreme Court possesses the political power to strike down provisions of the Patriot Act that infringe upon civil liberties appears easy to answer. After all, the Supreme Court ordered schools to desegregate,¹²⁷ signaled the

123. MICHALOWSKI & WOODS, *supra* note 117, at 20.

124. *Id.* at 21 (citing BVerfGE 61, 218 (220-22)).

125. *Constitutional Litigation as Dispute Processing: Comparing the U.S. Supreme Court and the German Federal Constitutional Court*, in CONSTITUTIONAL COURTS, *supra* note 83, at 6.

126. *Id.*

127. See generally *Brown v. Board of Educ. of Topeka*, 349 U.S. 294 (1955).

end of the Nixon presidency,¹²⁸ and decided a presidential election.¹²⁹ Yet there are problems with basing that broad conclusion on a selective sample of cases. In the first two cases, the impact of the Supreme Court can only be considered in conjunction with the concurrent actions undertaken by Congress.¹³⁰ Additionally, while the Court may have unilaterally sent George W. Bush to the White House, the Court held that the decision itself had no precedential value.

The legal scholar, Stephen Griffin, has argued that “[t]wo structural features of American constitutionalism prevent the Supreme Court from being the primary agent of constitutional change.”¹³¹ Although we are specifically discussing the issue of protecting constitutional values here, his argument is applicable to the current war-time context. The structural features that Griffin indicates include the Court’s prohibition against issuing advisory opinions and the concept of judicial restraint, most notably in the area of foreign affairs.¹³² As Griffin forcefully argues:

The Court has either taken an entirely hands-off approach to foreign affairs cases, regarding them as presenting “political questions,” or it has usually deferred to presidential authority. The result is the same—an expansion in the power of the other two branches results not in the Court adapting the Constitution to the new reality, but in the Court getting out of the way.¹³³

Thus, in the present context, the Constitution can only act as a restraint on anti-terrorism legislation and government power to the extent that the Court elects to give full effect to its provisions.

There are unique features of the current war on terrorism that will profoundly shape the scope of the judiciary’s impact. These key factors include: 1) the requirement of actual litigation, 2) the geographic location of the alleged constitutional violation, and perhaps most importantly, 3) the fact that the country is at war. As with the German case, America’s distinct legal culture has shaped, not only the role of the courts, but their decision-making as well.

128. *See generally* United States v. Nixon, 418 U.S. 683 (1974).

129. *See generally* Bush v. Gore, 531 U.S. 98 (2000).

130. *See, e.g.*, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

131. Stephen Griffin, *The Problem of Constitutional Change*, 70 Tul. L. Rev. 2121, 2150 (1996).

132. *Id.* at 2152.

133. *Id.* at 2151.

At the outset, it is worthwhile to note that a distinctive difference between Germany and the U.S. is that the litigation of constitutional issues in the U.S. is not confined to the Supreme Court. Constitutional claims may be litigated in the ordinary course of litigation. Moreover, because the Supreme Court decides fewer than three percent of the significant constitutional claims that are litigated each year before state supreme courts and federal appellate courts, it is likely that the decisions of those courts will be the last word on the legal issues concerning the war on terrorism.¹³⁴

The fact that the Bush Administration, with the approval of Congress,¹³⁵ has responded to terrorism militarily and framed the Patriot Act as a means to fight that war, may profoundly constrain the judiciary's role. The case of Jose Padilla, the individual suspected of plotting with terrorists to detonate a "dirty bomb," illustrates the nature of some of these constraints. Jose Padilla, currently sits in a Naval brig in Charleston, South Carolina. The government continues to detain him, not because he is facing criminal charges for his conduct or because he is an alien subject to deportation, but rather because the President has declared him to be an "enemy combatant." The government maintains that Padilla qualifies as an "enemy combatant" because he is "closely associated with al Qaeda, engaged in 'hostile and war-like acts' and represents [a] 'continuing, present and grave danger to the national security of the United States.'"¹³⁶ Although the government originally arrested Padilla on a "material witness" warrant issued by a federal court,¹³⁷ once the President designated him as an "enemy combatant," the government transferred him into military custody.¹³⁸ As a result of an order issued by Attorney General John Ashcroft, the military initially prohibited Padilla from meeting with his counsel. It required an interim federal court order filed in the course of Padilla's habeas proceedings for Padilla to gain access to counsel.¹³⁹ By declaring a war on terrorism

134. Robert A. Kagan, *Constitutional Litigation in the United States*, in CONSTITUTIONAL COURTS, *supra* note 83, at 30-32.

135. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

136. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 572 (2002).

137. Pursuant to 18 U.S.C. § 3144, a federal district court may issue a material witness warrant at the government's request to enforce a subpoena to secure a witness's testimony before a grand jury.

138. 'Dirty' Bomb Suspect Wins in Court, CBSNEWS.com, Dec. 4, 2002, at <http://www.cbsnews.com/stories/2002/08/14/attack/main518626.shtml> (last visited Nov. 5, 2003).

139. 233 F. Supp. 2d at 599.

necessitating a state of emergency, the President, through the designation of "enemy combatant" status, has unilaterally restricted legal rights of individuals suspected of participating in the war.

The important contours of fundamental rights of criminal defendants in America were developed by the Warren Court in the context of appeals to the Supreme Court of pending criminal proceedings. The Court had jurisdiction to review cases like *Gideon v. Wainright* (1963), granting indigent defendants a right to a court-appointed attorney, *Miranda v. Arizona* (1966), requiring the police to advise suspects of their rights, and *Katz v. United States* (1967), applying fourth amendment protections to electronic surveillance, because the government filed criminal charges against a defendant. It now appears probable that the majority of individuals detained during the war on terrorism by the U.S. will spend little time in the courtroom and possess limited opportunity to challenge their confinement in court.¹⁴⁰

In the war against terrorism, one of the government's most formidable weapons is likely to be the constitutional requirement of *case or controversy*.¹⁴¹ One facet of this requirement is the concept of *standing*. In order to challenge the conditions of one's confinement in federal court, a petitioner must be the proper party to bring suit. Given that access to many individuals detained by the government has been limited, the government has strongly circumscribed the ability of detainees to challenge their confinement using the judicial system. While the law permits a "next friend" to file a petition on an individual's behalf when the detainee lacks access to a court, federal law specifies that only individuals who have a significant relationship to the petitioner and are dedicated to their best interest may file an action on their behalf.¹⁴²

In the handful of cases regarding detention litigated so far, the issue of standing has barred most claims from judicial relief. The one exception to date is *Padilla v. Bush*, where Padilla's attorney, Donna Newman, filed a writ of habeas corpus challenging the lawfulness of Padilla's detention,¹⁴³ despite the fact that she had not had the opportunity to meet with her client since May 2002.¹⁴⁴ Although a

140. See generally *Gideon*, 372 U.S. 335 (1963); see also *Miranda*, 384 U.S. 436 (1966); see also *Katz*, 389 U.S. 347 (1967).

141. See U.S. CONST. art. III, § 2, cl. 1.

142. 28 U.S.C.A. §§ 2241- 2242 (West Supp. 2003).

143. Filed pursuant to 28 U.S.C.A. §2241.

144. See generally *Padilla*, 233 F.Supp. 2d 564 (2002).

federal district court ruled that Newman had standing to file a petition as “next friend” because she had met with Padilla prior to his transfer to military detention,¹⁴⁶ the government is likely to appeal the court’s ruling.¹⁴⁶ In a separate case, *Hamdi v. Rumsfeld*, a different federal court held that, where a federal defender that had no preexisting relationship with an enemy combatant, the attorney could not file a petition on his behalf.¹⁴⁷ However, the detainee’s father subsequently filed a “next friend” petition on his son’s behalf.¹⁴⁸

As a result of the requirement that a litigant must have an ongoing case or controversy to obtain judicial relief, many of the government’s violations of constitutional rights may not be subject to judicial review. A significant reason why there has been an increase in the amount of constitutional litigation in the United States in recent decades, is that a large number of public advocacy groups, such as the National Association for the Advancement of Colored People and the American Civil Liberties Union, have used litigation to raise constitutional issues on behalf of individuals who typically lack the knowledge, human resources, and financial means to succeed at the appellate court level.¹⁴⁹ Because of the issue of standing and the requirement of a case or controversy, to use litigation to challenge the constitutionality of government action, these groups must file a legal claim on behalf of a specific petitioner or group of petitioners. Without access to individuals who may have constitutional claims, these groups lack the standing to assert claims on a petitioner’s behalf. For example, when a group of clergy, lawyers, and professors filed a petition on behalf of the combatants currently being held in Cuba, the Ninth Circuit Court of Appeals held that, for purposes of determining standing, the group was not being held incommunicado and the petitioners lacked standing to file a petition on their behalf.¹⁵⁰

A second distinctive feature of the war on terrorism, that will affect the ability of courts to protect individual rights, is the fact that the constitutional requirement of *jurisdiction* may preclude access to American courts because the U.S. is detaining foreign nationals outside the U.S. The fact that the Bush Administration has elected to detain foreign nationals at a naval base located at Guantanamo Bay,

145. *Id.* at 569.

146. *‘Dirty’ Bomb Suspect Wins in Court*, *supra* note 138.

147. *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002).

148. *Hamdi v. Rumsfeld*, 296 F.3d 278, 279 (4th Cir. 2002).

149. *See Kagan*, *supra* note 134, at 31-33.

150. *Coalition of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153 (2002).

Cuba, may bar those individuals from obtaining judicial relief in U.S. courts. When family members of Kuwaiti nationals filed a suit on behalf of twelve detainees alleging violations of numerous constitutional provisions, such as the Alien Tort Claims Act, the Administrative Procedure Act, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, as well as customary international law, a federal district court judge dismissed the claim for lack of jurisdiction.¹⁵¹ The petitioners alleged that the individuals were allegedly in Pakistan and Afghanistan as volunteers in charitable programs to provide humanitarian aid and had been seized by Afghan villages seeking to collect a bounty offered by the U.S.¹⁵² The court held that challenges to custody could only be brought through a petition for writ of habeas corpus and, relying on the Supreme Court's decision in *Johnson v. Eisentrager*,¹⁵³ the court lacked jurisdiction because the naval base lay outside the sovereign territory of the United States.¹⁵⁴ Since *Johnson* dealt with a number of Germans who challenged their confinement by the U.S. military in China, a strong argument can be made that it does not apply to the current situation. Unlike *Johnson*, where the Chinese government controlled the territory, Cuba does not exercise sovereign control over Guantanamo. The case may more closely parallel the facts of the 1946 case *Application of Yamashita*,¹⁵⁵ where the Supreme Court ruled on the claim of a Japanese general tried by the U.S. military in the Philippines, and implicitly established that an enemy alien in a foreign territory under American control is protected by the Constitution.¹⁵⁶

It is conceivable, moreover, that large numbers of constitutional violations may occur that citizens will never know about. At the present moment, the Department of Justice's key interest is in preventing further acts of terrorism rather than in prosecuting individuals who have violated the criminal law. Given the devastation caused by the attack on the World Trade Center and the potential for future devastation, there are strong reasons supporting

151. *Rasul v. Bush*, 215 F. Supp. 2d 55 (2002).

152. *Id.* at 61.

153. 339 U.S. 763 (1950).

154. *Rasul*, 215 F. Supp. 2d at 72-73.

155. 327 U.S. 1 (1946).

156. Anupam Chander, *Guantanamo and the Rule of Law: Why We Should Not Use Guantanamo Bay To Avoid the Constitution*, FindLaw's Legal Commentary, March 7, 2002, at http://writ.news.findlaw.com/commentary/20020307_chander.html (last visited Nov. 5, 2003).

the government's strategy to get as much information as possible from individuals involved in terrorist networks. If the government never intends to file criminal charges against detainees, there is a far smaller chance that those individuals will be accorded many of the protections typically accorded to individuals in custody. For example, if it is likely that the case will never go to court, the government has virtually a free hand to use whatever interrogation tactics it finds effective, as the *Miranda* decision and its progeny cannot be invoked outside the context of a pending criminal case. Steven Clymer points out that the majority of federal courts that have addressed the issue of whether police who fail to issue *Miranda* warnings violate the Constitution have ruled that there is no violation unless the suspect's statements are used in a criminal case.¹⁵⁷ These are rules governing the admissibility of evidence rather than constitutional restraints on police conduct.¹⁵⁸

The war on terrorism has likewise affected what evidence may be admitted during a terrorism trial. The bulk of case law in the United States concerning the admission and exclusion of evidence does not pertain to wartime conditions. In the case of evidence obtained during actual combat, traditional exclusionary rule doctrines which mandate such protections as *Miranda* warnings may be difficult to apply to the battlefield. As a result, law enforcement's search and seizure tactics may no longer be tightly constrained by the exclusionary rule doctrine, which prohibits the prosecution from introducing illegally obtained evidence at trial. There is some evidence which suggests that the government offered John Walker Lindh, the American captured fighting with the Taliban, a plea rather than take him to trial.¹⁵⁹ During pre-trial hearings in the case, Lindh's attorney argued that the government had not advised Lindh of his rights as required under *Miranda*. In addition, after the plea, commentators speculated that the government did not want an appellate court to review whether or not some of Lindh's statements should have been suppressed because of the government's interrogation tactics. Given that the Constitution requires that there be an actual case or controversy, absent a pending criminal case in which the government seeks to criminally punish a detained

157. Steven D. Clymer, *Are Police Free to Disregard Miranda*, 112 Yale L.J. 447, 452 (Dec. 2002) (citing Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998)).

158. See Clymer, *supra* note 157, at 451.

159. *Lindh's Bargain*, THE SALT LAKE CITY TRIBUNE, July 18, 2002, at A16.

individual, the government's interrogation or investigation tactics may not be subject to the level of judicial review accorded appellate cases. While courts in the *Hamdi* and *Padilla* cases have ruled that their detention is subject to judicial review, because of the invocation of the "enemy combatant" status, the scope of that review has been extremely limited.

The complexity inherent in balancing the nation's security interests with defendant's rights is best illustrated by the case of Zacarias Moussaoui, an American citizen charged with conspiracy in connection with the September 11th attacks.¹⁶⁰ Although Moussaoui admits that he belongs to al Qaeda, he has denied participating in the September 11th attacks. In preparing his own defense, Moussaoui has sought access to a fellow member of al Qaeda currently in U.S. custody as well as a number of classified documents, claiming that discovery will establish his innocence. The government has vigorously opposed both of the defendant's requests, citing national security interests. The district court denied the defendant access to classified material on the ground that disclosure would jeopardize national security because the defendant is an al Qaeda member,¹⁶¹ the court further ruled that Moussaoui could depose the enemy combatant witness.¹⁶² In reaching its decision to permit Moussaoui to depose the witness, the court applied the procedures set forth in the Classified Information Procedures Act (CIPA),¹⁶³ and determined that the witness' testimony was relevant and material to the defense.¹⁶⁴

160. The superseding indictment filed in the case charges Moussaoui with the following crimes: Conspiracy to Commit Acts of Terrorism Transcending National Boundaries (18 U.S.C. §§ 2332b(a)(2) & (c) (2003)), Conspiracy to Commit Aircraft Piracy (49 U.S.C. §§ 46502(a)(1)(A) and (a)(2)(B) (2003)), Conspiracy to Destroy Aircraft (18 U.S.C. §§ 32(a)(7) & 34 (2003)), Conspiracy to Use Weapons of Mass Destruction (18 U.S.C. § 2332a(a) (2003)), Conspiracy to Murder United States Employees (18 U.S.C. §§ 1114 & 1117 (2003)), and Conspiracy to Destroy Property (18 U.S.C. §§ 844 (f), (i), & (n) (2003)). Superseding Indictment, United States v. Moussaoui, available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss602supind.pdf> (last visited Nov. 9, 2003).

161. This issue is complicated by the fact that the defendant has elected to represent himself. See Order, United States v. Moussaoui (No. 01-455-A), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss92602dcsopn.pdf> (last visited Nov. 9, 2003).

162. Petition for Writ of Mandamus, United States v. Moussaoui (No. 03-4162), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss62603opn.pdf> (last visited Nov. 9, 2003).

163. 18 U.S.C.A. App. 3 §§ 1-16 (West 2000 & Supp. 2003).

164. No. 03-4162, *supra* note 162, at 6.

Moreover, the court concluded that the defendant's and the public's interest in a fair trial outweighed the government's national security interest.¹⁶⁵ This issue has sparked a contentious debate in the Fourth Circuit Court of Appeals, which held in a 7-5 decision, that it did not have jurisdiction to review this discovery issue at this point in the proceedings.¹⁶⁶ It remains to be seen how American courts will reconcile the inherent tension between balancing national security and the interest in a fair trial.

The American judiciary has played a prominent role in enlarging the legal protections accorded to individuals during the past fifty years. Nevertheless, several distinctive features of American constitutional jurisprudence, most notably the fact that Congress has granted the President broad latitude to pursue a war on terrorism, will likely constrain courts to protect constitutional liberties only in the context of egregious governmental overstepping. In sharp contrast, Germany's Federal Constitutional Court may play an active role in determining whether Germany's anti-terrorism legislation threatens basic rights because Germany has not declared a similar national emergency. While all three branches of government in the United States share a responsibility for protecting the Constitution, the Federal Constitutional Court occupies a unique position in Germany as the protector of the Constitution. Thus, while the U.S. Supreme Court may be reluctant to challenge both the executive and legislative branches in the current context, the Federal Constitutional Court may not share that same reluctance. Moreover, the fact that the Federal Constitutional Court has been playing an increasingly integral role in extending the boundaries of rights, the German conception of militant democracy may affect how the Court balances threats to national security with civil liberties.

165. *Id.*

166. *Id.* While interlocutory appeals of discovery orders are generally not permitted in federal court, CIPA § 7 defines a narrow range of circumstances, which serve as exceptions to this general rule. The dissent argued that this case fell within that range of circumstances and stated that the appellate court's failure to review the discovery order would jeopardize national security and embolden terrorists. July 14, 2003 Order, *United States v. Moussaoui* at 3 (No. 03-4162), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss71403ord4th.pdf> (last visited Nov. 29, 2003). In response, the majority responded that "such speculation can only serve to needlessly alarm the public and appears, regrettably, to be an attempt to divert attention from the legal principles that control our decision." *Id.* at 5.

IV. FUNDAMENTAL CONSTITUTIONAL RIGHTS

Although both the Federal Constitutional Court and the Supreme Court adjudicate claims concerning basic constitutional rights, the fact that both courts were born during distinctively different historical periods strongly influenced the birth and subsequent evolution of those rights.¹⁶⁷ From its inception during the creation of a new federal democratic state after World War II, the Federal Constitutional Court's mission has been oriented towards the protection of fundamental human rights. Moreover, the acknowledgement of fundamental human rights and the state's role in guaranteeing those rights stand at the forefront of the basic text. In contrast, at the time of the Constitution's ratification in 1790, the American court's fundamental concerns were to preserve the Union and protect property rights.¹⁶⁸ Although the nation's first Congress passed amendments to the Constitution that became the "Bill of Rights," it took a century for the Court to breathe life into those rights and even longer for Congress to enact the fourteenth amendment upon which much of the nation's constitutional jurisprudence is now based. While it is easy to draw historically derived distinctions between these two courts, it is much more difficult to accurately identify how differences in the articulation of specific rights may play out as both countries respond to terrorism. It is to that task that this paper now turns.

A. Germany and the Basic Law

Germany's Constitution or Basic Law, *Grundgesetz*, binds the state to protect the basic rights of its citizens. The Basic Law's Article 1(3) states, "[t]he following basic rights shall bind the legislature, the executive, and the judiciary as directly enforceable law."¹⁶⁹ During its over fifty year history, Germany's Federal Constitutional Court has broadly affirmed and formatively shaped the constitutional rights expressed in the Basic Law.¹⁷⁰ The concept that the court is the ultimate arbiter of the fundamental values of a state, as expressed in

167. See, e.g., Hans J. Lietzmann, *Constitutional Courts in Changing Political Systems*, in CONSTITUTIONAL COURTS, *supra* note 83, at 91 (arguing "the fact that the constitutional court was established in the United States in the eighteenth century and in the Federal Republic of Germany in the twentieth renders any comparison implausible").

168. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 5, 17 (3d ed. 2000).

169. Rinkin, *supra* note 83, at 61.

170. *Id.* at 56.

its Constitution, was only embraced in Germany with the passage of the Federal Constitutional Court Act in 1951.

In considering the role that the Court will play in preserving the basic rights of its citizens during the war on terrorism, the relative newness of the Court, its position in the government, and its jurisprudence, stand in stark contrast to the U.S. Supreme Court. The principles that the Constitution reflects the supreme law of a democratic state and the highest court in the land has the power to interpret the Constitution, has been accepted in the United States since the Supreme Court's 1803 decision in *Marbury v. Madison*.¹⁷¹ Despite the Federal Constitutional Court's short history, part of the reason that the Court has gained political legitimacy and assumed an important role in the German state is the fact that the Constitution awarded the Court the role of ensuring that each branch of government abides by the Constitution. In contrast to the democratically shaped, doctrinal expansion of rights that the U.S. Supreme Court has pursued since the 1930s, the German Federal Constitutional Court has interpreted fundamental rights through a legalistic prism that casts basic rights as part of a stable normative structure.¹⁷²

While it is a goal of the Court to interpret basic rights to have a broad effect, the Basic Law itself states that individual rights must be tempered by the state's right to protect life in the community.¹⁷³ At the heart of the Basic Law and Germany's constitutional jurisprudence lies the concept of human dignity. In fact, the Basic Law's first article states that: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."¹⁷⁴ Some commentators have suggested that, while the American Constitution is a constitution of liberty, the focal point of the German Constitution is human dignity.¹⁷⁵ While this characterization may be

171. *Marbury*, 5 U.S. 137 (1803).

172. Christian Starck, *Constitutional Interpretation*, in *STUDIES IN GERMAN CONSTITUTIONALISM: THE GERMAN CONTRIBUTIONS TO THE FOURTH WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW 59* (Christian Starck ed., 1995).

173. *Id.* at 60.

174. Helmut Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 45, 46* (Ulrich Karpen ed., 1988).

175. EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 7* (2002).

overly simplistic given that human dignity has played a role in some of the Supreme Court's most important cases such as *Miranda v. Arizona*, the comparison serves as a useful analytical starting point.

The Basic Law includes fundamental human rights such as religious liberty, equality, freedom of speech and association, the right to petition the government, as well as the right to property.¹⁷⁶ While the Basic Law protects free speech, especially when it involves political speech, the rights to speech and press cannot be interpreted independently of the Federal Constitutional Court's systematic framework of rights, which places the concept of human dignity at its apex.¹⁷⁷ Freedoms similar to the right to privacy and protection against search and seizure are cast in the Basic Law as a series of protections including: protection against interference with the mails, protection from interference with the right of the secrecy of telecommunication and protection against the interference with the right of inviolability of the home.¹⁷⁸

As a point of comparison, it is important to note that, while the American Constitution enumerates individual liberties that the government cannot infringe upon, the Basic Law defines individual freedom within the context of the social community and that rights carry attendant responsibilities.¹⁷⁹ Within the German legal framework of rights, rights such as privacy, control over personal information, and the right to control the presentation of oneself in society, define a protected inner sphere of individual privacy that is a critical component of human dignity. At the foundation of German constitutional theory lies the concept that the state is obligated to secure a stable, democratic society that honors human dignity.¹⁸⁰

Despite the fact that Germany is a civil law system, in some areas of the law, and the scope of privacy in particular, the Federal Constitutional Court has enlarged the definition of several key basic rights. In response to advances in computer technology, the Federal Constitutional Court created a doctrine of informational self-determination using Articles 1(1) and 1(2) of the Basic Law, which protect personal freedom. This doctrinal evolution commenced during the 1980s when the government attempted to gather comprehensive statistical information on German residents such as information on

176. See Goerlich, *supra* note 174, at 47 (citing GG arts. 3, 4, 5, 9, 13, 14 & 17).

177. See KOMMERS, *supra* note 100, at 441.

178. GG arts. 10, 13.

179. EBERLE, *supra* note 175, at 8.

180. *Id.* at 19.

the source of their personal income, education, transportation uses, and utility costs, in addition to basic demographic information. Citizens challenged the intrusion as a violation of one's personal autonomy. In the *Census Case* (1983), the Court articulated a right of informational self-determination, which it defined as "the authority of the individual to decide fundamentally for herself, when and within what limits personal data may be disclosed."¹⁸¹ This right is not without restrictions, as the Court balances the public interest with individual rights. The Federal Constitutional Court determined the government must have an "overriding public interest" to intrude upon the right to informational self-determination.¹⁸² In this case, the Court determined the government's desire to gather the information to enhance planning, environmental protection, and redistricting did not justify the intrusion on individual freedom.¹⁸³

A desire to avoid the period of political instability that facilitated the rise of the Nazi Party to power runs through the Basic Law. The purpose of several of the Basic Law's provisions is to prevent anti-democratic forces from undermining the constitutional order.¹⁸⁴ To this end, although the protections afforded by human rights are guaranteed to individuals, the Basic Law grants additional rights, such as the freedom of assembly and free movement, as well as freedom of profession, only to German citizens.

While the German constitutional framework protects individual freedom, a key objective of those freedoms is, not only to respect individuality, but also to assign free individuals a prominent role in the constitutional order of a stable democratic society. The German vision of society is not one in which individuals operate as autonomous actors striving to achieve their own individualistic goals, but one in which individuals possess reciprocal obligations to others and society.¹⁸⁵ To achieve this balance, the legislature may limit individual freedoms to advance the freedom of other individuals or to promote community rights.¹⁸⁶ In weighing basic rights and statutory obligations, the Court subjects new regulations to a proportionality test under which the intrusion must be proportionate to the legislation's desired goal. In evaluating whether Germany's anti-

181. *Id.* at 90 (citing BVerfGE 65, 42).

182. EBERLE, *supra* note 175, at 91.

183. *Id.*

184. MICHALOWSKI & WOODS, *supra* note 117, at 18.

185. EBERLE, *supra* note 175, at 44.

186. LEPSIUS, *supra* note 7, at 8.

terrorism legislation disproportionately infringes on constitutional rights, the focus of the analysis must be not simply on whether or not the legislation curbs individual freedoms, but rather whether it redefines human dignity and alters the autonomous role of the individual within a democratic society. Despite this deadlock, it is interesting to note that while the U.S. has sharply restricted immigration in the aftermath of September 11th, there is substantial political support within Germany to liberalize the nation's immigration policy.

B. United States

Three characteristics of American legal and political tradition contrast starkly with the German framework. First, while German jurisprudence seeks to balance individual rights with community responsibility, American constitutional jurisprudence often seeks to protect the individual from governmental intrusion in a private sphere. The right to privacy is defined most often in terms of an individual's right to make decisions in areas such as abortion, procreation, and marriage. In search and seizure law, there is an expectation of privacy in one's home, which the government must demonstrate probable cause to broach. This language of rights permeates the political sphere. One of the nation's most powerful interest groups, the National Rifle Association, seeks to protect the "right to bear arms." Moreover, it is a widely held belief that, by pursuing individual rights, the community's welfare will improve.¹⁸⁷ More often than not, rights are emphasized over obligations.¹⁸⁸

A second distinctive characteristic of America's domestic legal tradition is that courts, in particular the Supreme Court, have exercised considerable leeway in interpreting the original constitutional text. In part this reflects the country's common law tradition as well as the fact that the Constitution is an older, more ambiguous text, than the Basic Law. Moreover, changes in American values impact interpretation of the Constitutional text. At a fundamental level, increased judicial activism, which began in the 1930s, reflects the growth and activism of the government itself and the need to protect congressional policymaking, encourage administrative agencies' discretion, and protect citizens from the

187. Herbert Jacob, *Courts and Politics in the United States*, in *COURTS LAW & POLITICS IN COMPARATIVE PERSPECTIVE* 16, 28 (Herbert Jacob et al. eds., 1996).

188. *Id.*

enlargement of government power.¹⁸⁹ Against the Court's recent history of judicial activism, lies the ongoing debate among American legal scholars about the Court's "countermajoritarian problem." While this issue is too large to fully consider here, for our purposes it is helpful to note that, when judicial activism appears to thwart political preferences, critics invariably question how a political democracy can justify the exercise of judicial review by unelected and largely unaccountable judges.¹⁹⁰ While this debate was largely fueled by the activism of the Warren Court, it certainly recaptured momentum after *Bush v. Gore*, 531 U.S. 98 (2000), and it may buttress the doctrine of judicial restraint in light of the Court's traditional deference to the executive during times of war.

Finally, American constitutional jurisprudence does not possess an overriding aim parallel to its German counterpart's vision of vindicating human dignity.¹⁹¹ There is no constitutional blueprint for the pursuit of happiness in America. It is an individual pursuit rather than a path that the government helps pave.

With specific reference to the response to terrorism, doctrinal differences in two areas may affect whether claims are actionable. The fact that American jurisprudence has not developed a doctrine comparable to the German concept of interiority (the right to be left alone), may make it more difficult to challenge the government's proposed widespread use of private information for investigative purposes. The development of a right to informational self-determination may ultimately provide Germans with greater protection against the abuse of data by the government.

Conversely, for better or worse, Americans are likely to enjoy greater freedom to speak out about links between ethnic differences and terrorism because the Supreme Court has elevated free speech to a heightened level of protection.¹⁹² While free speech protects the right to speak out against the government, it protects hate speech as well. In contrast, free speech is tempered by human dignity in

189. Joel B. Grossman & Charles R. Epp, *Agenda Formation on the Policy Active U.S. Supreme Court, in* CONSTITUTIONAL COURTS, *supra* note 83, at 104 (Patrick Vollmer trans., 2002).

190. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part V*, 112 YALE L.J. 153, 155 (2002).

191. EBERLE, *supra* note 175, at 257.

192. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971) (protecting offensive speech); *see also* *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (protecting hate speech); *see also* *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (requiring actual malice to establish defamation against a public figure).

Germany, which seeks to protect reputation, honor, and personality.¹⁹³ In Germany, denigrating speech over race, ethnicity, gender, or physical appearance is outlawed.¹⁹⁴ While the metaphor of a “marketplace of ideas” and confidence in John Stuart Mill’s thesis that ultimately the truth will prevail sharply drives America’s First Amendment jurisprudence, Germany’s conditional protection of speech reflects the country’s strong desire to distance itself from the totalitarian excesses of the Nazi era.

Despite these differences, freedoms often depend on activist Courts for protection from majoritarian impulses in both countries.¹⁹⁵ Both possess a rich legacy of constitutional rights that their respective courts have protected during the last half-century. The next section explores potential conflicts between constitutional rights and anti-terrorism legislation in both countries.

V. THE RESPONSES TO TERRORISM LIMIT FUNDAMENTAL FREEDOMS

The vast majority of individuals residing in the United States and Germany may not notice that their civil liberties have been altered by their country’s response to terrorism. Those changes that have been noticed, for example the appearance of federal employees as airport security personnel in airports, have been accepted as welcome security improvements. In addition, few Americans may be disturbed by the fact that an individual who attempted to detonate a “dirty bomb” on an airline is being held as an “enemy combatant” in a Navy brig in South Carolina. Yet, the history of government action during times of national crisis in both countries has taught us that the government has often used secret investigations and illegal tactics, not just to target legitimate national security threats, but also to monitor and disrupt groups for ideological reasons. As the law enforcement agencies raise the intensity of their intelligence gathering activities and subject hundreds of individuals to detention, the probability increases that government action will compromise liberties. This section of the paper identifies the tension created by the anti-terrorism legislation and examines the impact of these legislative changes on fundamental freedoms.

193. EBERLE, *supra* note 175, at 263.

194. *Id.*, at 226 (citing StGB arts. 130-31).

195. *Id.*, at 252.

A. *Germany*

1. Restrictions on Fundamental Rights and Individual Autonomy

a. *The Internal Sphere*

Germany's recent anti-terrorism legislation redefines the boundaries of state action vis-à-vis human liberty in Germany. This change recasts the scope of protection previously awarded to the individual's inner sphere. Key provisions of German legislation that challenge the traditional balance between individual autonomy and the state's interests include legislation that empowers the government to add biometric data to identification cards, gather voice recordings of individuals seeking asylum, and to conduct more extensive security checks of individuals employed in positions that are important to national security.

The expanded data collection powers granted to federal police and intelligence agencies in the second anti-terrorism package pose a threat to an individual's freedom of action,¹⁹⁶ the rights to privacy of posts and communications,¹⁹⁷ and the right to self-regulation of information.¹⁹⁸ The legislation significantly enhanced the authority of the Federal Office for the Protection of the Constitution and the Federal Intelligence Service to gather data on individuals. Those agencies are now empowered with the authority to request information from financial institutions, the post office, telecommunications enterprises, and airline companies about financial accounts, money flows, and customer information. There is no provision to notify the customer of the information request.

196. GG art. 2(1) (stating, "[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law").

197. GG art. 10, which states,

(1) The privacy of correspondence, posts and telecommunications shall be inviolable.

(2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.

198. GG art. 2 (1). *See also* LEPSIUS, *supra* note 7, at 11.

Although citizens have filed legal challenges to the government's use of computerized searches based on profiles using religious affiliations, courts in Berlin and Frankfurt have denied those challenges.¹⁹⁹ There is convincing evidence, however, that the German people are less eager than their government to enhance the government's data collection ability. The German police asked companies to dump their databases into the government's database to enable the government to compare transactions with a basic profile of the hijackers. However, because of widespread privacy concerns, only 212 of 4,000 companies complied.²⁰⁰

These statutes appear to run counter to the enhanced protections developed by the Court during the past thirty years, by extending the government's reach into an individual's private sphere, gaining increased access to private information. While most of Germany's basic rights cannot be restricted, some rights are always subject to restriction under the doctrine of proportionality.²⁰¹ In announcing the right of informational self-determination in the 1983 *Census Case*, the Federal Constitutional Court stated that it was limited by the "predominant public interest."²⁰² Many of Germany's anti-terrorism measures will automatically expire in five years. Given that these measures circumscribe basic privacy rights, it is essential that the legislature not extend these measures unless the government can demonstrate: (1) that terrorists continue to pose a threat within Germany, (2) the government's enhanced data gathering capability has enabled the government to effectively combat that threat, and (3) the government has not used its enhanced capability for political purposes.

While it is too early to evaluate the second and third prongs of this proposed test, there is ample evidence that terrorists currently pose a threat within Germany. In 2000 and 2001, German police arrested a number of Algerian men that were part of an al Qaeda cell and charged them with planning a bomb attack on the Christmas Market in Strasbourg.²⁰³ Also, there is some evidence to suggest the

199. PRIVACY INTERNATIONAL, *supra* note 107, at 190.

200. Bowers, *supra* note 103, at 3.

201. *See, e.g.*, GG art. 5(3).

202. PRIVACY INTERNATIONAL, *supra* note 107, at 182.

203. *Germany's Terrorism Test*, DEUTSCHE WELLE, Apr. 16, 2002, at http://www.dw-world.de/english/0,3367,1432_A_499109_1_A,00.html (last visited Nov. 9, 2003).

attack on at least ten German tourists in Tunisia in early 2002 was planned by al Qaeda operatives in Germany.²⁰⁴

b. Freedom of Association

In addition to affecting the scope of privacy in the internal sphere, the legislative measures will impact the relationship between the state and some religious organizations. Germany's anti-terrorism measures stripped away special protections given to religious and ideological organizations and strengthened the state's ability to ban groups that foster intolerance and promote terrorism.²⁰⁵ These measures reworks the balance between state security concerns and the freedom of individuals to participate in particular religious organizations. These measures allow the government to use the law on private associations to ban groups that include: (1) fundamentalist Islamic organizations that refuse to reject violence as a means to further their beliefs, (2) organizations that claim a religious status that pursue profit-making or political objectives, and (3) religious sects that commit murder or participate in mass suicides.²⁰⁶

These restrictions potentially implicate the rights included in Article 4 (2) of the Basic Law, which guarantees freedom of faith.²⁰⁷ To the extent that individuals are precluded from joining particular Islamic religious groups because those associations have been banned, this new legislation redefines the relationship of the state to certain religious groups that challenge state security. The relationship between church and state articulated in Article 136f of the Weimar Constitution acknowledges that "[t]he authorities shall not have the right to inquire into a person's membership of a religious body except to the extent that rights or duties depend thereon."²⁰⁸

These restrictions not only represent a response to September 11th, but to the increase in the number of foreign extremists living in Germany as well. The Federal Office for the Protection of the Constitution (BfV) estimated that the number of extremists residing

204. *See id.*

205. 'Second Anti-Terrorism Package' Approved, DIE BUNDESREGIERUNG, Jan. 7, 2002, available at http://eng.bundesregierung.de/top/dokumente/Artikel/ix_59819.htm?template=single&id=59819_9143&ixepf=_59819_9143& (last visited Nov. 9, 2003).

206. *German Government Provides 3Billion Marks to Strengthen Security*, DIE BUNDESREGIERUNG, Oct. 15, 2001, available at http://eng.bundesregierung.de/dokumente/Artikel/ix_59819_9143.htm? (last visited Nov. 9, 2003).

207. GG art. 4(1) (stating, "[f]reedom of faith and of conscience, and freedom to profess a religious or philosophical creed shall be inviolable").

208. GG art. 136.

in Germany in 2001 had climbed to 59,100 individuals.²⁰⁹ For the past several decades, Germany possessed a liberal asylum policy that permitted many individuals with foreign terrorist ties to enter the country. Since Germany's criminal law provisions relating to terrorism only referred to domestic terrorism, German agencies engaged in foreign intelligence and domestic police services did not share information about individuals living in Germany with ties to foreign terrorist groups.²¹⁰ As a result, Germany now faces the predicament of trying to develop effective tools to determine whether groups already within German borders pose a threat to the state. In December 2001, the government used the new legislation to ban the Union of Islamic Associations and Communities, which was led by Metin Kaplan, an individual who had recently been convicted of incitement of murder.²¹¹ The group consisted of a network of fundamentalist Muslims who live in Germany and advocate the violent overthrow of the Turkish government.²¹² More recently, in January 2003, the German government banned the group, the Party of Liberation, which it accused of spreading violent anti-Semitic and anti-American propaganda after a two-month investigation.²¹³ While it is clear that the group's communications were intended to provoke violence, the issue of whether or not the government possessed evidence that the group actively engaged in violence within Germany is far from certain. The German government appears intent on striking at the roots of terrorism in Germany by attempting to dismantle Islamic fundamentalist organizations that promote violence.

Germany's Basic Law guarantees the freedom of speech, as well as the right to form associations, under the theory that a person is not an isolated individual, but rather a member of a community "who depends for his development on multiple interpersonal relations."²¹⁴ The widening scope of §§ 129, 129a, and 129b StGB triggered an active debate in Germany about where the law should draw the line

209. *Number of Foreign Extremists Living in Germany Climbs*, *supra* note 122.

210. KATZENSTEIN, *supra* note 2, at 17.

211. *Number of Foreign Extremists Living in Germany Climbs*, *supra* note 122.

212. *Germany Bans Radical Islamic Group*, DEUTSCHE WELLE, Dec. 19, 2001, at http://dw-world.de/english/0,3367,1432_A_351858_1_A,00.html (last visited Nov. 16, 2003).

213. *Net Around German Islamic Fundamentalists Gets Tighter*, DEUTSCHE WELLE, Jan. 17, 2003, at http://www.dw-world.de/english/0,3367,1430_A_757372_1_A,00.html (last visited Nov. 16, 2003).

214. See MICHALOWSKI & WOODS, *supra* note 117, at 277-78 (citing BVerfGE 50, 290).

between objectionable opinion that is protected by the basic rights and expressing an opinion that qualifies as recruiting support for a criminal cause. The new changes attempted to more clearly delineate the line between protected speech and speech that constitutes criminal recruitment. Thus, lobbying for sympathy for groups is no longer punishable under the law, while targeted advertising and lobbying for members and supporters is a criminal offense.²¹⁵ Speaking before the Bundestag on April 26, 2002 on the revision of §§129, 129a, and 129b StGB, Justice Minister Herta Däubler-Gmelin stated:

Experience accumulated over the past several decades has shown us that courts have sometimes had trouble deciding whether or not a statement crosses the borderline between the expression of an objectionable opinion but one nonetheless protected by basic rights and the expression of an opinion that is tantamount to recruitment for a criminal cause. We do not want to increase these difficulties in connection with the inclusion of foreign organizations.²¹⁶

Despite the fact that the definition of prohibited speech has been tightened, there is concern within Germany that the government will prosecute members of freedom groups that are fighting autocratic regimes as terrorists. The new legislation attempts to avoid that possibility by requiring that the Federal Justice Ministry approve all prosecutions under this law.²¹⁷ The new provision, §129b StGB, differentiates the scope of the government's response according to whether or not the terrorist organization is European or not. The state may prosecute a European terrorist organization, whether or not Germans are involved in the organization.²¹⁸ In contrast, the state may only pursue criminal prosecution against non-European terrorist organizations and their members, if a provision of the German criminal law applies to the activity,²¹⁹ if a German is one of the perpetrators, if a German is one of the victims of a terrorist act, or if the member of the organization is apprehended in Germany.²²⁰

215. *New Weapon in Germany's Fight against Terror*, DEUTSCHE WELLE, Apr. 26, 2002, at http://www.dw-world.de/english/0,3367,1432_A_507392_1_A,00.html (last visited Nov. 9, 2003).

216. *New Law Designed to Step Up Fight Against International Terrorism*, *supra* note 22.

217. *New Weapon in Germany's Fight against Terror*, *supra* note 215.

218. § 129a(1) StGB.

219. §§ 3-5 StGB.

220. §129b(1) StGB.

Perhaps the most important restriction is that the government can only prosecute foreign terrorist organizations for criminal activities within Germany, when German citizens engage in criminal activity, or when the victims of the attacks are Germans.²²¹ With these last three categories of cases, the Federal Justice Ministry must approve the prosecution before it can proceed.

2. The Structure of Government

In both the United States and Germany, federalism, as well as the separation of powers, serve as structural safeguards, which seek to preserve democracy by spreading power among different levels of government, as well as between different branches of government. A key difference between the two countries is that the Länder are largely responsible for implementing federal law.²²² According to the Basic Law, the federal government's exclusive power to legislate exists in areas such as foreign affairs, defense, citizenship, freedom of movement, currency matters, customs and postal and telecommunications services.²²³ While the primary authority for criminal prosecution and police powers rests with the Länder, the federal government may enact legislation regarding the cooperation between the federal government and the Länder in matters related to the criminal police and protecting the free democratic order and the constitution.²²⁴ In a number of areas such as civil law, criminal law and the execution of sentences, as well as the organization of the courts, the federal government has concurrent legislative authority with the Länder, which it may exercise if it satisfies certain

221. *New Weapon in Germany's Fight against Terror*, *supra* note 215.

222. See LEPSIUS, *supra* note 7, at 9.

223. GG art. 73 §§ 1-11.

224. GG art. 73(10).

The Federation shall have exclusive power to legislate with respect to . . . cooperation of the Federation and the Länder concerning

- (a) criminal police work,
 - (b) protection of the free democratic basic order, existence, and security of the Federation or of a Land (protection of the constitution) and
 - (c) protection against activities within the federal territory which, by the use of force or preparations for the use of force, endanger the external interests of the Federal Republic of Germany,
- as well as the establishment of a Federal Criminal Police Office and the international action to combat crime

prerequisites.²²⁵ As a practical matter, the federal government continues to expand the number of areas in which it has enacted legislation overruling Länder legislation. As a result, while the Länder remain responsible for administration and enforcement, the range of their lawmaking authority has narrowed.

Reflecting a desire to prevent the excesses perpetrated by the federal police during the Nazi era, the constitution prohibits the creation of an "imperial security authority."²²⁶ According to Article 87 of the Basic Law, the role of the federal criminal police is restricted to "the compilation of data for purposes of protection of the constitution and of protection against activities within the federal territory which, through the use of force or acts preparatory to the use of force, endanger the external interests of the Federal Republic of Germany."²²⁷ In essence, the Basic Law only grants the federal authorities the power to create a central office for police coordination, not a separate police force. Critically, a key purpose for separating criminal prosecution and the intelligence services was to prevent federal authorities from holding any police powers.²²⁸

Despite the intent of the framers of the Basic Law to limit the range of competence of the federal investigative authorities, the recent anti-terrorism measures extend the power of those authorities. As a result of this legislation, the Federal Agency Entrusted with Protection of the Constitution (*BfV*), now possesses the authority to monitor attempts to disrupt the peace. The *BfV*, whose responsibilities had previously been restricted to the domestic arena, has now become an independent investigative authority with no limits on the geographic scope of its investigations.²²⁹ This enlargement threatens to compromise the distinction and separation between preventative investigation and the pursuit of criminal prosecutions.²³⁰

3. Judicial Review and Anti-Terrorism Legislation

Any individual who has been injured by government action in Germany has the right under Germany's Basic Law to access the judicial system. In Article 19(4), the Basic Law declares that,

225. GG art. 74 (Concurrent legislation, catalogue); GG art. 72 (Concurrent legislation of the Federation, definition).

226. LEPSIUS, *supra* note 7, at 10.

227. GG art. 87(1).

228. LEPSIUS, *supra* note 7, at 10.

229. *Id.* at 13.

230. *Id.*

“[s]hould any person’s rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.”²³¹ In addition, the Basic Law grants individuals the right to a court hearing. In the *Restatement Case*, the Federal Constitutional Court declared that right guaranteed individuals the opportunity to present their views on the facts, enter petitions, and make statements.²³² Although in some cases, such as the case of arrest warrants, the court may take action before a hearing is held with the subject present. In those cases, “[u]pon request of the person concerned, subsequent proceedings must be held in which he is heard and in which a decision as to the lawfulness of the measures will be rendered.”²³³

Under the Basic Law, the only exception to judicial review regards the secrecy of mail and telecommunications.²³⁴ In special security cases involving mail and telecommunications, the Constitution (GG) permits the use of extraordinary measures that attempt to balance national security interests while protecting basic rights. In those cases, pursuant to Article 10(2) GG, the Parliament may appoint a special body, typically a parliamentary committee, which performs the judicial review function. The government must inform that committee about surveillance measures on mail and telephone communications and the committee must approve surveillance measures installed on international communications.²³⁵

In addition, under Article 10, there is a G-10 commission, which consists of four deputies appointed by the parliamentary committee.²³⁶ This commission reviews whether the surveillance measures are necessary.²³⁷ While these committees are subject to some accountability (i.e. annual reporting) there is no way for the individuals who are the object of police surveillance to protest the surveillance to the courts or to the committee.²³⁸ In addition, given that the new legislation expanded the federal government’s information gathering powers, the absence of judicial review in this area raises the specter that individual liberties lack sufficient

231. GG art. 19(4).

232. MICHALOWSKI & WOODS, *supra* note 117, at 351.

233. BVerfGE 9, 89.

234. LEPSIUS, *supra* note 7, at 9.

235. *Id.* at 11-12.

236. *Id.* at 12.

237. *Id.*

238. *Id.*

protection. Importantly, since the new legislation does not require the federal agencies to inform the parliamentary committee of all investigations, the committee's oversight function is limited to the specific cases of which they are aware.²³⁹ At the time that the legislature considered the second anti-terrorism package, the German Judges Federation declared that it is "particularly alarming" that the federal investigative authorities' powers will be increased and that they "will not be subject to judicial scrutiny."²⁴⁰ While comprehensive public oversight may compromise the secrecy of government investigations, the government's increased use of telecommunication information to ferret out terrorists raises the risk that the government will encroach upon individual liberties without the public's knowledge.

Under the German Criminal Procedure Code (*Strafprozessordnung*, StPO), § 100f, the government can only use personal data pursuant to police law for the purposes of criminal proceedings and in "specific cases to avert an actual danger to the life, limb or liberty of another or to substantial property or assets."²⁴¹ Presumably, these provisions would prohibit the potential for abuse allowed in U.S. courts with the government's increasing use of *in camera ex parte* presentations of evidence to show that individuals qualify as "enemy combatants" and are thus subject to indeterminate military detention.

B. United States

1. Violations of Constitutional Rights

a. First Amendment

Both the 1996 Act and the Patriot Act implicate the rights to free speech and free association protected under the First Amendment. By broadening the definition of "terrorist" activity as well as the definition of providing support to terrorists, the legislation increases the probability that individuals who engage in protected First Amendment conduct will be investigated and possibly criminally punished. Moreover, in the case of non-citizens seeking to enter the

239. *Id.* at 12.

240. Elizabeth Zimmermann, *German Parliament Agrees Second Anti-terrorism Law Package*, World Socialist Web Site, Dec. 5, 2001, at <http://www.wsws.org/articles/2001/dec2001/germ-d05.shtml> (last visited Nov. 7, 2003).

241. § 100f (1) StPO.

country, the legislation permits the INS to exclude individuals on the basis of their ideology. Section 411 of the Patriot Act allows the INS to deny entry to non-citizens who are members of "a political, social or other similar group whose public endorsement of acts . . . undermines United States efforts to reduce or eliminate terrorist activities."²⁴² While, without question, the United States has a strong national security interest in prohibiting supporters of al Qaeda from entering the country, due to the broad nature of the war on terrorism, this statute also empowers the INS to block peaceful protestors of the war in Iraq from entering the country. Furthermore, the Act gives the INS authority to deport individuals for mere association with a terrorist group, regardless of whether or not there is any connection between an individual's connections to terrorists and violent crime.²⁴³ Since the new INS regulations define "terrorist activity" as almost any use or threatened use of a weapon and define a "terrorist group" as two or more individuals who have used or threatened to use a weapon, the regulations give the INS widespread latitude in its deportation decisions.

Given that Attorney General Ashcroft has labeled critics of the Patriot Act "unpatriotic" and charged them with "giving ammunition to America's enemies,"²⁴⁴ it is not unreasonable to argue that these provisions give law enforcement a license to resurrect the investigative abuses of the past. The enactment of a similar act, the Internal Security Act of 1950, prompted the growth of the FBI's COINTELPRO operations (counterintelligence programs).²⁴⁵ Though the purpose of the 1950 Act was to combat communism, the FBI investigated a myriad of domestic political groups including civil rights groups, the Socialist Workers Party, and groups protesting the Vietnam War.²⁴⁶ A subsequent Senate investigation of these activities, led by Senator Frank Church, concluded, "the Bureau conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous

242. USA Patriot Act of 2001 § 411(a).

243. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 966 (2002).

244. See Whitehead, *supra* note 69, at 1100 (citing Homeland Defense Before the Senate Comm. on the Judiciary, 107th Cong. (2001) (written testimony of John Ashcroft, Attorney General), available at http://www.senate.gov-judiciary/print_testimony.cfm?id+108&wit_id=42).

245. See COLE & DEMPSEY, *supra* note 52, at 73.

246. *Id.*

groups and the propagation of dangerous ideas would protect the national security and deter violence.”²⁴⁷

Moreover, given that the government’s primary emphasis is on detecting and preventing future terrorist attacks, the prime impetus behind law enforcement investigations will not be to gather information for purposes of a criminal indictment, but rather to gather any possible information related to terrorism. While criminal investigative searches are bound by the requirements of “reasonable suspicion” and “probable cause,” the scope of investigations conducted for the primary purpose of protecting national security may be virtually limitless.

With few exceptions under American law, individuals can only be punished for a criminal act that they commit, help another to commit, or conspire to commit. When the 1996 Act made it a federal crime to provide humanitarian support to “terrorist” organizations, it reintroduced the principal of “guilt by association” into the federal law.²⁴⁸ Under this statute, the government can prosecute people for funding lawful acts sponsored by certain designated groups.²⁴⁹ While we typically equate the term “terrorist” organization with al Qaeda or similar groups, during the State Department’s history of categorizing groups, it has also placed such groups as Nelson Mandela’s African National Congress into that category. Had this law been in effect during the 1980s, individuals who had given contributions to finance Mandela’s speaking tours could have been prosecuted.²⁵⁰

In the months following the September 11th attacks, student demonstrators, global justice workers, civil libertarians, animal rights and peace activists, were all characterized as terrorist sympathizers.²⁵¹ Since the Patriot Act defines domestic terrorism broadly, to include activities that seek “to influence the policy of a government by intimidation or coercion,” it threatens to categorize First Amendment conduct as terrorist activity.²⁵² Thus, the broadening scope that constitutes terrorist activity, the liberal application of the definition of a terrorist organization, and law

247. *See id.* at 73-74.

248. *Id.* at 118.

249. *Id.*

250. *Id.*

251. Patricia Williams, *By Any Means Necessary*, THE NATION, November 26, 2001, available at <http://www.thenation.com/doc.mhtml?i=20011126&s=williams> (last visited Nov. 7, 2003).

252. USA Patriot Act of 2001 § 802(a)(5)(B)(ii).

enforcement's changing mission may all challenge First Amendment activities.

The most striking parallel between the German and American legislation in this area is the broad similarity between the criminalization of conduct related to speech and association which may support terrorism. However, there are also important differences in the criminalization of that conduct. In crafting the definition of speech that constituted recruitment for a terrorist cause, German legislators took stock of the lessons learned from the country's prior legislative assault on terrorism in the 1970s. During the U.S. Congress' expedited deliberations of the Patriot Act, there is little evidence that legislators reflected upon the country's extensive history of characterizing political dissent as criminal activity. This difference may reflect how severely September 11th rocked the country and politicians' eagerness to take action in the face of the country's powerlessness to ameliorate the event's catastrophic impact.

In devising effective strategies to ferret out dangerous Islamic extremists, while promoting religious freedom and not perpetuating discrimination, both countries have had to confront different legacies. Germany had to overcome its postwar reluctance to profile religious organizations to broaden the scope of investigations based on associational ties and set aside associational rights previously given to fundamentalist Islamic groups. In contrast to the United States, during this period Germany attempted to liberalize its immigration policies. Although President Bush has condemned violence against Muslims, the government's closer monitoring of aliens and increased reporting requirements has resulted in large scale detentions of aliens of Middle-Eastern descent.

Moreover it is an open question whether American law enforcement agencies will use the terrorism's new reach to target dissent. The fact that al Qaeda supporters belong to the Muslim religion, and that some organizations marry humanitarian activities with violent acts, could lead to constitutional violations if law enforcement abuses its wider mandate. In addition, some of the Bush Administration's rhetoric against both countries and individuals that have opposed their policies has called into question the Administration's commitment to tolerate dissent.

b. Fourth Amendment

A key provision of the Patriot Act may exempt a number of searches conducted pursuant to the war on terrorism from the probable cause requirement. Although the government is prohibited

by the Fourth Amendment from conducting searches or wiretaps unless it has probable cause to believe that an individual is engaged in criminal activity or possesses evidence of a crime, the Patriot Act waives that requirement when the government can show that the investigation has a “significant” foreign intelligence purpose.²⁵³ In an effort to protect the secrecy of government investigations related to foreign intelligence and still subject those investigations to some form of judicial review, in 1978 Congress established the Foreign Intelligence Surveillance Court.²⁵⁴ The 1978 Act allowed the FBI to conduct surveillance and secret searches for the purpose of gathering foreign intelligence information, in the absence of specific probable cause that an individual was engaged in criminal activity, after they applied for and received an order from the FISA court.²⁵⁵ In order to obtain a FISA warrant, law enforcement had to demonstrate that the primary purpose of an investigation was to collect foreign intelligence rather than to pursue criminal law enforcement.²⁵⁶ At the time the legislation was enacted, a House report defined “foreign intelligence information” as evidence of “crimes relating to sabotage, international terrorism, or clandestine intelligence activities.”²⁵⁷

The Patriot Act’s amendment of the FISA statute relaxes the requirement that the government show the primary purpose of an investigation is not to pursue criminal prosecution. While Congress amended FISA to make it easier for law enforcement to obtain a FISA warrant in those cases where an individual may be a source of foreign intelligence and the target of a criminal investigation, the amendment makes it easier for the FBI to use the FISA court, rather than ordinary federal courts, to obtain warrants for information that may be used in criminal investigations.

The comparison between the impact of the expanded information gathering powers granted under the new legislative packages in Germany and the U.S. is an interesting one. It appears that in many cases related to national security, Germany’s law enforcement forces will be able to expand the scope of their investigations, if they can show that the investigations are related to national security. To the extent that there is oversight of these investigations, it is oversight by

253. Cole, *supra* note 243, at 972-73.

254. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§1801-1862 (1978).

255. COLE & DEMPSEY, *supra* note 52, at 159-60.

256. Cole, *supra* note 243, at 974.

257. *In re Sealed Case*, 310 F.3d 717, 724 (2002) (citing H.R. REP NO. 95-1283, at 49 (1978)).

a special parliamentary committee, rather than by a court. The increasing centralization of investigative ability and the expected increase in the number of investigations may improve Germany's ability to monitor terrorists, but it will also make oversight more difficult and less effective. Here again, Germany has had to relax some of their statutory protections that were enacted as a response to the rise of the Nazi regime, in an attempt to counter the new level of threat posed by terrorism.

The U.S. Justice Department has attempted to bypass the judicial oversight, typically exercised by the federal courts over its investigative activities, by enlarging opportunity to obtain warrants from the FISA courts. While an argument can be made that the jurisdiction of the FISA courts should be expanded to include terrorists with foreign ties, if the primary purpose of the enhanced secrecy of the FISA courts is to facilitate the gathering of intelligence, one way to accomplish that goal and ensure that the FBI does not use the FISA courts rather than ordinary federal courts to obtain warrants for information that may be used in criminal investigations is to institute an exclusionary rule. The rule would prohibit the FBI from using information obtained pursuant to a FISA warrant in a criminal prosecution. Congress' failure to add reasonable protections to the Patriot Act and ignorance of the FBI's legacy of using investigations to monitor political dissent may reflect the haste in which the Patriot Act was enacted, rather than a deliberated consideration of the threat posed by terrorism.

The net result of the changes in both countries is that, although the constitutional requirements restricting the investigative activities of federal law enforcement authorities in both countries have been loosened, it is too early to tell whether investigative agencies in either country will direct their newly enhanced power against inappropriate targets.

c. Fifth Amendment

In the immediate aftermath of September 11th, the government arrested and held over 1,000 individuals without filing formal criminal charges against them.²⁵⁸ While the government has invoked section 412 of the Patriot Act, which allows the Attorney General to take into custody any alien whom he "has reasonable grounds to believe"²⁵⁹ threatens national security, indefinite detention jeopardizes

258. Williams, *supra* note 251.

259. USA Patriot Act of 2001 § 412.

an individual's right to due process. Although the rights of aliens are limited by immigration power, this power is subject to constitutional limitations. In the recent case, *Zadvydas v. Davis*, not involving suspected terrorists, the Supreme Court held that the indefinite detention of aliens violates the Fifth Amendment Due Process Clause.²⁶⁰ Unfortunately section 412, which grants the Attorney General the power to hold aliens for periods of up to six months and to extend those periods of detention if the alien threatens the security of the community, also restricts aliens' access to the judicial system.²⁶¹ Additionally, under section 412(b)(3), the final deportation order may only be reviewed by the U.S. Court of Appeals for the District of Columbia Circuit.²⁶²

d. Sixth Amendment

Despite the fact that Congress granted the Justice Department a wide range of new tools to combat terrorism in the Patriot Act, the government has acquired some of its most constitutionally troubling tools not by statutory authorization, but rather by executive fiat. On October 30, 2001, Attorney General Ashcroft unilaterally issued an executive regulation that allows federal agents to monitor conversations that occur in detention facilities. Pursuant to this regulation, the determination of what conversations will be monitored will not be made by judges upon an objective showing of reasonable suspicion, but rather on Ashcroft's own determination of reasonable suspicion.²⁶³ Although inmates have a lower expectation of privacy while they are incarcerated, Ashcroft's executive order threatens to undermine the right to effective representation by circumscribing the ability of individuals to confer confidentially with their counsel.²⁶⁴ The Supreme Court and other federal courts have long recognized the

260. 533 U.S. 678, 682 (2001).

261. USA Patriot Act of 2001 § 412(a).

262. USA Patriot Act of 2001 § 412(b)(3).

263. Akhil Reed Amar & Vikram David Amar, *The New Regulation Allowing Federal Agents to Monitor Attorney-Client Conversations: Why it Threatens Fourth Amendment Values*, Findlaw's Legal Commentary, Nov. 16, 2001, at <http://writ.news.findlaw.com/amar/20011116.html> (last visited Nov. 9, 2003).

264. See Letter from Patrick Leahy, Senate Judiciary Committee Chairman, to John Ashcroft, Attorney General (Nov. 9, 2001), at <http://www.senate.gov/~leahy/press/200111/110901.htm> (last visited Oct. 16, 2003).

integral role that confidential communications play in guaranteeing the right to counsel.²⁶⁵

Since Germany's system of justice is an inquisitorial one, German lawyers do not play a role comparable to a lawyer's role in the American adversarial system. As a result, it may not be surprising that Germany's effort to detect terrorism has not similarly affected German defense counsel. However, the German government's reluctance to interfere with defense counsel may not completely reflect the inquisitorial nature of the judicial system, but rather the fact that there was considerable debate about restrictions on defense attorneys during Germany's prior bout with terrorism. Attempts to circumscribe the role of defense counsel in terrorist proceedings occurred in several German courts during the 1970s, when the state sought to exclude defense counsel from specific trials. While the exclusion of one attorney was reversed by the Federal Constitutional Court,²⁶⁶ in 1975, the German parliament enacted a defense counsel exclusion statute that enabled courts and prosecutors to exclude defense counsel from trial under certain conditions.²⁶⁷ The Federal Constitutional Court responded by striking down the statute, holding that it lacked adequate standards to guide its application.²⁶⁸ The Bundestag subsequently drafted a more precise statute.

2. The Executive Branch as Judge: Circumventing the Constitution Through the Use of "Enemy Combatant" Status

In order to benefit from the criminal law's basic procedural protections, one must be considered a criminal defendant. The process of invoking constitutional protections such as the right to counsel, the right to remain silent, as well as the protections afforded by probable cause requirements, presumes that the government has filed criminal charges. In fact, more often than not, if the government obtains evidence unlawfully, the remedy is not that the government is sanctioned, but rather that the court rules the evidence inadmissible in the criminal proceeding against the defendant. The judicial branch's reluctance to sanction the executive branch helped to spawn

265. *Id.* (citing *Hoffa v. United States*, 383 U.S. 293, 306 (1966); *Shillinger v. Hayworth*, 70 F.3d 1132, 1141 (10th Cir. 1995); *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951)).

266. RADVANYI, *supra* note 4, at 79.

267. *Id.*

268. KOMMERS, *supra* note 100, at 235, 564 n.110 (citing BVerfGE 49, 24).

the creation of the exclusionary rule as a remedy for violations of the Fourth, Fifth, and Sixth Amendments.²⁶⁹

By implication, if the government does not file criminal charges against individuals held in detention, few constitutional restraints may regulate the conditions of confinement. The war on terrorism has produced an interesting paradox. Although the government has indicted a number of individuals in federal court, including individuals suspected of being active members of terrorist cells, eight individuals have been classified as “enemy combatants.”²⁷⁰ While those charged in federal court will enjoy the full benefits of the adversarial process and a criminal trial, those labeled as “enemy combatants” may be stripped of their constitutional rights.

By designating some detainees as “enemy combatants,” the Executive Branch has unilaterally awarded itself a license to subject detainees to coercive conditions of confinement and cut them off from contact with the outside world. The fact that the country is now at war has strongly influenced judicial decision-making, as the existence of wartime conditions was a decisive factor in the *Padilla* court’s decision to grant the President considerable latitude in its designation of “enemy combatants.”²⁷¹ The court reasoned that, during war and in cases involving national security, the judicial system typically accords the Executive Branch a wide range of discretion and determined that the President’s power to detain unlawful combatants flowed from his

269. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* § 2.01 (2d ed. 1986).

270. The first two of those cases have provoked court challenges. On June 23, 2003 President Bush designated Ali Saleh Kahlah Al-Marri as an enemy combatant alleging that he was an al Qaeda sleeper agent. See Jerry Markon, *Jailing of Hamdi Upheld as Rehearing is Denied*, WASH. POST, July 10, 2003, at A10. On July 3, 2003, President Bush designated six more individuals currently being detained by the United States as “enemy combatants” clearing the way for the six individuals to face military tribunals. See Press Release, President Determines Enemy Combatants Subject to His Military Order, U.S. Department of Defense (July 3, 2003), available at <http://www.defenselink.mil/releases/2003/nr20030703-0173.html> (last visited Nov 5, 2003). When it became apparent that the group contained two British citizens, the European Union as well as the U.K. protested the classification and warned that applying the death penalty to the suspects could undermine European support for the war on terrorism. See Jimmy Burns & Jean Eaglesham, *UK to Confront US Over Secret Tribunals*, FIN. TIMES (London), July 5, 2003, at 1. To appease the British, the U.S. agreed that it would not seek the death penalty for the two British detainees. See Hugh Williamson, *U.S. Concessions on Guantanamo Likely to be ‘Problematic’*, FIN. TIMES (London), July 30, 2003, at 6.

271. *Padilla v. Bush*, 233 F. Supp. 2d 564, 606 (S.D.N.Y.2002).

duties as Commander-in-Chief.²⁷² Moreover, the court applied Justice Jackson's analysis of the degrees of Presidential authority in *Youngstown Sheet & Tube Co. v. Sawyer*,²⁷³ stating, "[i]n the decision to detain Padilla as an unlawful combatant . . . the President is operating at maximum authority, under both the Constitution and the Joint Resolution."²⁷⁴

The court's deference to Presidential authority in the *Padilla* case has been matched in the second enemy combatant case, *Hamdi v. Rumsfeld*.²⁷⁵ While the Court of Appeals for the Fourth Circuit denied the government's Motion to Dismiss a Petition for Writ of Habeas Corpus and rejected the government's argument that the President's determination of Hamdi's status as an enemy combatant was not subject to judicial review,²⁷⁶ in a January 2003 decision, the Court held that Congress had authorized Hamdi's detention as an enemy combatant and the government's affidavit was sufficient to establish a basis for detention.²⁷⁷ Although the district court ordered the government to produce more evidence to support the government's decision to classify Hamdi as an enemy combatant,²⁷⁸ the Fourth Circuit Court held that the fact that Hamdi had been captured in a zone of active combat was sufficient in and of itself to justify Hamdi's detention as an "enemy combatant."²⁷⁹

Moreover, while the district court attempted to delineate a meaningful standard of judicial review that would apply to the executive branch's decisions to designate individuals as enemy combatants, the Fourth Circuit struck down that standard of review.²⁸⁰ According to the district court, a meaningful judicial review should determine:

- (1) Whether the government's classification of the detainee's status was determined pursuant to appropriate authority to make such determinations.

272. *Id.* at 606.

273. 343 U.S. 579, 637 (1952).

274. *Padilla*, 233 F. Supp. 2d at 607.

275. 296 F.3d 278 (4th Cir. 2002).

276. *Id.* at 283.

277. 316 F.3d 450, 474 (4th Cir. 2003).

278. Respondent's Motion for Relief, *Hamdi v. Rumsfeld* (No. 2:02ev439), available at <http://news.findlaw.com/hdocs/docs/hamdi/hamdirums080502gmot.pdf> (last visited Nov. 9, 2003).

279. *Hamdi*, 316 F. 3d at 473.

280. *Id.* at 467.

(2) Whether the screening criteria used to make and maintain the classification of an American born detainee held in the continental United States met sufficient procedural requirements as to be consistent with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law.

(3) On what basis has the government determined that the continuing detention of Hamdi without charges and without access to counsel serves national security.²⁸¹

In setting aside those provisions and ordering the district court to dismiss Hamdi's habeas petition, the Fourth Circuit determined that Congress' "Authorization for the Use of Military Force," enacted on September 18, 2001, invested the President with the power to detain those captured during a period of hostilities.²⁸² That legislation authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons . . ." ²⁸³ Moreover, the Court argued that the judiciary must defer to the political branches in deciding "cases implicating sensitive matters of foreign policy, national security, or military affairs,"²⁸⁴ because to trespass on those powers would infringe "the right to self-determination and self-governance" at a time when the country's defense is critical.²⁸⁵ The Court also reflected on the status of constitutional rights during wartime:

The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. In fact, if deference to the executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain As we emphasized in our prior decision, any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect this deference as well as "a recognition

281. Respondent's Motion for Relief, *supra* note 278, at 9.

282. *Hamdi*, 316 F. 3d at 467.

283. Authorization for Use of Military Force § 2(a).

284. *Hamdi*, 316 F. 3d at 463 (citing *Hamdi II*, 296 F.3d at 281).

285. *Id.* at 465.

that government has no more profound responsibility” than the protection of American citizens from further terrorist attacks.²⁸⁶

Thus, while the national legislatures in both Germany and the U.S. expanded the power of the executive branch to pursue terrorists, the greatest difference between the two responses to terrorism is the scope of the power that the U.S. Congress has granted to the President to combat terrorism. The Congressional authorization giving the President the power “to use all necessary and appropriate force” has dramatically shifted the balance of power in the United States’ separation of powers scheme. To date, federal courts have interpreted that authorization as a mandate for the judiciary to defer to the President in his role of Commander-in-Chief. While the war on terrorism may represent a new kind of war against a non-nation-state, the judiciary has failed to craft a standard of judicial review that may be better suited to this new threat, rather than the traditional *carte blanche* granted to the President in traditional wars. In this instance, the body of American constitutional jurisprudence that has developed during prior periods of war may prove to be ill-suited precedent to balancing national interests during the current hostilities.

The individuals who stand to experience the greatest loss of rights will be those designated by President Bush as “enemy combatants.” Given that, to date, that designation has only been applied to two people, the largest number of individuals who will be detained with more limited rights are likely to be aliens, who will be subject to deportation because the Attorney General has single-handedly determined they represent a threat to community security.

286. *Id.* at 465 (citing *Hamdi II*, 296 F.3d at 283). On July 9, 2003, the Fourth Circuit, by an 8-4 vote denied the petition for rehearing and suggestion for rehearing en banc filed on Hamdi’s behalf by his father and a group of more than one-hundred law professors and legal organizations. See *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003). In her dissent, Judge Diana Motz stated that: “[f]or more than a year, a United States citizen, Yaser Esam Hamdi, has been labeled an enemy combatant and held in solitary confinement in a Norfolk, Virginia naval brig. He was not been charged with a crime, let alone convicted of one. The Executive will not state when, if ever, he will be released. Nor has the Executive allowed Hamdi to appear in court, consult with counsel, or communicate with the outside world. . . .To justify forfeiture of a citizen’s constitutional rights, the Executive must establish enemy combatant status with more than hearsay. In holding to the contrary, the panel allows appropriate deference to the Executive’s authority in matters of war to eradicate the Judiciary’s own Constitutional role: protection of the individual freedoms guaranteed by all citizens.” *Id.* at 368.

In the context of the current U.N. debate on Iraq, it is often mentioned that Europe is more leery of war than the U.S. Certainly the closest that America has ever come to experiencing the extent of the destruction that Germany experienced during World War II would be the Civil War, which is beyond the reach of the country's current collective memory. Ironically, a key historical factor that has shaped both countries' responses to terrorism may be the differences in our experiences of national devastation. While September 11th caused Congress and the President to view legal policy through a wartime lens, the devastation that Germany experienced during World War II caused German politicians to reject war as the appropriate response to terrorism. As a result, the German balance of separation of powers has been less disrupted by the country's legislative response.

VI. CONCLUSION: THE FUTURE OF LIBERAL DEMOCRACIES IN A TIME OF TERROR

Germany and the United States have responded to the common threat posed by global terrorism in ways that have been profoundly shaped by historical forces, the role of political institutions, and each state's vision of the nature of human freedom and dignity. Ultimately, the unique confluence of those factors in each country will determine how well each state balances the security threat posed by terrorism with each state's commitment to preserve human rights. While terrorism poses a threat to human life that cannot be underestimated given the loss of nearly 3,000 lives on September 11th, government action in both countries threatens to alter the balance between the role of the individual, and individual rights in society, with the government.

The United States decision to respond to September 11th by declaring war has resulted in the sharpest distinctions between legal changes in both countries. The decision to declare war has, to date, empowered the President to label a number of suspected terrorists as "enemy combatants" and hold them incommunicado indefinitely, without the threat or protection of criminal charges. While such a strategy may improve the ability of law enforcement to gather valuable intelligence, it threatens to shield government action from judicial review. Moreover, by electing to detain large numbers of individuals outside the United States, the U.S. has sought to deny the detainees access to U.S. courts. As challenges to this exercise of executive power proceed through the federal court system, it remains to be seen how much deference the judicial branch will ultimately

grant the executive branch. The fact that, in the context of war, government power in the U.S. is not subject to significant constitutional constraints, unless the legislative and executive branches are willing to constrain themselves, may prove to be the most salient difference between the German and American responses to terrorism.

In terms of the actual legislative packages enacted by both countries, there are similarities in the broad objectives of the legislation. Both countries have enacted measures that expand the definition of terrorism and broaden what it means to provide criminal support for terrorism. Both countries have made it a crime to provide humanitarian aid to organizations engaged in terrorist activities. These broadening definitions increase the risk that law enforcement will use these new tools to target political dissenters. In both countries, law enforcement agencies in the past have shown varying proclivities to interpret their investigative mandate, overzealously prompting legislative responses.

In both Germany and the United States, legislatures took steps to exempt law enforcement search-and-seizure activity related to foreign intelligence from ordinary judicial review by expanding existing legislation. In the U.S., this expansion occurred by broadening the definition of cases that law enforcement may take to the FISA courts. In Germany, the legislature loosened the oversight of those activities provided by a parliamentary committee. Given the differences in institutional mandates, it is likely that far fewer cases will escape the review of ordinary courts in Germany, although those that do will only be subject to the review of a parliamentary committee.

The U.S. took an additional step to restrict judicial review with respect to cases involving aliens. Not only did Congress expand the Attorney General's authority to detain aliens by allowing detention under a standard of reasonable suspicion he is virtually free to construe as he wishes, Congress also severely restricted aliens' access to the judicial system. In the immediate aftermath of September 11th, the government detained over 1000 aliens. While most of those aliens were eventually released in mid-December 2002, the government detained hundreds of aliens living in Southern California who had reported to INS offices to comply with new fingerprinting regulations. Despite the black mark left on American history by the detention of Japanese-Americans during World War II, the INS has not hesitated to strictly enforce its new powers. In balancing the

legacy of *Korematsu*²⁸⁷ with the fact that several of the September 11th hijackers entered or resided in the country illegally, the Justice Department has tipped the balance in favor of enhancing domestic security.

In contrast, while Germany has tightened restrictions governing asylum, it has resisted efforts to detain and deport large numbers of foreign residents. In determining how to respond to terrorism, Germany has had to weigh a desire to counter the legacy of abuse inflicted by Nazis against religious groups with a desire to ferret out Islamic groups that may be sponsoring terrorism. Germany has attempted to strike that balance by tightening restrictions on the ability of religious groups to seek protected constitutional status. The mere claim that they are a religious organization no longer protects the rights of fundamentalists to organize. A key tool in Germany's arsenal has been the government's longstanding ability to ban groups that threaten the federal democratic order according to the concept of militant democracy. The government has already used the lifting of the religious restriction to ban several fundamentalist Islamic groups.

Beyond these differences in the scope of the response to terrorism, as well as the particular content of the legislative changes, a key arbiter of the shape of change will be Germany's Federal Constitutional Court and the federal courts in the United States. While both of these institutions have created legacies of protecting rights, differences in how each state's constitutional jurisprudence defines and enforces rights may lead to some profound differences in how both institutions construe rights in a time of terror. Since Germany places human dignity at the apex of its basic values, there is a well defined endpoint which the government cannot violate as it investigates, detains, prosecutes, and punishes terrorists. Under German law, the death penalty is unconstitutional,²⁸⁸ and the use of a polygraph machine is considered an affront to human dignity because it treats human beings as a means to an end.²⁸⁹

Whatever the state's security interests, the importance of human dignity and Germany's stronger emphasis on rehabilitation in the sentencing process place stronger restraints on Germany's efforts to punish terrorists. As a point of comparison, the German court that recently found Mounir El Motassadeq guilty of more than 3,000 counts of accessory to murder and membership in a terrorist

287. See generally *Korematsu v. United States*, 323 U.S. 214 (1944).

288. GG art. 102.

289. KOMMERS, *supra* note 100, at 305, 574 n.15.

organization for his role in providing logistical support to the September 11th hijackers sentenced him to the maximum sentence available, fifteen years.²⁹⁰ While it is extremely rare for a defendant to receive the maximum sentence in Germany, and the sentence even surprised some German prosecutors, the sentence was lenient by American standards for an individual who challenges the charges against him and takes his case to trial.²⁹¹ In another German case, the Jordanian national, Shadi Moh'd Mustafa Abdallah, who was detained in Germany in April 2002, and accused of planning terrorist attacks, faces a maximum ten-year sentence if convicted.²⁹²

In contrast, American John Lindh, who pled guilty to supplying services to the Taliban and carrying an explosive during the commission of a felony, received a twenty year prison term and could have faced the death penalty had he been found guilty at trial.²⁹³ There can be little doubt that those individuals accused of terrorist actions in the United States, who are fortunate to receive a criminal trial, will receive longer sentences than individuals charged with similar crimes in Germany. The government is seeking the death penalty against Zacarias Moussaoui.²⁹⁴ In another prominent American terrorism case that was resolved by plea agreement, the defendant Iyman Faris, faces a maximum twenty-year prison sentence under the terms of his plea agreement. Faris, the Ohio

290. *9/11 Terrorist Gets Maximum Sentence*, GERMAN EMBASSY, WASHINGTON D.C., Feb. 21, 2003, at <http://www.germany-info.org/relaunch/info/publications/week/2003/030221/politics2.html> (last visited Nov. 9, 2003).

291. *First Guilty Verdict in Sept. 11 Terrorism Case*, DEUTSCHE WELLE, Feb. 20, 2003, available at http://www.dw-world.de/english/0,3367,1432_A_782772_1_A,00.html (last visited on Nov. 9, 2003).

292. *Terror Suspect Trial Begins in Germany*, DEUTSCHE WELLE, June 24, 2003, available at http://www.dw-world.de/english/0,3367,1430_A_900864_1_A,00.html (last visited Nov. 9, 2003). Abdallah's trial began in June 2003. German prosecutors have accused him of being a member of an al-Tawhid terrorist cell that was allegedly planning to attack people in a busy square of a German city. *Id.* In July 2003, Abdallah admitted in court that he had undergone training in Afghanistan in bomb-making and that he had participated in planning terrorist attacks. See *German Politician Calls for Tougher Anti-Terror Law*, DEUTSCHE WELLE, July 5, 2003, available at http://www.dw-world.de/english/0,3367,1432_A_912527_1_A,00.html (last visited Nov. 9, 2003).

293. *Plea Agreement*, United State v. Lindh (No. 02-37A), available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf> (last visited Nov. 5, 2003).

294. *Petition for Writ of Mandamus*, United States v. Moussaoui (No. 03-4162), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmoussa62603opn.pdf> (last visited Nov. 9, 2003).

truck driver who pled guilty to conspiracy as well as providing material support or resources to a foreign terrorist organization, assisted al Qaeda by “researching and providing information about ultralights, extending travel tickets, researching gas cutters, asking other individuals about gas cutters, surveying a target (the bridge) and then reporting his assessment [to al Qaeda]”²⁹⁵

The appropriate yardstick of sentences for individuals convicted in the United States of terrorist acts that result in death is perhaps the sentences invoked against Timothy McVeigh and Terry Nichols who planned and executed the 1995 Oklahoma City bombing that killed 168 people. Timothy McVeigh, who was convicted of murder under a 1994 anti-terrorism law, was sentenced to death and subsequently executed. A federal judge sentenced Terry Nichols, who was convicted of conspiring to use a weapon of mass destruction and involuntary manslaughter, to life in prison without parole. Finally, Michael Fortier, who failed to warn authorities of the attack, was sentenced to a twelve-year prison term.

In the United States, the fact that many rights require the existence of a criminal proceeding to invoke, may mean that the rights of enemy combatants and detainees will only be protected by a “shocks the conscience” standard. At the same time, the fact that the United States has an adversarial system of justice and a host of public interest law organizations profoundly affects the battle between the government and citizens over the protection of constitutional rights. The American Civil Liberties Union, the National Association of Criminal Defense Lawyers, and a host of other groups have already challenged government action, even in the restrictive FISA courts. That the government has attempted to use the doctrine of standing to limit challenges filed by these organizations is a testament to the important role that they play in asserting constitutional claims. However, the fact that the political system is the primary instrument for controlling democratic states will ensure that the battle over civil liberties may not ultimately be settled in the courtroom, but rather at the polls. In Germany, the contours of dissent will be shaped by the country’s proliferation of political parties, as well as by law professors, who have played a historic role in the development of the law. In

295. Plea Agreement, *United States v. Faris*, available at <http://news.findlaw.com/hdocs/docs/faris/usfaris603plea.pdf>; Statement of Facts, *United States v. Faris*, available at <http://news.findlaw.com/hdocs/docs/faris/usfaris603sof.pdf> (last visited Nov. 9, 2003).

addition, large anti-war protests in both countries underscore the importance of public opinion as a check on government power.

The interaction of these diverse influences will ultimately shape how each state balances their concerns for security with the protection of liberties. Despite the forces of globalization in the economic sphere and the proliferation of cooperative agreements to combat terrorism in the international arena, dramatic differences will continue to exist between each countries' response to terrorism. History, culture, and the structure of political institutions have strongly shaped these differences. Ultimately, however, judicial systems will weigh the need for security with the desire to protect fundamental constitutional values and cast their own imprint on these responses.