

# Balancing Security and Liberty in Germany

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## INTRODUCTION

Scholarly discourse over America's national security policy frequently invites comparison with Germany's policy.<sup>1</sup> Interest in Germany's national security jurisprudence arises because, like the United States, Germany is a constitutional democracy. Yet, in contrast to the United States, modern Germany's historical encounters with violent authoritarian, anti-democratic, and terrorist movements have endowed it with a wealth of constitutional experience in balancing security and liberty. The first of these historical encounters – with National Socialism – provided the legacy against which Germany's post-World War II constitutional order is fundamentally defined.<sup>2</sup> The second encounter – with leftist domestic radicalism in the 1970s and 1980s – required the maturing German democracy to react to domestic terrorism.<sup>3</sup> The third encounter – the security threat posed in the

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1. See, e.g., Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 *AM. J. COMP. L.* 493 (2007); Francesca Bignami, *European Versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 *B.C. L. REV.* 609 (2007); Shawn Boyne, *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*, 11 *TULSA J. COMP. & INT'L L.* 111 (2003); Russell A. Miller, *Comparative Law and Germany's Militant Democracy*, in *U.S. NATIONAL SECURITY, INTELLIGENCE AND DEMOCRACY* 229 (Russell A. Miller ed., 2008).

2. Norbert Frei described it as “[t]he postwar democracy’s foundational anti-Nazi consensus.” NORBERT FREI, *ADENAUER’S GERMANY AND THE NAZI PAST* xii (Joel Golb trans., 2002).

3. STEVEN OZMENT, *A MIGHTY FORTRESS: A NEW HISTORY OF THE GERMAN PEOPLE* 296–297 (2004). Ozment states that for a radical few, the killing of a student protester by police in 1967 and the crippling assassination attempt on leftist Rudi Dutschke by a right-wing extremist

... transformed protest into terrorism. The most violent group active in the 1970s was the Red Army Faction (RAF), popularly known as the Baader-Meinhof gang in romanticized honor of pioneer terrorists Andreas Baader and Ulrike Meinhof – the former a professor’s son, the latter a pastor’s daughter, journalist, and mother of two – who happened also to be lovers. With other kindred groups, the RAF killed 28, wounded 93, took 162 hostages, and robbed 35 banks of 5.4 million

post-9/11 world by global fundamentalist terrorism – reveals Germany’s still unfolding response to global fundamentalist terrorism.<sup>4</sup> Throughout the whole of its sixty-year existence, the Federal Republic of Germany has been engaged in a constitutional balancing of security and liberty in response to, or anticipation of, actual authoritarian and terrorist threats, which the United States, at least prior to 2001, had been fortunate to avoid. To scholars such as Bruce Ackerman, Germany seems a fitting candidate to teach the United States lessons from its experience with the struggle to honor constitutional commitments to liberty while maintaining national security in the face of terrorist threats.<sup>5</sup>

This essay answers Ackerman’s comparative law summons by providing a brief survey of the decades-long struggle of German jurisprudence to balance security and liberty. The most noteworthy feature of this jurisprudence is the prominent role played by the *Bundesverfassungsgericht* (Federal Constitutional Court, hereinafter referred to as Constitutional Court, or Court) and its explicit use of proportionality and balancing analyses to resolve these cases.<sup>6</sup> One consequence of the latter phenomenon that is sure to interest hawks in America’s so-called “war on terror” is the Court’s acknowledgment that national security is a public, constitutional interest of the highest order.

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marks before being neutralized.

*Id.* See UWE WESEL, DER GANG NACH KARLSRUHE 369 (2004) (“Die Bundesrepublik hat 27 Jahre lang mit dem Terrorismus der Roten Armee Fraktion gelebt, von 1970 bis zu deren Auflösung 1997.”).

4. For media coverage, see Christopher Caldwell, *Germany on Tiptoe over Terrorism*, N.Y. TIMES, Sept. 9, 2007, §4, at 1; Judy Dempsey & Katrin Bennhold, *Germany Debates Security Measures*, N.Y. TIMES, Sept. 8, 2007, available at <http://www.nytimes.com/2007/09/08/world/europe/08investigation.html?fta=y>; Katrin Bennhold & Judy Dempsey, *German Investigators Are Building Case Against Others Implicated in Foiled Plot*, N.Y. TIMES, Sept. 7, 2007, at A6; Mark Landler, *Fears of a Terrorist Attack Lead Germans To Weigh Civil Rights Against Public Safety*, N.Y. TIMES, July 13, 2007, at A11; Mark Landler, *2<sup>nd</sup> Suspect Surrenders in Plot To Bomb Two German Trains*, N.Y. TIMES, Aug. 25, 2006, at A6; Mark Landler, *Bomb Plot Shocks Germany into Antiterrorism Debate*, N.Y. TIMES, Aug. 22, 2006, at A8; Richard Bernstein, *Germany Struggles To Assess True Aims of Islamic Group*, N.Y. TIMES, Sept. 26, 2004, §1, at 14; Douglas Frantz & Desmond Butler, *Traces of Terror: Germany; Sept. 11 Attack Planned in '99, Germans Learn*, N.Y. TIMES, Aug. 30, 2002, at A5; Philip Shenon, *A Nation Challenged: The Investigation; Terrorists Could Still Be Plotting in Germany, An Official Warns*, N.Y. TIMES, Oct. 23, 2001, at B4; Steven Erlanger, *A Nation Challenged: Berlin; Shocked Germany Weakens Cherished Protections*, N.Y. TIMES, Oct. 1, 2001, at B1.

5. BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 3 (2007).

6. Interest balancing has become the Federal Constitutional Court’s favorite interpretive approach. Robert Alexy is widely regarded as the scholar most attuned to Germany’s postwar constitutionalism, not the least because he is the leading theorist of constitutional balancing. See Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT’L J. CONST. L. 572 (2005). For an introduction to the Federal Constitutional Court, see Donald P. Kommers & Russell A. Miller, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court*, 3 J. COMP. L. 194 (2009).

American progressives, on the other hand, will take hope from the fact that the Court's proportionality and balancing *praxis* has meant that national security is regarded as only *one* among *many* competing constitutional values, including human dignity, privacy, and individual self-determination. Notwithstanding the high importance that German jurisprudence attributes to national security, the Constitutional Court never has treated it as an *absolute* value that must be secured at any cost.<sup>7</sup>

The practical consequence of the Constitutional Court's balancing approach to maintain both security and liberty has been a shifting jurisprudence, a fact that is bound to buoy and bother American conservatives and progressives in equal measure. There is something in the Court's cases for both camps. Before 9/11, the Court deferred to the legislature's attempts at promoting security. This inclination, however, changed dramatically in the post-9/11 period. In a string of cases the Court has consistently invalidated national security legislation for failing to adequately take account of constitutionally protected liberty interests. After providing a sketch of the German jurisprudence I will offer a few brief observations that, with additional research, might help explain the Court's recent change in direction – and more fully illuminate the lessons Germany's national security jurisprudence has to offer.

#### I. THE NAZI LEGACY AND THE BASIC LAW'S MILITANT DEMOCRACY

The fire that terrorists (supposedly) set to the German *Reichstag* (parliament) building during the night of February 27, 1933 was so symbolically potent as to offer a pretext for (or was orchestrated as) Hitler's intensification of the "repressive measures [the Nazis] had already initiated against all forces opposed to the regime."<sup>8</sup> We are all too familiar with the horrors unleashed by the Nazi tyranny, which were, in part, presented as the necessary response to the threat of Bolshevik terrorism.<sup>9</sup> Indeed, the seeds of World War II and the Holocaust were planted in the fertile, dictatorial soil created by Hitler's emergency decree issued on February 28, 1933, the

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7. Compare John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 170 (1996); RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11* (2006). *But see* HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); David Gray Adler, *George Bush, The Unitary Executive and the Constitution*, in *US NATIONAL SECURITY, INTELLIGENCE AND DEMOCRACY* 99, *supra* note 1; Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699 (2006); FREDERICK A.O. SCHWARZ, JR. & AZIZ HUG, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWERS IN A TIME OF TERROR* (2007); ARTHUR M. SCHLESINGER, JR., *WAR AND THE AMERICAN PRESIDENCY* (2005).

8. GERMAN BUNDESTAG, *QUESTIONS ON GERMAN HISTORY: PATHS TO PARLIAMENTARY DEMOCRACY* 264 (1998).

9. See OZMENT, *supra* note 3, at 271-272.

day after the *Reichstag* fire. The decree suspended “key basic rights and all constitutional guarantees.”<sup>10</sup>

But democracy itself, enshrined and preserved in many of the rights that Hitler hastily abolished after the *Reichstag* fire, was just as much an accomplice to Hitler’s rise to power as it was his victim. Certainly with no small amount of thuggery,<sup>11</sup> but also through effective campaigning,<sup>12</sup> as early as 1930 the Nazis could claim that they drew their support from all sectors of German society.<sup>13</sup> In the snap parliamentary elections held in early March 1933, shortly after the *Reichstag* fire – the last credibly free elections of the German Weimar Republic – Hitler and the Nazis became the German parliament’s largest party. Joseph Goebbels ridiculed the system, declaring that “it will always remain one of the best jokes of democracy that it provides its own deadly enemies with the means with which it can be destroyed.”<sup>14</sup>

In response to this history, the framers of (West) Germany’s new postwar *Grundgesetz* (Basic Law or Constitution) were determined to provide security against state terrorism such as Hitler’s. Of the many forms the Basic Law’s “anti-Nazi consensus” took, two are most relevant to this essay. First, the framers articulated an enforceable catalogue of fundamental rights in the Basic Law’s initial nineteen articles, beginning with the simple but profound declaration in Article 1: “Human dignity shall be inviolable. To respect it shall be the duty of all state authority.”<sup>15</sup> This guarantee, along with the rights of personal integrity and freedom,<sup>16</sup> and the right to the privacy of correspondence, posts, telecommunication, and the home,<sup>17</sup> is the constitutional counterweight the Court has sought to balance with the constitutional interest in national security. (The Court’s balancing jurisprudence has focused on terrorism arising in later periods of

10. GERMAN BUNDESTAG, *supra* note 8; see Verordnung des Reichspräsidenten zum Schutz von Volk und Staat [Order of the Reich President for the Protection of People and State], Feb. 28, 1933, RGBI. I, at 83.

11. Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1, 11 (1995) (“Not surprisingly, Hitler abused his power over the few key ministries held by his party by arresting and intimidating opponents before calling for new elections. Despite rampant intimidation of other parties and their candidates by the now unchecked Nazi storm troopers, the elections of March 1933 still did not yield an absolute majority for the Nazis.”).

12. OZMENT, *supra* note 3, at 269 (“Using airplanes (the campaign was called ‘Hitler Over Germany’) and film commercials for the first time in a German political campaign, [Hitler] took 30 percent of the vote [in the 1932 presidential election] to Hindenburg’s 49 percent, rising to 37-53 percent in the runoff in May.”).

13. *Id.* at 260 (“Over the years the [Nazi] party would win more white-collar than blue-collar voters, while demonstrating a substantial appeal across the social spectrum.”).

14. NATIONALSOZIALISTISCHE DIKTATUR, 1933-1945: EINE BILANZ 16 (K.D. Bracher et al. eds., 1983) (quoting Joseph Goebbels, translation from Andras Sajó, *From Militant Democracy to the Preventive State*, 27 CARDOZO L. REV. 2255, 2262 n. 20 (2006)).

15. GRUNDGESETZ art. 1.

16. *Id.* at art. 2.

17. *Id.* at arts. 10 and 13.

Germany's postwar history in cases that I will discuss in this essay's subsequent sections.)

But the Basic Law has another, and for American observers a rather surprising,<sup>18</sup> anti-Nazi feature. Beyond the Basic Law's protection of human dignity, life, liberty, and privacy, the postwar constitution contains a number of provisions that are meant to ensure that the enemies of democracy will never again be able to exploit the freedoms provided by democracy. For the enemies of freedom, the framers' sentiment ran, there should be no freedom. The resulting finely wrought system of *undemocratic* provisions – meant to preserve and protect democracy as an institution even at the expense of individual liberty interests – has come to be known as “militant democracy.”<sup>19</sup> To meet the democratic threats to democracy, the Basic Law provides a number of forms of militant democracy,<sup>20</sup> including (1) authority to prohibit “associations” whose aims and activities threaten the constitutional order (Article 9(2)); (2) authority to restrict freedom of movement in order to avert an imminent threat (Article 11(2)); (3) the authority to declare that an individual has forfeited his or her fundamental rights because they were being used to harm the free, democratic basic order (Article 18); and (4) the authority to ban political parties that pose a threat to the free, democratic basic order (Article 21(2)).

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18. DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 213 (1994) (Militant democracy represents the most “startling aspects of the Basic Law to an observer from the other side of the Atlantic.”).

19. Karl Loewenstein coined the phrase. See Karl Loewenstein, *Militant Democracy and Fundamental Rights – Part I*, 31 *AM. POL. SCI. REV.* 417 (1937) (“A virtual state of siege confronts European democracies. State of siege means, even under democratic constitutions, concentration of powers in the hands of government and suspension of fundamental rights. If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles.”); Karl Loewenstein, *Militant Democracy and Fundamental Rights – Part II*, 31 *AM. POL. SCI. REV.* 638 (1937); see also MAX LERNER, *IT IS LATER THAN YOU THINK: THE NEED FOR A MILITANT DEMOCRACY* (Transaction Publishers, 1989) (1943); KARL MANNHEIM, *The Third Way: A Militant Democracy*, in III *COLLECTED WORKS OF KARL MANNHEIM – DIAGNOSIS OF OUR TIME* 4 (1943); *MILITANT DEMOCRACY* (András Sajó ed., 2004); *THE ‘MILITANT DEMOCRACY’ PRINCIPLES IN MODERN DEMOCRACIES* (Markus Thiel ed., 2009); Michel Rosenfeld, *A Pluralist Theory of Political Rights in Times of Stress*, in *POLITICAL RIGHTS UNDER STRESS IN 21ST CENTURY EUROPE* 12 (Wojciech Sadurski ed., 2006); Jochen A. Frowein, *How To Save Democracy From Itself*, 26 *ISRAEL YEAR BOOK ON HUMAN RIGHTS* 201 (1996).

20. See Markus Thiel, *Germany*, in *THE “MILITANT DEMOCRACY” PRINCIPLES IN MODERN DEMOCRACIES* 109 (Markus Thiel ed., 2009); G. Brinkmann, *Militant Democracy and Radicals in the West German Civil Service*, 46 *MOD. L. REV.* 584 (1983); Judith Wise, *Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party*, 5 *U. CHI. L. SCH. ROUNDTABLE* 301, 303 (1998); Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 *TUL. L. REV.* 1549 (2004).

Rarely invoked,<sup>21</sup> these tenets of militant democracy had their most dramatic impact in the immediate postwar era. In 1956, very early in the life of the Federal Republic, the Constitutional Court banned the Socialist Reich Party (SRP) (the successor to Hitler's National Socialist Party) and the German Communist Party (KPD).<sup>22</sup> Yet these cases must be viewed as chiefly symbolic. The bans were not essential to securing democracy in Germany because neither the SRP nor the KPD represented a significant political movement that threatened to seize the democratic machinery through democratic means. For example, in the May 6, 1951 state elections in Lower Saxony, the SRP's supposed stronghold, the party drew only eleven percent of the vote.<sup>23</sup> The Communist Party likewise was plagued by voter disregard in that era.<sup>24</sup> Since the 1950s, the Constitutional Court has turned back the handful of government attempts to deploy militant democracy.<sup>25</sup>

The relevance of Germany's militant democracy in comparative law discussions of constitutional democracies' contemporary confrontation with global, fundamentalist terrorism is further undermined by the obvious differences between the current threat and the mid-twentieth century fascism with which militant democracy seems to be preoccupied. Indeed, militant democracy is not well suited to obstructing today's terrorists, who do not seem animated by a will to seize, control, and govern democratic institutions, because safeguarding those institutions is precisely the aim of militant democracy. I do not agree that al Qaeda's ambition, like Nazism before it, is to replace constitutional government with emotional government.<sup>26</sup> Contrary to fascism's ambitions, today's terrorism does not seem to want to secure governing authority at all. Instead, by its nature, it seeks to disrupt governing authority. While I will not hazard a fuller explanation of al Qaeda's opaque, shifting and, ultimately, elusive goals,<sup>27</sup> I

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21. See Miller, *supra* note 1.

22. 2 BVerfGE 1 (1952); 5 BVerfGE 85 (1956).

23. See JOHN D. NAGLE, *THE NATIONAL DEMOCRATIC PARTY: RIGHT RADICALISM IN THE FEDERAL REPUBLIC OF GERMANY* 20-21 (1970).

24. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 222-223 (2nd ed. 1997); DONALD P. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY* 190-191 (1976).

25. "If a deeper examination of the context in which Germany first sought to implement its militant democracy suggests that those efforts were primarily symbolic, claims of the efficacy of Germany's militant democracy are further undermined by militant democracy's long dormancy after the SRP and KPD cases. The court has not banned a party since." Miller, *supra* note 1, at 241. See KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*, *supra* note 24, at 224. Most recently, the Constitutional Court dismissed an application to ban the extreme right-wing National Democratic Party of Germany. 107 BVerfGE 339 (2003).

26. Loewenstein, *Militant Democracy and Fundamental Rights – Part I*, *supra* note 19, at 423; Andras Sajó, *From Militant Democracy to the Preventive State*, 27 *CARDOZO L. REV.* 2255, 2264 (2006).

27. See LOUISE RICHARDSON, *WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY*,

am inclined to agree with Kent Roach, who has concluded that today's "[a]nti-terrorism laws [should] be construed and defended without reference to the problematic idea of militant democracy. . . ."<sup>28</sup>

Germany's militant democracy is interesting as a matter of democratic theory, and it certainly frames a fascinating perspective on the Federal Republic's constitutional and political history. Yet, for the reasons just mentioned and others I present elsewhere,<sup>29</sup> militant democracy is not very instructive for today's constitutional engagement with terrorism. The Constitutional Court's jurisprudence addressing the state's less extraordinary shows of muscularity – usually involving infringements on fundamental rights in order to facilitate the discovery, prevention, investigation, and prosecution of terrorist threats and acts – seems a better fit for the comparative glance Ackerman urges.<sup>30</sup> I now turn to those cases.

## II. DER BAADER MEINHOF KOMPLEX<sup>31</sup>

Long before the September 11, 2001 terrorist attacks in the United States raised the specter of global, fundamentalist terrorism as the defining issue of the new century, Germany had to grapple with the precarious balance that must be struck between showing due respect for constitutionally protected individual liberties, on the one hand, and preserving its citizens' lives and well-being while maintaining the orderly functioning of society, on the other hand. Starting in the 1960s and running through the 1990s, Germany suffered a scourge of terrorist robberies, kidnappings, bombings, hijackings, and assassinations.<sup>32</sup> For the most part these were the actions of a violent, radical fringe of the new left, student, and anti-war movements that emerged in Germany in that era. The *Rote*

CONTAINING THE THREAT (2007); BRUCE RIEDEL, *THE SEARCH FOR AL QAEDA: ITS LEADERSHIP, IDEOLOGY, AND FUTURE* (2008); ABDEL BARI ATWAN, *THE SECRET HISTORY OF AL QAEDA* (2nd ed. 2008).

28. Kent Roach, *Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses*, in *MILITANT DEMOCRACY*, *supra* note 19, at 171.

29. Miller, *supra* note 1.

30. ACKERMAN, *supra* note 5. See *Printz v. U.S.*, 521 U.S. 898, 977 (1997) (Breyer J., dissenting).

31. *DER BAADER MEINHOF KOMPLEX* (Constantin Film Production 2008) (Oscar-nominated film chronicling the terrorist activities that plagued Germany in the 1970s and 1980s).

32. "[B]etween 1969 and 1979 there were 69 terrorist attacks on people that resulted in 25 deaths; 247 incidents of arson and bombing; and 69 other serious offenses such as bank robberies." Shawn Boyne, *Law, Terrorism, and Social-Movements: The Tension Between Politics and Security in Germany's Anti-Terrorism Legislation*, 12 *CARDOZO J. OF INT'L & COMP. L.* 41, 64 (2004). See OZMENT, *supra* note 3, at 296-297; JOHN ARDAGH, *GERMANY AND THE GERMANS* 535-539 (4th ed. 1995); STEFAN AUST, *DER BAADER-MEINHOF-KOMPLEX* (2008); WILLI WINKLER, *DIE GESCHICHTE DER RAF* (2008); MARTIN KNOBBE & STEFAN SCHMITZ, *TERRORJAHR 1977 – WIE DIE RAF DEUTSCHLAND VERÄNDERTE* (2007).

*Armee Fraktion* (RAF – Red Army Faction), also known as the “Baader-Meinhof gang” (for its eponymous leaders Andreas Baader and Ulrike Meinhof), was the most prominent of several terrorist organizations. Along with the *Revolutionäre Zellen* (RZ – Revolutionary Cells) and the “June 2nd Movement,” the RAF sought to disrupt and bring disrepute to the Federal Republic by provoking authoritarian responses to a campaign of terror. “The terrorist attacks reached a climax in 1977 with the assassinations of Federal Prosecutor-General Siegfried Buback; Jürgen Ponto, president of Dresdner Bank; and Hanns Martin Schleyer, president of the Employer’s Association; as well as the hijacking of a Lufthansa aircraft.”<sup>33</sup> This rising tide of politically motivated crimes aroused enormous resentment and fear among West Germans.

As disruptive student protests raged across Germany in the spring and summer of 1968,<sup>34</sup> a grand coalition of the center-left (SPD) and center-right (CDU/CSU) political parties realized a longstanding ambition of the German political elite by amending the Basic Law and enacting legislation to strengthen Germany’s national security regime. The first and most prominent of these anti-terror measures, known as the *Notstandsgesetze* (Emergency Laws) and *Notstandsverfassung* (Emergency Constitution), added eleven new articles to the Basic Law under the heading “State of Defense.”<sup>35</sup> In the years to come, as the leftist terrorism in Germany became increasingly bloody and pervasive, additional security measures were adopted as part of the controversial *Kontaktsperregesetz* (Contact Ban Act),<sup>36</sup> which limited the rights of suspected terrorists in criminal

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33. BUNDESTAG, *supra* note 8, at 409. See MICHAEL BUBACK, *DER ZWEITE TOD MEINES VATERS* (2008).

34. See 1968 – MEMORIES AND LEGACIES OF A GLOBAL REVOLT (Philipp Gassert & Martin Klimke eds., 2009); 1968. HANDBUCH ZUR KULTUR- UND MEDIENGESCHICHTE DER STUDENTENBEWEGUNG (Martin Klimke & Joachim Scharloth eds., 2007); NORBERT FREI, 1968 – JUGENDREVOLTE UND GLOBALER PROTEST (2008); JÜRGEN BUSCHE, *DIE 68ER: BIOGRAPHIE EINER GENERATION* (2005); MARK KUKRLANSKY, 1968 – YEAR THAT ROCKED THE WORLD (2004); 1968 IN EUROPE: A HISTORY OF PROTEST AND ACTIVISM, 1956-1977 (Martin Klimke & Joachim Scharloth eds., 2008); MARTIN KLIMKE, *THE OTHER ALLIANCE: STUDENT PROTEST IN WEST GERMANY AND THE UNITED STATES IN THE GLOBAL SIXTIES* (2009).

35. See Siebzehntes Gesetz zur Ergänzung des Grundgesetzes [17th Act Amending the Basic Law], June 24, 1968, BGBl. I, at 709. The Emergency Constitution provided for a declaration of a “state of defense” during which, *inter alia*, the Federal Chancellor could assume Parliament’s and the Defense Ministry’s authority over the armed forces; the usual rules for and limits on enacting federal legislation could be suspended; and the limits on the jurisdiction and authority of the Federal Border Police could be suspended. See also DIETER STERZEL, *KRITIK DER NOTSTANDSGESETZE* (1968); András Jakab, *German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse*, 7 GERM. L. J. 453 (2005), available at [http://www.germanlawjournal.com/pdfs/Vol07No05/PDF\\_Vol\\_07\\_No\\_05\\_453-478\\_Articles\\_Jakab.PDF.pdf](http://www.germanlawjournal.com/pdfs/Vol07No05/PDF_Vol_07_No_05_453-478_Articles_Jakab.PDF.pdf).

36. Das Gesetz zur Änderung des Einführungsgesetzes zum Gerichtsverfassungsgesetz [Act for the Amendment of the Introductory Provisions of the Judiciary Act], Sept. 30, 1977, BGBl. I at 1877. The Contact Ban Act imposed severe restrictions on suspected terrorists’ detention conditions and trial proceedings, including the regulation of contact and

proceedings. The civil servant loyalty decree, which was upheld by the Constitutional Court in the *Civil Servant Loyalty Case*,<sup>37</sup> was another component of the new security regime.

As in the *Civil Servant Loyalty Case*, many of these security-oriented constitutional amendments, statutes, and regulations were challenged before the Constitutional Court for too severely encroaching upon personal liberty. The *Klass Case* was one of the most prominent decisions to result from these constitutional challenges.<sup>38</sup> In its original version, Article 10 of the Basic Law declared simply that the “[p]rivacy of the mail and telecommunications shall be inviolable.” One of the 1968 constitutional amendments restricted this basic right by permitting government agents to tap telephones and break into other private communications without informing the persons involved so long as the intrusions “serve to protect the free democratic basic order or the existence of the federation or a state.”<sup>39</sup> In addition, the amended Article 10 barred aggrieved parties from contesting such invasions of privacy in the courts.<sup>40</sup> The constitutional amendment’s implementing statute provided that the legality of the new surveillance measures would be reviewed by commissions appointed by the *Bundestag* (West German Parliament).<sup>41</sup> Several German citizens, including Gerhard Klass, a senior state prosecutor, brought constitutional complaints against the implementing statute as well as the amendment of Article 10. The complainants argued that these measures were null and void under Articles 19(4) and 79(3) of the Basic Law, constitutional provisions that, respectively, guarantee judicial review of administrative actions thought to have encroached upon basic rights, and prohibit constitutional amendments that infringe upon “the essential content of a basic right.”<sup>42</sup>

In a decision that is representative of the pro-security tenor of the jurisprudence in this era, the Court approved the constitutional amendments and upheld the accompanying implementing statute. The Court emphasized

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communication with defense counsel.

37. 39 BVerfGE 334 (1975).

38. 30 BVerfGE 1 (1970).

39. Das Gesetz zur Änderung des Einführungsgesetzes zum Gerichtsverfassungsgesetz [Act for the Amendment of the Introductory Provisions of the Judiciary Act], Sept. 30, 1977, art. 2, BGBl. I, at 1877.

40. *Id.*

41. Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses [Act Restricting Post and Telecommunication Privacy], Aug. 13, 1968, art. 1 §§6-8, BGBl. I, at 949.

42. GRUNDGESETZ [Basic Law or Constitution] art. 19(4) (“Should any person’s rights be violated by public authority, he may have recourse to the courts.”); GRUNDGESETZ art. 79(3) (“Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”).

that the infringement of individual liberty interests was outweighed by the common good that the new measures advanced by enhancing security. But because the Basic Law does not contain an explicit, textual mandate that the state ensure security against anti-system violence, the Court was required to divine a normative value for security that includes the maintenance of freedom, stability, and security. Yet, even while upholding the new security-oriented regime in *Klass*, the Court took pains to weigh and balance the constitutional interest in security against the Basic Law's liberty guarantees. The result of that analysis was the Court's conclusion that the new regime's substantive limits and procedural safeguards satisfied the constitutional principles of legality and proportionality while respecting the basic concept of human dignity.<sup>43</sup> As part of the reasoning supporting its conclusion in *Klass*, the Court found that the Basic Law's textual commitment to militant democracy justified the great weight it had assigned to the newly announced constitutional interest in security:

Constitutional provisions must not be interpreted in isolation but rather in a manner consistent with the Basic Law's fundamental principles and its system of values. . . . In the context of this case, it is especially significant that the Constitution . . . has decided in favor of a "militant democracy" that neither permits the abuse of basic rights nor an attack on the liberal order of the state. Enemies of the Constitution must not be allowed to endanger, impair, or destroy the existence of the state while claiming protection of rights granted by the Basic Law.<sup>44</sup>

Not all the anti-terror legislation in this period survived constitutional review. Some provisions were found to be unconstitutional on their face and others were found to be unconstitutionally implemented. For example, the Constitutional Court ruled in the *Contact Ban Case* that the *Kontaktsperregesetz*, which permitted the exclusion of defense counsel

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43. Having lost in the Federal Constitutional Court, *Klass* and his fellow complainants, claiming that the Court's judgment violated Article 6 (right of access to courts of justice), Article 8 (privacy of home and correspondence), and Article 13 (national remedy for breach of basic rights) of the European Convention on Human Rights, appealed to the European Commission on Human Rights. In a unanimous holding, and after its detailed review of the Constitutional Court's decision, together with an equally extensive examination of the statute at issue and its administration, the commission ruled that the West German government had not breached any of these articles. *See Klass v. Federal Republic of Germany*, 2 EUROPEAN HUMAN RIGHTS REPORTS 214 (1978).

44. 30 BVerfGE 1, 19-20 (1970). Justices Geller, von Schlabrendorff, and Rupp, dissenting, argued that Article 10 as amended conflicts with Articles 19(4) and 79(3) because it deprives individuals of their essential right to judicial protection when the state encroaches on a basic right (in this instance, privacy). This right, being absolute, cannot be abrogated under any circumstances. Article 10 as amended violates the foundation principles of Articles 1 (human dignity) and 20 (legality and separation of powers). The amendment, like the statute passed pursuant to it, they concluded, is therefore itself unconstitutional (*Id.* at 33-47).

from terrorism-related cases, lacked adequate standards to guide prosecutors and judges in applying its provisions.<sup>45</sup> The Federal Parliament responded to the Court's decision by drafting a more precise statute specifying the conditions under which it would be permissible to exclude defense counsel from trials.

For the most part, however, the Constitutional Court followed the approach it adopted in *Klass* in deciding national security cases. Very often a majority of the Court, over a strenuous dissent, would uphold security legislation, but not without a conscientious consideration of the scope of the rights infringement implicated by the anti-terrorism provisions. With a view to the latter, the Court would often order limits to the scope of security measures out of respect for constitutionally guaranteed individual liberties. In this way, the Court engaged in a balancing of society's interest in security and individuals' interest in their basic rights. Oliver Lepsius described this analytical tradition in the following terms:

The basic rights are subject to a system of constitutional limitation-clauses ("legislation-reservation-clauses") that allow the legislatures to infringe on basic rights as long as the infringement can be justified within the terms of the limitation clause. In deciding whether the limitation of a right or freedom is justified a court will usually need to weigh and assess the competing values at stake through the use of the proportional test, the so-called *Abwägung*. Whether a limitation of a right or freedom is justified primarily depends upon whether or not the statutory limitation of the basic rights is proportional, i.e. whether or not the infringement is useful and necessary to achieve the desired objective, and whether it is in a deeper sense proportionate to the achievement of purpose (so-called proportionality-principle, *Verhältnismäßigkeitsgrundsatz*). The purpose has to be legitimate and must serve a higher legally protected right than the basic right that is protected in the concrete case. . . . Apart from conflicting basic rights, an infringement of a fundamental right can be justified not only by recourse to conflicting basic rights but also to predominant community rights, i.e. a common good.<sup>46</sup>

In *Klass* and other cases arising out of the terrorism of "*der Deutscher Herbst*" (the era of domestic, radical left-wing terrorism in the 1970s and 1980s is often referred to as "the German Autumn") we see the main elements of the German jurisprudence from this period: the Court's articulation and continued enforcement of a constitutional interest in

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45. 49 BVerfGE 24 (1978).

46. Oliver Lepsius, *Liberty, Security, and Terrorism: The Legal Position in Germany*, 5 GERM. L. J. 435, 443 (2004), available at [http://www.germanlawjournal.com/pdf/Vol05No05/PDF\\_Vol\\_05\\_No\\_05\\_435-460\\_special\\_issue\\_Lepsius.pdf](http://www.germanlawjournal.com/pdf/Vol05No05/PDF_Vol_05_No_05_435-460_special_issue_Lepsius.pdf).

national security; and the Court's assessment of the state's pursuit of that interest, and the resulting impact of individuals' liberty interests, through a balancing analysis. In this period the scales were weighted perceptibly in favor of security, so long as the infringements on liberty interests were proportional.

### III. SECURITY AND LIBERTY IN THE NEW WORLD ORDER

Despite the many changes that confronted Germany and the world in the 1990s,<sup>47</sup> the Constitutional Court persisted in favoring security over liberty. This is demonstrated by the Court's ruling on constitutional challenges to 1994 amendments to the law regulating the *Bundesnachrichtendienst* (Federal Intelligence Service).<sup>48</sup> The amendments expanded the Federal Intelligence Service's authority to depart from the protections of Article 10 of the Basic Law and to conduct telecommunication surveillance. The changes to what is known as the "G10 Act" were presented as a reaction to the new generation of security concerns that emerged in the 1990s. With the end of the Cold War and the remission of domestic political violence in Germany, new classes of threatening activity justifying telecommunications surveillance were identified, particularly including the then nascent threat of international terrorism.<sup>49</sup>

Pursuant to the amendments to the G10 Act, surveillance justified by the newly identified threats was to be limited to *wireless* and *international* telecommunication traffic,<sup>50</sup> a telecommunication medium and geographic sphere not adequately addressed by the 1968 security reforms. Whereas earlier security policy was oriented towards old land-line technology, domestic terrorism, or Cold War threats to the Federal Republic's homeland emanating from the Warsaw Pact, the newly added justifications for telecommunication surveillance targeted the burgeoning use of wireless technology and were global in their scope. The amendments also sought to take advantage of new technology by permitting sweeping telecommunications surveillance of relevant terms and concepts, without regard to the international origin of the acts of communication.<sup>51</sup>

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47. See OZMENT, *supra* note 3, at 302-303 (discussing the events leading to the eventual reunification of East and West Germany).

48. Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses in der Fassung des Gesetzes zur Änderung des Strafgesetzbuches, der Strafprozeßordnung und anderer Gesetze (Verbrechensbekämpfungsgesetz) [Crime Control Act], Oct. 28, 1994, BGBl. I, at 3186; geändert durch das Begleitgesetz zum Telekommunikationsgesetz (BegleitG) [Act Accompanying the Telecommunications Act], Dec. 17, 1997, BGBl. I, at 3108. [Hereinafter G10 Act].

49. See G10 Act, *supra* note 48, at §3 ¶1, sentence 2 (permitting surveillance to detect "preparations for acts of international terrorism in the Federal Republic of Germany").

50. G10 Act, *supra* note 48, at §3 ¶1.

51. *Id.* at §3, ¶2.

Additionally, the amendments to the G10 Act removed the previous ban on sharing collected intelligence with other agencies, opening the door for the use of the shared intelligence in criminal prosecutions.<sup>52</sup> Finally, the amendments deleted the duty, imposed on the Federal Intelligence Agency by earlier security regimes, to inform individuals that they had been subject to surveillance for those cases in which the collected intelligence was purged within three months.<sup>53</sup>

Challenging the amendments, an academic engaged in research on the topic of international drug trafficking, as well as journalists and newspaper publishers covering issues included among the new, expanded catalogue of activities justifying telecommunication surveillance, argued that the new G10 Act would greatly increase the likelihood that they would be subject to unjustifiable surveillance because of their wholly legitimate work. They alleged violations of Article 10 (telecommunication privacy), Article 5(1) (freedom of expression) and Article 19(4) (right to a judicial remedy) of the Basic Law. The Court, in its lengthy *Telecommunication Surveillance Act Case*,<sup>54</sup> found most parts of the amended G10 Act to be constitutional. In doing so the Court embraced the legislation's expanded list of the threats to the state as relevant to the security that the Basic Law guarantees for all. "The objective of timely recognizing and counteracting the threats specified [in the new G10 Act]," the Court explained, "is a legitimate interest of the common good."<sup>55</sup> This is true, the Court said, even while these new threats "do not carry the same weight as the threat of an armed aggression, which has from the outset been regarded as a legitimate reason for telecommunications monitoring."<sup>56</sup> Thus, the expanded notion of security that emerged from the *Telecommunication Surveillance Act Case* encompasses threats that do not generally affect the existence of the state but nonetheless "concern high-ranking public interests whose violation would result in serious damage to external or internal peace and to the legal interests of individuals."<sup>57</sup>

The *Telecommunication Surveillance Act Case* was the high-water mark as regards the deference the Court has shown to legislatively authorized infringements on fundamental liberty interests in order to protect national security. The Court's endorsement of the G10 Act's expansive view of the kind of threats justifying limitations on liberty necessarily prioritized the constitutional interest in security in the balance being struck

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52. *Id.* at §3, ¶5.

53. *Id.* at §3, ¶8, sentence 2.

54. 100 BVerfGE 313 (1999).

55. 100 BVerfGE 313 [373] (1999).

56. *Id.*

57. *Id.* But see Michael Sachs, *BVerfG: Fernmeldeüberwachung durch den Bundesnachrichtendienst*, 40 JURISTISCHE SCHULUNG 597 (2000); Claus Arndt, *Zum Abhörurteil des BVerfG*, 53 NEUE JURISTISCHE WOCHENSCHRIFT 47, 48 n. 7 (2000).

by the Court. Slowly at first, but definitively, the Constitutional Court's jurisprudence would begin to place greater weight on liberty interests. The shift took place against the backdrop of the September 11, 2001 terrorist attacks in the United States – and the subsequent attacks in Madrid and London – and the many (putative) security-enhancing policies enacted by countries around the world as a reaction to the very real threat of global fundamentalist terrorism.

#### IV. 9/11 AFTER-SHOCKS

Some facets of German security reform and policy that had been initiated *prior* to the September 11, 2001 attacks were first scrutinized by the Constitutional Court *after* the hijacked planes crashed into the World Trade Center, into the Pentagon, and in rural Pennsylvania. These cases provided the first indication of a shift in the Court's jurisprudence.

In the *Acoustic Surveillance Case* decided by the Constitutional Court in 2004, the change was subtle but incredibly significant.<sup>58</sup> In seeming conformity with the pro-security tenor of its prior decisions, the Court upheld the 1998 amendments to Article 13 of the Basic Law that permitted acoustic surveillance of the home.<sup>59</sup> The Court began by recognizing the “close connection between the inviolability of housing and the dignity of man [guaranteed in Article 1 of the Basic Law].”<sup>60</sup> The home, the Court explained, provides a secure sphere for the most personal and intimate communication. The Court concluded that the importance of the degree of privacy granted to a home justifies attributing nearly absolute protection from governmental intrusion in this sphere.<sup>61</sup> But, as it might have done in

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58. 109 BVerfGE 279 (2004). See Ulrich Palm, *Die Person als ethische Rechtsgrundlage der Verfassungsordnung*, 41 DER STAAT 47, 49-50 (2008); Christoph Gusy, *Lauschangriff und Grundgesetz*, 44 JURISTISCHE SCHULUNG 457 (2004); Michael Sachs, *Grenzen der Verfassungsänderung – Grundrechte – “Großer Lauschangriff,”* 44 JURISTISCHE SCHULUNG 522 (2004); see also MAXIMILIAN WARNTJEN, *HEIMLICHE ZWANGSMAßNAHMEN UND DER KERNBEREICH PRIVATER LEBENSGESTALTUNG – EINE KONZEPTION IM ANSCHLUSS AN DAS URTEIL DES BUNDESVERFASSUNGSGERICHTS ZUR AKUSTISCHEN WOHNRAUMÜBERWACHUNG* (109 BVerfGE 279 (2006)).

59. Article 13 (3) was amended to provide:

If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offense, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorization shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge.

60. 109 BVerfGE 279 [313] (2004); see Jutta Stender-Vorwachs, *The Decision of the Bundesverfassungsgericht of March 3, 2004, Concerning Acoustic Surveillance of Housing Space*, 5 GERM. L. J. 1337, 1344 (2004), available at [http://www.germanlawjournal.com/pdf/Vol05No11/PDF\\_Vol\\_05\\_No\\_11\\_1337-1348\\_Public\\_Vorwachs.pdf](http://www.germanlawjournal.com/pdf/Vol05No11/PDF_Vol_05_No_11_1337-1348_Public_Vorwachs.pdf).

61. 109 BVerfGE 279 [313-314] (2004).

its earlier national security jurisprudence, the Court found no violation of Article 79(3), recognizing a class of communication, including conversations related to the commission of a crime, which could be excluded from the near absolute protection contemplated for homes.<sup>62</sup> In its earlier jurisprudence, however, this might have been where the Court left the matter. In this case, however, the Court went on to rule that the safeguards provided by the statute implementing the new surveillance regime did not show adequate regard for the great weight the Basic Law assigned to privacy of the home as an elemental part of human dignity. The Court held that the catalogue of crimes for which such an encroachment on privacy could be justified must be limited to the most serious crimes, including those bearing a potential prison sentence of five years or more.<sup>63</sup> The Court found that the security interests at stake in the “minor” crimes for which the implementing statute authorized surveillance did not represent security interests serious enough to outweigh the interest of privacy in the home.

With this ruling – a clear departure from the *Telecommunication Surveillance Act Case* just a decade earlier – the Court signaled an end to its expansive interpretation of the security interests it was willing to embrace as weighty justifications for infringements on individual liberty interests. Furthermore, the Court insisted that intelligence gathering undertaken pursuant to the amendments to Article 13 would have to be regulated by legislative safeguards requiring judicial authorization for the surveillance; requiring that the parties subject to surveillance be notified of the action; and providing rules regulating the maintenance and destruction of data gathered pursuant to such surveillance.

Another policy enacted prior to 9/11 but reviewed in the aftermath of the terrorist attacks bore a striking resemblance, at least in its essentials, to the heavily criticized American policy of “preventive detention” of terrorist suspects in the so-called “war on terror.”<sup>64</sup> Preventive detention policies provide that individuals determined by executive branch authorities (in the law enforcement, military, and intelligence communities) to pose a security threat may be detained for lengthy periods without receiving the benefit of judicial branch adjudication of their status.<sup>65</sup> A number of German states

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62. *Id.* at 319.

63. *Id.* at 347-348.

64. “After 9/11, for example, . . . the [U.S.] executive branch implemented far-reaching preventive detention by employing preexisting immigration law, the material witness statute, pretextual prosecution, and an asserted power to detain ‘enemy combatants.’” David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 694-695, 725 n. 152 (2009). See Jules Lobel, *Preventive Detention: Prisoners, Suspected Terrorists and Permanent Emergency*, 25 T. JEFFERSON L. REV. 389 (2002-2003); Kenneth Roth, *After Guantánamo – The Case Against Preventive Detention*, FOREIGN AFF., May/June 2008, at 9.

65. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention*

had enacted “preventive detention” laws that permitted them to prolong a prisoner’s incarceration after his or her sentence expired on the basis of prison officials’ conclusion that the inmate posed a continuing threat to society. The policy was not applied to terrorists in Germany; the initial targets were violent sex offenders.<sup>66</sup> Referring to constitutional protections applicable in criminal proceedings, the Supreme Court eviscerated some parts of the American preventive detention policy, at least with respect to U.S. citizens, in its landmark decision *Hamdi v. Rumsfeld*.<sup>67</sup> For its part, in another blow to the purported new security paradigm, the Constitutional Court struck the preventive detention policy on federalism grounds.<sup>68</sup> But, reflecting Germany’s balancing approach, the Court signaled the policy’s acceptability if it were to be properly conceived and enacted under the federation’s legislative competence.

As in *Acoustic Surveillance*, the Court seemed willing to allow the German security apparatus to adapt to the new terrorist threat, but only within a narrowly defined range of discretion marked by the Court’s increasing sensitivity to liberty interests. Importantly, by invalidating the legislation, the Court demonstrated its willingness to exercise its sweeping jurisdictional authority to monitor and shape changing priorities regarding security and liberty. Andrew Hammel explained that the Court viewed preventive detention as a “severe infringement of the detainees’ right to liberty,” but an infringement nonetheless proportional (and thus permissible) in its impact in light of the limited number of persons affected by the policy and the critical nature of the state’s interest.<sup>69</sup> As with the infringements upon telecommunication privacy accepted by the Court in the *Telecommunication Surveillance Act Case*, the Court again insisted that “the invasion of detainees’ right to personal freedom be as limited as possible.”<sup>70</sup>

The Court eventually was called upon to review the anti-terrorism legislation enacted in Germany in response to the September 11, 2001

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as *Criminal Justice*, 114 HARV. L. REV. 1429 (2001) (“during the past several decades, the justice system’s focus has shifted from punishing past crimes to preventing future violations through the incarceration and control of dangerous offenders”).

66. Andrew Hammel, *Preventive Detention in Comparative Perspective*, in ANNUAL OF GERMAN & EUROPEAN LAW – 2004 89 (Russell A. Miller & Peer C. Zumbansen eds., 2006). See Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77 (2005-2006).

67. 542 U.S. 507 (2004). See Russell A. Miller, *Hamdan Case*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2008).

68. 109 BVerfGE 190 (2004).

69. Hammel, *supra* note 66, at 95.

70. *Id.* Hammel compares the Federal Constitutional Court’s ruling with the more directly analogous rulings of the Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997) and *Kansas v. Crane*, 534 U.S. 407 (2001). In the context of violent sex offenders, the Supreme Court upheld post-sentence detention policies as a matter of civil confinement, so long as due process is observed in reaching the decision regarding the prolonged confinement.

terrorist attacks, much of which was directly or indirectly influenced by the international polices that Kim Lane Scheppelle describes in her contribution to this symposium.<sup>71</sup> The legislative reaction to the threat of global terrorism was comprehensive and swift, no doubt especially animated by the fact that a number of the terrorist hijackers in the September 11, 2001 attacks had been German residents. For the most part, the new anti-terrorism legislation sought to reform or build upon the security regime already in place from the 1970s and 1980s, encompassing a matrix of fields, including immigration law, law enforcement regulations, intelligence services regulations, telecommunications laws, general criminal law, and economic-financial matters.

Three anti-terrorism packages had the greatest impact. Hans-Jörg Albrecht summarized the aims of the new legislation as consisting of five goals:

- To destroy terrorist structures through exerting strong pressure on terrorists and terrorist groups by way of criminal investigation.
- To prevent terrorism from developing by way of controlling extremism through administrative instruments (banning radical organizations and tight border and immigration controls).
- To strengthen international cooperation and data exchange on suspicious immigrants and terrorists.
- To protect the public and sensitive infrastructure through permanently monitoring and risk assessment and through providing intensive security checks in risk prone space (airports, etc.).
- To eliminate the causes of terrorism by contributing to missions established to promote international peace and build and maintain order.<sup>72</sup>

To these ends, the first anti-terrorism package of legislation expanded existing measures criminalizing threatening organizations and abolished the “religious privilege,” which had shielded ostensibly religious associations from being banned pursuant to the militant democracy provision of Article 9(2) of the Basic Law.<sup>73</sup>

In the immediate aftermath of the September 11, 2001 terrorist attacks, state authorities in Germany, with federal assistance and coordination,

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71. See Kim Lane Scheppelle, *The International Standardization of National Security Law*, 4 J. NAT'L SECURITY L. & POL'Y 437 (2010).

72. HANS-JÖRG ALBRECHT, COUNTERTERRORISM POLICIES IN GERMANY (2006), available at [http://www.mpicc.de/shared/data/pdf/fa\\_38\\_albrecht10\\_06.pdf](http://www.mpicc.de/shared/data/pdf/fa_38_albrecht10_06.pdf).

73. Erstes Gesetz zur Änderung des Vereinsgesetzes [First Act Amending the Associations Act], Dec. 4, 2001, BGBl. I, at 3319.

initiated a far-ranging *Rasterfahndung* (data-mining) investigation. Data processing technology permits the rapid comparison and cross-referencing of the large amounts of data that each of us generates daily. *Rasterfahndung* consists of extensive, indiscriminate sweeps of this data in the public and private sphere in order to build investigative profiles. The aim of the data-mining investigations conducted after the September 11, 2001 attacks was to search for data profiles similar to those of the terrorists (male Muslim students between eighteen and forty years old) in order to uncover other potential “sleeper cells” in Germany.<sup>74</sup> In constitutional complaint proceedings brought by a twenty-four year old Muslim university student from Morocco, the Constitutional Court found the *Rasterfahndung* program to be a violation of the constitutionally protected right to informational self-determination.<sup>75</sup>

Now, quite clearly, the Court gave greater weight to the implicated liberty interests than to the admittedly grave security threat posed by terrorism. The Court acknowledged that security against terrorism constitutes a high-ranking constitutional value,<sup>76</sup> but found the *Rasterfahndung* program constituted an especially significant and intense infringement of the right to informational self-determination.<sup>77</sup> Data profiles of the kind likely to emerge from the *Rasterfahndung* program, the Court explained, would be extremely personally revealing.<sup>78</sup> These profiles would also increase the risk of other criminal and administrative investigations of the persons profiled.<sup>79</sup> Finally, the profiles themselves would create harm by propagating stereotypes and, potentially, promoting racial or religious discrimination.<sup>80</sup> To be proportional, the Court held, such an extensive infringement on informational self-determination must be limited to cases of concrete threats.<sup>81</sup> Because the case was so clearly linked to the September 11, 2001 terrorist attacks and the remote part played by Germany in the tragedy, the Court’s articulation of a restrained view of the state’s interest in security was particularly poignant:

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74. Data Mining Case, 115 BverfGE 320 (2006). See Christian Hillgruber, *Der Staat des Grundgesetzes – nur, “bedingt abwehrbereit”?*, 62 JURISTEN ZEITUNG 209 (2007).

75. 115 BverfGE 320, 324-331 (2006).

76. *Id.* at 346 (“The federation’s and states’ continued existence and security, as well as the body, life and freedom of individuals, both of which must be protected against threats, are regarded as protected interests of a high constitutional significance. The security of the state, which serves as the power for establishing peace and order, and which ensures the security of its citizens while respecting their dignity and individuality, is a constitutional value that compares with other high ranking values.”).

77. *Id.* at 341-349. See Census Act Case, 65 BVerfGE 1 (1983).

78. *Id.* at 349-351.

79. *Id.* at 351-352.

80. *Id.* at 352-353.

81. *Id.* at 361-365.

The state should and must confront terrorist activities with the appropriate legal means – particularly those that have as their goal the destruction of the free democratic order, and those that use the deliberate destruction of human life as the means to realize this end. However, the state's choice of legal means is limited by the Basic Law.

Under the rules of a state governed by the rule of law, the Basic Law contains a mandate to protect the basic principles of a free democratic order from adverse effects. That the state also subordinates its treatment of its enemies to the universally valid basic principles demonstrates the strength of the rule of law.

This is also true for the state's pursuit of the fundamental aim of ensuring the security of and protecting its population. The Constitution demands that the lawmaker strike a reasonable balance between freedom and security. At its core this mandate excludes the pursuit of absolute security, which is impossible in any case and, even if it were not, could only be achieved at the price of repealing freedom. The Basic Law also limits the state's more concrete efforts to maximize security. The trappings of the rule of law must be observed, in particular, the prohibition of disproportionate infringements upon basic rights. This is a right of protection against the state.

In this prohibition, the state's duty to provide security finds its limit. Basic rights are designed to protect individuals' sphere of freedom against attacks by the public authority; they are citizens' defensive rights against the state. The function of basic liberties as objective principles, and the protective duties that emerge therefrom, have their roots in and are amplified by this essential understanding.

In choosing the means it will use to fulfill its duty to provide security, the state is limited to those measures the adoption of which is in harmony with the Constitution. The state's intrusion into the individual's absolute right to freely develop is unconstitutional no matter the significance of the constitutional interests that may have justified the intrusion . . . .<sup>82</sup>

The process the Court started in *Acoustic Surveillance* was crystallized in the *Data Mining Case*. Not only had the Court begun to reconsider the great weight it had long attributed to a constitutional interest in security, it was now beginning to build a catalog of basic rights the protection of which would outweigh the interest in security in every case. The textually

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82. *Id.* at 357-359.

inscribed right to household privacy had not made the cut in the *Acoustic Surveillance Case*, but the judicially divined right to informational self-determination did make the list in *Data Mining*.

The Court's new liberty-enhancing approach to national security cases was clearly on display as it invalidated the two key components of the third post-9/11 anti-terrorism package. First, in the *European Arrest Warrant Case*, the Court invalidated the liberalization of Germany's extradition policy as was seemingly required by EU legislation.<sup>83</sup> In a second case, the Court voided the provisions of the Aviation Security Act that authorized the armed forces to shoot down aircraft that are being used as weapons.<sup>84</sup> As one of the most discussed national security cases in the Court's history – and in light of the case's symbolic relevance to the September 11, 2001 terrorist attacks – the *Aviation Security Act Case* merits a more detailed discussion.<sup>85</sup>

One of the provisions of the Aviation Security Act authorized the Federal Minister of Defense, with the consent of the Federal Interior Minister, to employ the armed forces to shoot down a passenger aircraft that was intended to serve as a weapon aimed at civilian targets. Several lawyers and a pilot filed constitutional complaints against the statute, claiming its incompatibility with various provisions of the Basic Law, among them the right to life secured by Article 2(2) in conjunction with the guarantee of human dignity under Article 1(1). They argued that the statute “relativized the human life of the passengers on board, treating them as mere objects of state action and robbing them of their human value and honor.”<sup>86</sup> The Court agreed with those sentiments but chose instead to void the “shoot-down” authorization as incompatible with Article 35(2) and (3) of the Basic Law. This article provides for Federal-*Länder* cooperation in the event of a “natural disaster” or a “grave accident.”<sup>87</sup> In such situations, the *Länder* may ask for federal assistance in response to which the federal government may issue regulations on the use of the armed forces. The Court ruled, however, that Article 35 does not permit the direct employment of military weapons against a passenger plane.<sup>88</sup> In reinforcing this interpretation of Article 35, the Court invoked Article 87a(2), a provision that limits the use of the armed forces to purposes “explicitly permitted” by the Basic Law.<sup>89</sup>

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83. 113 BVerfGE 273 (2005)

84. Luftsicherheitsgesetz [Aviation Security Act], Jan. 11, 2005, §14, BGBl. I at 78.

85. 115 BVerfGE 118 (2006). See Jochen von Bernstorff, *Pflichtenkollision und Menschenwürdegarantie. Zum Vorrang staatlicher Achtungspflichten im Normbereich von Art. 1 GG*, 41 DER STAAT 21 (2008); Christian Starck, *Anmerkung*, 61 JURISTENZEITUNG 417 (2006).

86. 115 BVerfGE 118, 127 (2006).

87. GRUNDGESETZ [Basic Law or Constitution] art. 35(2) and (3).

88. 115 BVerfGE 118, 140-53 (2006).

89. *Id.* at 147-148. See GRUNDGESETZ art. 87a(2).

More relevant for an appraisal of the Constitutional Court's approach to balancing security and liberty in the face of terrorist threats was its assessment of the significance of the right-to-life and human dignity clauses of the Basic Law to the case.<sup>90</sup> To allow the "shoot-down," said the Court, would deprive passengers and crew of their right to self-determination and thus convert them to "mere objects of [the state's] rescue operation for the protection of others."<sup>91</sup> Innocent passengers, said the Court, are human beings and not simply parts of the aircraft. The Court reiterated its long-standing position on the right to life in conjunction with the principle of human dignity. It noted:

The right to life guaranteed by Article 2(2) is subject to its reservation clause, [stating that the right to life may be limited only by a parliamentary statute]. Any law limiting this right, however, must be considered in the light of its close linkage to the guarantee of human dignity under Article 1(1). Human life is intrinsically connected to human dignity as a paramount principle of the Constitution and the highest constitutional value. Every human being is endowed with dignity as a person without regard to his or her physical or mental condition, . . . capacities, or . . . social status. No person can be deprived of his or her dignity. Any infringement of this value would be injurious. This principle holds true during the entire length of a person's life up to and including his or her dignity even after death.<sup>92</sup>

Even though the right to life can be limited by law, the principle of human dignity, ruled the Court, "absolutely" bars the intentional killing of helpless persons on a hijacked aircraft. The grant of statutory authority of this nature would encroach on the "essence" of a basic right, and any assumption that passengers entering a plane would implicitly consent to such a "shoot-down" is nothing less than an "unrealistic fiction."<sup>93</sup> In short, an aircraft may not be shot down – and there is no constitutional state duty to shoot it down – simply because it may be used as a weapon to extinguish life on the ground. This analysis identified another basic right – alongside informational self-determination, which had featured in *Data Mining* – that per se outweighs the constitutional interest in security. In *Aviation Security* it was the right to life in its nexus with the right to human dignity. More than this, however, the Court shifted to a much more restricted understanding of the constitutional interest in security, seemingly limiting it to threats that would bring an end to the body politic or the constitutional

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90. GRUNDGESETZ arts. 1(1) and 2(2).

91. 115 BVerfGE 118, 154 (2006).

92. *Id.* at 152.

93. *Id.* at 157.

system. This is a far cry from the expansive definition of the constitutional interest in security that the Court embraced in the *Telecommunications Surveillance Act Case*.

In 2008 the Court persisted with its post-9/11 liberty-enhancing approach to balancing security and liberty with a remarkable decision in the *Online Search Case*.<sup>94</sup> The Court again invalidated a prominent piece of anti-terror legislation, substantiating the claim that the scales had now definitively tipped to the advantage of liberty interests in the Court's national security jurisprudence. Even more telling with respect to this trend, however, was the fact that the relevant liberty interest at the core of the case was one that the Court had never before articulated. The wholly new right to the "confidentiality and integrity of information technology systems" proved weightier than the constitutional interest in security. As a result of this balancing analysis, the Court invalidated the "online search" provisions in the newly amended Constitutional Protection Act passed by the state of North Rhine-Westphalia.<sup>95</sup> The statutory provisions in question authorized the state's intelligence gathering agency, on one hand, to infiltrate and collect data from information technology systems via the Internet, and, on the other hand, to monitor and access the content of Internet communication.<sup>96</sup>

With respect to data gathering, the Court felt it necessary to articulate a new facet of the long-recognized right of informational self-determination because the traditional protection did not adequately address the unique and comprehensive intrusion posed by the state's acquisition of data stored on personal information technology systems. Notably, informational self-determination is itself a judicially derived facet of the Basic Law's textual guarantee of the right to freely develop one's personality. Central to this assessment was the ubiquity of information technology systems in daily life and the depth, scope, and richness of the personal information those devices wittingly and unwittingly record. The Court explained:

[T]he traditional right to informational self-determination does not fully account for threats that emerge from the fact that individuals rely on information technology systems for the development of their personality. In those circumstances, individuals entrust personal data to the system or inevitably create such data merely by using the system. A third party accessing such a system can obtain data stocks that are potentially extremely large and revealing without having to rely on further data collection and data

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94. 120 BVerfGE 274 (2008).

95. Verfassungsschutzgesetz Nordrhein-Westfalen in der Fassung des Gesetzes zur Änderung des Gesetzes über den Verfassungsschutz in Nordrhein-Westfalen [North Rhine-Westphalia Constitution Protection Act as Changed by the Act Amending Constitutional Protection in North Rhine-Westphalia], Dec. 20, 2006, GV NW 2006, at 620.

96. *Id.*

processing measures. In its impact on the personality, such access goes beyond the discrete attempts at collecting data against which the right to informational self-determination provides protection.

Insofar as no adequate protection exists against threats that arise from individuals' reliance on information technology systems for the development of their personality, the general right of personality accounts for the need for protection . . . by guaranteeing the integrity and confidentiality of information technology systems. As with the right to informational self-determination, this right is based on Article 2(1) in conjunction with Article 1(1) of the Basic Law; it protects the personal and private life of those to whom the fundamental rights apply against the state gaining access to information technology systems as a whole and not only to individual communication events or stored data. . . .

The fundamental right to the integrity and confidentiality of information technology systems is to be applied . . . if the empowerment to encroach covers systems that, alone or in their technical networking, can contain personal data of the person concerned to such a degree and in such a diversity that access to the system facilitates insight into significant parts of the life of a person or indeed provides a revealing picture of his or her personality. Such a possibility applies, for instance, to access to personal computers regardless of whether they are installed in a fixed location or are operated while on the move. As a rule it is possible to discern characteristics and preferences based on both private and business patterns of use of information technology systems. Mobile telephones or electronic assistants, which have a large number of functions and can collect and store many kinds of personal data, are specifically covered by this fundamental right.

Above all, the fundamental right guaranteeing the confidentiality and integrity of information technology systems involves the interest of users of these systems in ensuring that the protected data that are created, processed and stored remain confidential. An encroachment on this fundamental right is also to be presumed to have taken place if the integrity of the protected information technology system is affected by the system being accessed such that its performance, functions and storage contents can be used by third parties; the crucial technical hurdle for spying, surveillance or manipulation of the system has then been overcome.

The general right of personality in the manifestation dealt with here in particular provides protection against secret access, by means of which the data available on the system can be observed in its entirety or in major parts. The fundamental right-related protection

covers both the data stored in the working memory and also that which is temporarily or permanently kept on the storage media of the system. The fundamental right also protects against data collection using means that are technically independent of the data processing events of the information technology system in question, but the subject-matter of which is these data processing events. This is for instance the case with use of so-called hardware keyloggers or in measuring the electromagnetic radiation from monitors or keyboards.<sup>97</sup>

The Court relied on Article 10(1) of the Basic Law, which guarantees telecommunications privacy, in striking those facets of the amended statute that permitted the state's acquisition of the content of Internet communication by monitoring or manipulating the channels provided for such communication.<sup>98</sup>

Once again, in the *Online Search Case*, the Court added to the list of weighty liberty interests that inherently trump the constitutional interest in security. This trend stands in stark contrast to the Court's expansion of the list of security concerns in the *Telecommunications Surveillance Act Case*. Indeed, with the articulation and prioritization of the new liberty interest in confidentiality and integrity of information technology systems, the Court created the impression that it was willing to go to great lengths to counter the new, more invasive post-9/11 national security paradigm.

Further evidence of the Court's post-9/11 prioritization of liberty interests over national security concerns came in its recent decision in the *Data Stockpiling Case* decided in March 2010.<sup>99</sup> The Court was called on to judge the constitutional complaints of more than 50 professionals, parliamentarians, and telecommunication service providers who challenged amendments to the Telecommunications Act and the Code of Criminal Procedure enacted in 2007 in order to satisfy a European Community Directive.<sup>100</sup> The Court once more found the security-oriented provisions unconstitutional and void. The law required private telecommunication service providers to save all telecommunications data for a period of six months. By "all data," the relevant amendments to the Telecommunications Act identified information derived from landline, wireless, fax, SMS, and

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97. 120 BVerfGE 274, 312-314 (2008).

98. *Id.* at 340-46.

99. Bundesverfassungsgericht, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, from March 2, 2010, available at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20100302\\_1bvr025608.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20100302_1bvr025608.html).

100. Gesetz zur Neuregelung der Telekommunikationsüberwachung und anderer verdeckter Ermittlungsmaßnahmen sowie zur Umsetzung der Richtlinie 2006/24/EG [Act Newly Regulating Telecommunications Surveillance and other Secret Investigative Measures as well as the Implementation of Directive 2006/24/EC], Dec. 21, 2007, BGBl. I at 3198 [hereinafter *Data Stockpiling Act*]; Parliament and Council Directive Directive 2006/24, 2006 O.J. (L 105) 54 (EC).

email communications that would be necessary to reconstruct by whom, when, how long, with whom, and from where a telecommunications act had been conducted.<sup>101</sup> Additionally, changes to the Telecommunications Act and the Code of Criminal Procedure expanded both the justifications for the state's acquisition of the stockpiled data from the private service providers and the uses the state might make of the information.<sup>102</sup>

In a maneuver that allowed it to show due respect to the European Community, the Court held that the stockpiling of telecommunications data by private service providers was not, in itself, a constitutional violation.<sup>103</sup> Instead, the Court focused its disapproval on the Federal Parliament's implementing laws, concluding that they did not adequately protect the deeply intimate sphere of privacy represented by the data involved. The Court explained that the addresses, phone numbers, dates, times, and locations discernable in the telecommunications data, if examined over any length of time, could be used to sketch a deeply personal and revealing portrait of a subject's political associations, personal preferences, inclinations, and weaknesses.<sup>104</sup> An encroachment on liberty interests of such importance, the Court held, would be compatible with Article 10(1) of the Basic Law only if the data stockpiling was conducted by private actors for the state's use in investigating criminal acts or preventing security threats, both of which must involve considerable gravity.

#### V. MAKING SOMETHING (MORE) OF GERMANY'S NATIONAL SECURITY JURISPRUDENCE?

With its *Data Stockpiling* decision, the Court confirmed the dramatic shift in its national security jurisprudence that began with the *Acoustic Surveillance Case*. The Court is no longer willing to expansively interpret the scope of the constitutional interest in security. And even creditable interests in security now are regularly outweighed by opposing liberty interests in the Court's balancing analysis. In tandem with the foregoing development, the Court's post-9/11 decisions demonstrate its willingness to expand the catalogue of privacy and dignity interests that conflict with and ultimately outweigh the interests meant to be protected by many of the anti-terror measures enacted in the last decade. The Court has given great weight to liberty interests because they are fundamental rights with inherent priority over national security concerns.

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101. Data Stockpiling Act, *supra* note 100, at §§113a(2-4)

102. *Id.* at §113b.

103. Bundesverfassungsgericht, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, from March 2, 2010, §187, available at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20100302\\_1bvr025608.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20100302_1bvr025608.html).

104. *Id.* at §211.

What might explain this shift in the Constitutional Court's jurisprudence? Three factors come to mind. I will only treat them summarily here, with the hope that further research might draw out their significance, and with the caveat that deeper contextual analysis of the foregoing jurisprudential survey is necessary before any productive comparative use can be made by American national security experts and policymakers of the lessons the German experience has to offer.<sup>105</sup>

First, the fundamental role played by the Constitutional Court with respect to German national security policy itself merits critical consideration. That role has been most spectacular in the post-9/11 era during which the Court has consistently invalidated the domestic security reforms that were aimed at equipping authorities to better detect, prevent, and prosecute terrorist acts.<sup>106</sup> The Court's invalidation of provisions of the Aviation Security Act, representative of the trend pursuant to which the Court has refused to endorse prominent elements of the post-9/11 security regime, prompted some policymakers to call for a constitutional amendment that would deprive the Court of the constitutional bases for its defiance.<sup>107</sup> But the Court was no less involved in the earlier, security-favoring periods in its jurisprudence. This raises the question as to whether comparatists referring to German national security law should be interested chiefly in the substance of those policies or, more fundamentally, in a consideration of the distinct role the German system has afforded the Constitutional Court in shaping the country's national security regime. Any effort in this regard will require a careful assessment of the distinct ways in which the Court has used the balancing and proportionality analyses.

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105. See Miller, *supra* note 1, at 236-246. See also Susanne Baer, *Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 735 (2004); Ruti Teitel, *Book Review – Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570 (2003-2004); Pierre Legrand, *The Same and Different*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 240 (Pierre Legrand & Roderick Munday eds., 2003); Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221 (1999).

106. Ulrich Schellenberg, *Wenn das Verfassungsgericht zwölf Mal klingelt . . .*, TAGESSPIEGEL.DE, Mar. 19, 2010, available at <http://www.tagesspiegel.de/meinung/kommentare/wenn-das-verfassungsgericht-zwoelf-mal-klingelt-/1721620.html>.

107. *Verfassungsänderung – Schäuble hat konkrete Pläne*, FOCUS, Sept. 19, 2007, [http://www.focus.de/politik/deutschland/terrorabwehr\\_aid\\_133218.html](http://www.focus.de/politik/deutschland/terrorabwehr_aid_133218.html); *Durchsuchung von Computern – Schäuble erwägt Verfassungsänderung*, SUEDEUTSCHE.DE, Apr. 5, 2007, <http://www.sueddeutsche.de/politik/26/395813/text/>; *Luftsicherheitsgesetz: Schily offen für Verfassungsänderung*, FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 21, 2005, available at <http://www.faz.net/s/Rub594835B672714A1DB1A121534F010EE1/Doc~EAE6F7EA58B2B4FD98B7BE1516FD3256B~ATpl~Ecommon~Scontent.html>; Nina Baumann, *Luftsicherheitsgesetz Karlsruhe prüft Bundeswehreinsatz im Inneren*, FOCUS, Feb. 10, 2010, [http://www.focus.de/politik/deutschland/luftsicherheitsgesetz-karlsruhe-prueft-bundeswehreinsatz-im-inneren\\_aid\\_478627.html](http://www.focus.de/politik/deutschland/luftsicherheitsgesetz-karlsruhe-prueft-bundeswehreinsatz-im-inneren_aid_478627.html); *Frei zum Abschuss – Ein "Luftsicherheitsgesetz" soll den Einsatz der Bundeswehr gegen Zivilflugzeuge regeln. Das Grundgesetz wird zurechtgebogen*, ZEITONLINE, Oct. 2, 2003, <http://www.zeit.de/2003/41/Luftsicherheit>.

Second, a closer examination of the many different constitutional provisions presented in the foregoing survey suggests the possibility that the Basic Law's text and Germany's established constitutional doctrine explain the differences in the Court's approach to national security issues. For example, the high priority the Court gave to human dignity in the *Aviation Security Act Case* draws on well-established doctrine that places human dignity, as an inviolable absolute, at the top of the Basic Law's hierarchy of constitutional principles. In fact, much of the Court's liberty-enhancing jurisprudence in the post-9/11 era has been achieved by way of the Court's elevation of lower-order constitutional liberties, reading them as facets of the higher-order protection the Basic Law gives to human dignity. It must be noted also that Articles 10 and 13 of the Basic Law, which were at the center of the Court's earlier jurisprudence, are accompanied by limitations clauses. There is, then, good reason for the Court's less robust endorsement of those liberty interests in the *Acoustic Surveillance Case* and the *Telecommunications Surveillance Act Case*.

Third, the undeniably political character of the Constitutional Court suggests that we should not be surprised to find that changes in Germany's social and political perception of liberty and security filter through to the Court's decisions.<sup>108</sup> This possible explanation of the shift in the Court's national security jurisprudence is enhanced by the subjectivity inherent in the Court's balancing and proportionality analysis.<sup>109</sup> Thus, as commitments to fundamental rights and the fears aroused by security threats changed, so too has the balance the Court strikes between these values changed. With this in mind, one possible reading of the shift in the Court's national security jurisprudence would recognize that the Court sought to reinforce West Germany's too-fragile existence by pursuing a jurisprudence that favored security in the periods when the new-born Federal Republic still bore the gaping wounds of the Nazi shame and total capitulation, or later when the fledgling Federal Republic found itself squarely in the cross-hairs of the Cold War.

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108. DAS BUNDESVERFASSUNGSGERICHT IM POLITISCHEN SYSTEM (Robert Christian von Ooyen & Martin H.W. Möllers eds., 2006); ROBERT CHRISTIAN VON Ooyen, DER BEGRIFF DES POLITISCHEN DES BUNDESVERFASSUNGSGERICHT 180-211 (2005); CHRISTOPH MÖLLERS, DAS GRUNDGESETZ – GESCHICHTE UND INHALT 115-120 (2009); DAVID P. CONRADT, THE GERMAN POLITY 251-255 (8th ed. 2005); Kommers & Miller, *supra* note 6.

109. Bernhard Schlink, *German Constitutional Culture in Transition*, 14 CARDOZO L. REV. 711, 714-715 (1993) (“[A]s rules of optimization, fundamental rights [in a balancing jurisprudence] . . . guarantee the citizen entitlements only in accordance with what is legally and actually possible. In this view, because conflicts are unavoidable among fundamental rights, as well as between fundamental rights and state interests, the entitlement to a fundamental right does not go beyond its enforcement in the conflict. The degree of enforcement will be more in one conflict, less in another; it is as much as possible and, to the extent possible, the optimum.”).

The shift in the Court's approach to national security cases coincides with the post-reunification emergence of an increasingly self-confident, ever more "normal" Germany.<sup>110</sup> As part of that normalcy, German society, politics, and institutions, have distanced themselves from the American-led "war on terror" and sought to cast Germany as a model for the rule of law, drawing particularly on the very legacy that justifies our comparative interest in the Federal Republic in the first place. In support of this view of the Constitutional Court's liberty-enhancing post-9/11 jurisprudence, one need only consider the prescient remarks of Jutta Limbach, the Constitutional Court's President during the fateful period in 2001. Just days after the September 11, 2001 terrorist attacks then-Constitutional Court President Limbach clearly signaled the coming trend in the Court's jurisprudence:

Terrorism seeks to move us to give up on our civil virtues such that we renounce the freedoms of civil society and the necessity of tolerance, which are the foundations of our democracy. But powerlessness and hate are neither promising nor recommendable answers to acts of barbaric terrorism. . . . If the civilized world hopes to be victorious it cannot allow itself to compromise its respect for its fundamental values. Especially the recognition of the dignity and freedom of humankind distinguishes democracy from totalitarian ideologies. Human dignity and human rights know no weapons; rather, only citizens who make the observation of human dignity and human rights an obligation. We grieve together today over the still uncounted victims who have died as members of a society which aims for the highest ideals of human dignity and peace. We honor these victims best when we understand their deaths as a challenge to our shared, fundamental Western values; and we respond by championing these values. In this way, in our parting with these victims, we guarantee that every human matters.<sup>111</sup>

This is only a handful of the many rich, contextually embedded themes that comparatists in national security law would be obliged to explore before drawing conclusions from the German experience for the American struggle to balance security and liberty. Surely the urgency, complexity, and transnational nature of the global, fundamentalist terrorist threat justify that effort.

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110. See MARY-ANN MCGRIFF, *GERMANY AS A NORMAL COUNTRY: NATIONAL IDENTITY AND NATIONAL SECURITY* (1995); Regina Karp, *Germany: A 'Normal' Global Actor?*, 18 GERM. POL. 12 (2009).

111. Jutta Limbach, *Every Human Matters – Comments on the Occasion of the Terrorist Attacks in America*, 2 GERM. L.J., Sept. 15, 2001, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=85>.