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OTHER PEOPLE'S PATRIOT ACTS: EUROPE'S RESPONSE TO SEPTEMBER 11

*Kim Lane Scheppele**

I. INTRODUCTION

September 11, 2001 was a shock not just to the United States but to the world. In the immediate aftermath of September 11, expressions of solidarity and collective grief were nearly universally expressed by world leaders.¹ Both regional² and multilateral organizations³ indicated their willingness to act with the United States in response to the attack. The United Nations condemned the attacks and urgently called for

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1. *World Leaders Express Outrage*, GUARDIAN (London), Sept. 11, 2001, available at <http://www.guardian.co.uk/september11/story/0,11209,600809,00.html> (last visited May 11, 2004).

2. For the reactions of regional organizations, see INTERNATIONAL BAR ASSOCIATION, TASK FORCE ON INTERNATIONAL TERRORISM, INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES 32-38 (2004) [hereinafter TASK FORCE ON TERRORISM]. The European Union Council of Ministers had an extraordinary session shortly after September 11 and expressed its solidarity and cooperation with the United States. Press Release, European Council, Conclusions and Plan of Action of the Extraordinary European Council Meeting (Sept. 21, 2001), available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/140.en.pdf.

3. The North Atlantic Treaty Organization (NATO) invoked the mutual defense provision of the NATO charter under Article 5 by declaring that if this were a foreign attack on the United States, then it would be considered an attack against all NATO members. Press Release, North Atlantic Treaty Organization, Statement by the North Atlantic Council (Sept. 12, 2001), available at <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

international cooperation to bring justice to those responsible for the atrocities.⁴ The attack was widely perceived as being not just on the United States but on the “civilized world.”⁵ In those first few days before America’s disbelief turned to intense national patriotism, there was a widespread sense that, while the attack may have been specifically directed against the United States, the whole world felt the pain.

Since September 11, America’s own reaction has become more inward-looking, unilateral, and self-absorbed. The rest of the world, however, is still engaged by September 11 and its continuing threats. In particular, America’s European allies, though split over the justifiability of the attack by the United States on Iraq in the spring of 2003, have by and large adopted a posture supportive of and complementary to that of the United States in the ongoing fight against terrorism. This Article examines the developing legal framework of Europe’s response to September 11, first by examining the international legal basis for Europe’s actions,⁶ then the responses of the European Union (EU) itself,⁷ followed by the legal reforms of two of the EU member states who represent the most starkly opposed trajectories of reaction—Germany⁸ and Britain.⁹ In closing there is an examination of the jurisprudence of the European Court of Human Rights’ decisions on terrorism-related issues after September 11,¹⁰ since it urges caution in the name of human rights against overreacting to the terrorist threat. Though there is a common sense that September 11 requires a strong response, there is a great variation in the extent to which preserving respect for human rights and civil liberties is considered an equally important task.

4. G.A. Res. 1, U.N. GAOR, 56th Sess., Supp. No. 1, U.N. Doc. A/56/PV1 (2001), available at <http://ods-ddsback-ny.un.org/doc/UNDOC/GEN/N01/475/00/PDF/N0147500.pdf?OpenElement>.

5. Tony Blair started using this term shortly after September 11. Philip Webster, *We Will Not Stop, We Will Not Flinch, Blair Tells Assembly*, TIMES OF LONDON, Oct. 31, 2001, 2001 WL 29001014.

6. See *infra* Part II.A.

7. See *infra* Part II.B.

8. See *infra* Part III.A.

9. See *infra* Part III.B.

10. See *infra* Part IV.

II. THE INTERNATIONAL LEGAL FRAMEWORK

A. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1373

The international framework for national legal changes in response to September 11 was given first and foremost by an extraordinary resolution of the United Nations (UN) Security Council, passed on September 28, 2001, while the wreckage of the Twin Towers still smoldered a short distance away. In Resolution 1373,¹¹ the Security Council required all states to take a wide variety of measures to fight terrorism—including, among other things, cutting off financing of terrorist acts, taking steps to prevent terrorism, criminalizing participation in terrorist attacks, refusing safe haven to terrorists, and preventing the state's territory from being used for terrorism.¹² Resolution 1373 also called for increased international cooperation in fighting terrorism, for more comprehensive sharing of information and for intensified restrictions on the movement of terrorists.¹³ Resolution 1373 was adopted under Chapter VII of the United Nations Charter, since the Security Council determined that the attacks of September 11 constituted "a threat to international peace and security."¹⁴ Under Chapter VII, the Security Council may direct member states to comply with the program it has adopted, rather than merely suggesting or recommending courses of action.¹⁵

Resolution 1373 set up a special monitoring body, the Counter-Terrorism Committee (CTC), which receives reports from member states indicating their compliance with the resolution.¹⁶ To date, this committee has received initial reports from nearly all of the member states of the United Nations and as many as three or four reports from some countries.¹⁷ The CTC reviews these reports and asks specific and pointed questions of the member states, obviously prodding them toward further compliance with the resolution through specific and concrete

11. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/Res/1373 (2001), available at <http://www.un.org/Docs/scres/2001.htm>.

12. *Id.* at 2.

13. *Id.* at 3.

14. U.N. CHARTER art. 42.

15. *Id.* art. 39.

16. S.C. Res. 1373, *supra* note 11, at 3.

17. United Nations, Counter-Terrorism Committee, States' Reports, at <http://www.un.org/Docs/sc/committees/1373/reports.html> (last visited May 11, 2004).

directions.

As human rights experts noted, however, Resolution 1373 contained two worrisome gaps—the lack of any definition of terrorism¹⁸ and the lack of any mandatory concurrent compliance with human rights norms in carrying out the fight against terrorism.¹⁹ Since the start of international efforts to fight terrorism, attempts to create a comprehensive approach to counter-terrorism policy have been stalled again and again by the absence of agreement on what “terrorism” encompasses. Can terrorism be committed by states or only by sub-national entities? Is it a set of specific techniques? Or necessarily attached to an overt political program? Are the violent tactics used by independence movements included in the definition of terrorism? Can criminal networks like drug traffickers or money launderers be counted among terrorists? Questions like these have prevented international agreement in the past, and rather than wait for a common view of what terrorism includes,²⁰ the Security Council acted to enlist the energies of member states to fight it. Without some common definition of terrorism, however, there is a concern that states will use counter-terrorism efforts to suppress political opposition or use militaristic techniques against “mere” criminals. The potential to apply the “terrorism” label to any politically disruptive individuals or groups carries with it a clear potential for abuse.

Another major worry about Security Council Resolution 1373 is that it does not explicitly link compliance with the resolution to compliance with human rights norms. Sir Jeremy Greenstock, the first chairman of the Counter-Terrorism Committee, made the disconnect clear:

The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the

18. TASK FORCE ON TERRORISM, *supra* note 2, at 30.

19. *Id.* at 31.

20. The UN General Assembly is apparently working on a framework treaty for dealing with terrorism, but the link on the CTC's website to a definition of terrorism points only to the General Assembly webpage without any further detail. United Nations, Counter-Terrorism Committee, *A Definition of Terrorism*, at <http://www.un.org/Docs/sc/committees/1373/definition.html> (last visited May 12, 2004).

Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums.²¹

Since the UN system's provisions for monitoring human rights compliance consists only of bodies that have the power to "name and shame" without the power to mandate specific actions on the part of states that violate human rights, the abdication of the human rights field by the Security Council's own terrorism committee is disturbing because only the Security Council has the power to order sanctions.

B. THE EUROPEAN UNION

Since terrorist attacks have a longer history in Europe than in the United States, a number of European countries—Britain, France, Italy, Portugal, Greece and Spain among them—already had enacted comprehensive counter-terrorism laws before September 11.²² The European Union (EU) itself did not have such a comprehensive, substantive framework for fighting

21. United Nations, Counter-Terrorism Committee, *Terrorism and Human Rights* (quoting Sir Jeremy Greenstock), at http://www.un.org/Docs/sc/committees/1373/human_rights.html (last visited May 12, 2004). Since this is the first offering on the Counter-Terrorism Committee's webpage in its link to the subject of human rights and terrorism, one might reasonably conclude that the signal being overtly sent to member states seeking to comply with Resolution 1373 is that they do not have to worry much about compliance with human rights norms. In a later meeting, however, Sir Jeremy apparently said that CTC is giving a prominent role to human rights, but the only reference available for this statement is found in a first-hand report of a special meeting where the comment was apparently made orally. TASK FORCE ON TERRORISM, *supra* note 2, at 31. The website remains unchanged.

In January 2003, the UN Security Council passed Resolution 1456, which encouraged all states to follow Resolution 1373. Buried in Resolution 1456 is the following admonition: "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." S.C. Res. 1456, U.N. SCOR, 4688th meeting, S/RES/1456 (2003) at 6 available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/216/05/PDF/N0321605.pdf?OpenElement>. The UN Security Council apparently added this after successive UN High Commissioners for Human Rights had testified before them that more attention to human rights was urgent and necessary. See United Nations, Office for the High Commission on Human Rights, *Terrorism and Human Rights*, available at <http://www.unhchr.ch/terrorism/> (last visited June 19, 2004). But Resolution 1456 is not brought under Chapter VII, and so it might justly be read as optional.

22. TASK FORCE ON TERRORISM, *supra* note 2, at 34 n.30.

terrorism as a domestic threat because terrorism was, according to the EU's structure of responsibilities, to be primarily regulated through each EU member state's criminal law framework.²³ Criminal law is a "Justice and Home Affairs" responsibility, structured as the "third pillar" within the EU's "three pillar" framework.²⁴ As such, terrorism was not a subject for community lawmaking but could only be fought in EU terms within a framework of mutual agreement among member states. After September 11, however, the EU moved to speed up cooperation and the creation of new institutional frameworks to deal with terrorism across all member states, giving a sharp push to further EU integration in this area.

A special meeting of the General Affairs Council of Ministers was held on September 12, during which it "reaffirm[ed] its determination to combat all forms of terrorism with all the resources at its disposal."²⁵ The Council of Justice and Home Affairs Ministers, which met later that month, agreed on a variety of concrete proposals that would result in more coordination and cooperation between police and intelligence services throughout the EU.²⁶ A month later, the General Affairs Council adopted an anti-terrorism "roadmap"²⁷ that included a

23. In the one exception to this, in 1986, the European Community put into place a Counter-Terrorism Working Group called COTER. This group was tasked with responsibilities under what later came to be known as the second pillar of the EU framework—foreign and security matters. These second-pillar efforts were also bolstered after 9/11. See Monica den Boer, "9/11 and the Europeanization of Anti-Terrorism Policy: A Critical Assessment." Notre Europe, Policy Paper #6, Sept. 2003, at 19 available at <http://www.notre-europe.asso.fr/fichiers/Polycypaper6.pdf>.

24. The EU's increasing legal integration has taken place around a structure of three different sorts of understandings about the relationship between community and national law. In "first pillar" areas like economic regulation, and other areas explicitly outlined by the set of treaties that make up EU law, EU law is superior to and binding on the member states and is enforceable by the European Court of Justice. European Union, *Structure of the European Union: The Three Pillars*, at http://europa.eu.int/eur-lex/en/about/abc/abc_12.html (last visited May 12, 2004). In the "second pillar" area of foreign and security policy, as well as in the "third pillar" area of justice and home affairs, the EU may only act by cooperation and consensus among all of the member states through their adjustments of national laws and policy. *Id.*

25. Press Release, European Union, General Affairs Council (Sept. 12, 2001), at <http://ue.eu.int/newsroom/newmain.asp?LANG=1>.

26. See Conclusions Adopted by the Council (Justice and Home Affairs), September 20, 2001. Doc. SN 3926/6/01 REV 6.

27. Council of the European Union, *Note From the Presidency*, available at <http://register.consilium.eu.int/pdf/en/01/st12/12800-r1en1.pdf> (last visited May 11, 2004).

proposal for a European arrest warrant and the creation of Eurojust, an agency tasked with improving judicial and prosecutorial cooperation within the community.²⁸ Though these proposals had been on the drawing board before September 11, the attacks in the United States hastened their passage from plan to reality. Eurojust was authorized in February 2002,²⁹ adding judicial and prosecutorial coordination to the existing Europol policing power. The pan-European arrest warrant was finalized in June 2002,³⁰ despite substantial worries about the abolition of the prior rule of double criminality, which had limited extraditions within the EU to persons accused of actions defined as crimes in both the sending and receiving country. The debates over the pan-European arrest warrant sharply focused attention on the differences among EU member states in their substantive criminal law. Neither Eurojust nor the pan-European arrest warrant is limited to terrorism offenses, but their adoption occurred in the shadow of concern over terrorism.

Perhaps the most significant step taken by the EU, specifically on the topic of terrorism, was the adoption in June 2002 of a Framework Decision on Combating Terrorism.³¹ This provided a common definition of terrorist acts that member states were committed to adopting as part of their domestic, substantive criminal law.³² The structure of the terrorism definition in the Framework Decision bears strong resemblance to hate crime legislation; particular offenses can be punished more harshly if done with a particular motivation.³³ The specific motivation to

28. Council of the European Union, Coordination of Implementation of the Plan of Action to Combat Terrorism, Doc. 12800/01 REV 1 (Oct. 17, 2001).

29. Council Decision Setting up Eurojust with a View to Reinforcing the Fight against Serious Crime, Doc. 2002/187/JHA (Feb. 28, 2002), *available at* http://www.eurojust.eu.int/pdfdec/l_06320020306en00010013.pdf (last visited June 19, 2004).

30. Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States, Doc. 2002/584/JHA (June 13, 2002), 2002 O.J. (L 190) 45 [hereinafter Council Framework Decision], *available at* www.europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_190/l_19020020718en00010018.pdf (last visited May 13, 2004).

31. Council of the European Union, Framework Decision on Combating Terrorism, Doc. 2002/475/JHA, 2002 O.J. (L 164) (June 13, 2002) 3 [hereinafter Framework Decision on Combating Terrorism], *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf (last visited June 19, 2004).

32. *Id.*

33. The list of concrete actions that can constitute terrorism if done with the

intimidate a population, pressure a government or destabilize a country is what brings an ordinary criminal act into the realm of a terrorist offense.³⁴ Here, too, the concern is over the breadth of the definition, particularly as terrorist actions have an irreducibly political quality, which they share with legitimate political dissent. If, as the International Bar Association Task Force on Terrorism points out, a demonstrator burns a city bus as a way of making a political point about what the government should do, this could be considered a very serious terrorist offense punishable by a very harsh sentence.³⁵ Alternatively, to continue the parade of worrying hypotheticals, someone who interrupts the process of fluoridating water to pressure the government to take the health risks of chemically treated water seriously might be in the same boat. Setting fire to a flag to protest a government action could also be counted as a terrorist act, if the fire accidentally spread. One can easily add to the examples where political dissent might cross over into being considered a terrorist offense, under the EU definition.

Along with the redefinition of terrorism offenses, recommendations were made both for harsher punishments and for expansion of the set of potential terrorists to include terrorist groups, as well as individual terrorists.³⁶ Punishment for terrorism offenses was also extended to those who incited, aided or abetted such crimes. In addition, the Framework Decision created the category of a "terrorist-linked" offense that could also be punished as terrorism.³⁷ These terrorist-linked offenses included aggravated theft, extortion and production of false documents to support a terrorist act.³⁸

appropriate motivation includes: attacks upon life or physical integrity; kidnapping or hostage taking; destroying government facilities, public facilities or transportation systems; seizing aircraft or other means of transportation; doing nearly anything with biological or chemical weapons; releasing dangerous substances into the environment or causing fires, floods or explosions; interfering with the supply of water or other public utilities or threatening to commit any of these acts. *Id.* art. 1(1).

34. The relevant motivation is defined as "seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization." Framework Decision on Combating Terrorism, *supra* note 31, art. 1(1).

35. TASK FORCE ON TERRORISM, *supra* note 2, at 35.

36. Framework Decision on Combating Terrorism, *supra* note 31, art. 2.

37. *Id.* art. 3.

38. *Id.*

The Framework Decision required all EU member states to pass legislation implementing its provisions within six months, so that all EU states, in theory, would have harmonious laws on the books by the end of 2002.³⁹ To ensure continued compliance, the Council put into place a system for expert evaluation of the steps that member states were taking to comply with the Framework Decision.⁴⁰

September 11 seems to have sped up development, already in progress, toward a common policing and security policy across Europe. With respect to terrorism offenses, one might say that September 11 created pressure for harmonization of domestic criminal law across the EU faster than previously thought possible.

III. EUROPEAN PATRIOT ACTS: GERMANY AND THE UNITED KINGDOM

Operating under the UN Security Council Resolution 1373 and the EU's Framework Decision on Terrorism, how have individual European states dealt with the new urgency of a terrorist threat? At a minimum, one might reasonably guess that both Security Council Resolution 1373 and the EU Council Framework Decision would require a fair amount of tinkering with domestic law, and tinker many countries did.⁴¹ After September 11, two new European national laws stand out. A post-September 11 law was rushed through the British Parliament, even though a broad codification of its piecemeal anti-terrorism laws had been adopted a year earlier.⁴² Germany, which had numerous partial pre-September 11 anti-terrorism

39. Framework Decision on Combating Terrorism, *supra* note 31, art. 11.

40. Council of the European Union, Council Decision Establishing a Mechanism for Evaluating the Legal Systems and their Implementation at National Level in the Fight Against Terrorism, Doc. 21715/02, 2002 O.J. (L 349) 1 (Oct. 11, 2002), available at <http://register.consilium.eu.int/pdf/en/02/st12/12715en2.pdf> (last visited May 12, 2004).

41. See, e.g., United Nations, *Report to the Counter-Terrorism Committee Pursuant to Paragraph 6 of Security Council Resolution 1373 of 28 September 2001* (providing an explanation of the legislative actions taken in the British Parliament to address terrorism after September 11), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/715/09/PDF/N0171509> (last visited May 13, 2004). Reports of other member states are available at http://www.un.org/Docs/sc/committees/1373/submitted_reports.html (last visited May 13, 2004).

42. For a detailed guide to both laws, see CLIVE WALKER, *BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION* (2002).

laws,⁴³ adopted changes to both its criminal code and also to its investigative procedures shortly after September 11.⁴⁴

In reviewing European post-September 11 laws, this article focuses on Germany and the United Kingdom (UK). These two countries have been chosen because they represent very different approaches to terrorism prevention. Germany's approach is highly formalized with many checks provided by both separation of powers and judicial review of rights violations. Britain's approach, however, is more casual and consensual. Since its increasing integration into European institutions, the UK, however reluctantly, has been moving toward a more formal system for the protection of civil liberties. Since Germany and Britain were the two European countries to rush to enact relatively broad terrorism laws after September 11, this also makes for a good comparison of alternatives.

The consideration of these two frameworks will of necessity be only partial. Just as it is difficult to work through the layers of secrecy in the United States to see how counter-terrorism policy works in practice, it is also difficult to see through the secrecy in the European processes around security issues to view how the laws on the books are carried out in practice. But, as in the United States, it is possible to review the legal framework regulating such processes, which themselves reveal a great deal about a country's strategy for fighting terrorism.

A. GERMANY

Given Germany's past history of aggression against its neighbors and its massive violations of human rights against targeted populations in the first half of the twentieth century, the German Basic Law (Constitution) of 1949 instituted a number of serious safeguards both against militarism and against the danger of human rights violations. The new constitution was to prevent such things from ever happening again.⁴⁵ As a result, the

43. For an account in English of the relevant anti-terrorism legislation in Germany before September 11, see James I. Nelson, *Antiterrorismus: The German Experience with Politically Motivated Violence*, 20 PENN ST. INT'L L. REV. 563 (2002).

44. See Oliver Lepsius, *The Relationship Between Security and Civil Liberties in the Federal Republic of Germany After September 11* (Am. Inst. for Contemporary German Studies Working Paper 2002) (discussing German Counter-Terrorism legislation and the balance between security and liberty after September 11), available at <http://www.aicgs.org/publications/PDF/lepsiusenglish.pdf>.

45. The Preamble to the Basic Law indicates this renunciation of the past:

German constitutional order has an unusually large number of checks on concentrations of power as well as avenues for complaint about the violations of human rights in conjunction with policing, security, and defense matters.⁴⁶

First, the German Basic Law renounces aggressive military action against other states and indicates that actions leading to war must be criminalized.⁴⁷ Instead, principles of international law are automatically incorporated as federal law, superior to statutes, directly creating both rights and duties for inhabitants of Germany.⁴⁸ This incorporation of international law constitutionalizes the right for all those residing in Germany to appeal to international bodies, particularly the European Court of Human Rights, for redress of human rights infringements, presumably even in a time of crisis.

When it comes to crises, the German Basic Law, through amendment in 1968, adopted explicit textual guidance for what could and could not be done in "states of defense."⁴⁹ In the public

"Conscious of their responsibility before God and men, moved by the purpose to serve world peace as an equal part in a unified Europe, the German People have adopted, by virtue of their constituent power, this Constitution."

GRUNDGESETZ [GG] [Constitution] *translated in* THE BASIC LAW (GRUNDGESETZ) (Axel Tschentscher trans., 2002) *available at* <http://www.jurisprudencia.de/jurisprudencia.html>.

46. *See infra* notes 47-87.

47. *Article 26 [Ban on War]*

(1) Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare war or aggression, are unconstitutional. They have to be made a criminal offence.

Id. art. 26(1), *translated in* THE BASIC LAW, *supra* note 45, at 31.

48. *Article 25 [Public International Law]*

The general rules of public international law constitute an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory.

Id. art. 25, *translated in* THE BASIC LAW, *supra* note 45, at 31. Note that this protection applies to all residents, not just citizens.

49. *Article 80a [State of Defence]*

(1) Where this Constitution or a federal statute on defence, including the protection of the civilian population, stipulates that legal provisions may only be applied in accordance with this Article, their application is, except in a state of defence, admissible only after the House of Representatives [Bundestag] has determined that a state of tension exists or where it has specifically approved such application. In respect of the cases mentioned in Article 12a V 1 & VI 2, such determination of a state of tension and such specific approval requires a two-thirds majority of the votes cast.

(2) Any measures taken by virtue of legal provisions enacted under Paragraph I have to be revoked whenever the House of Representatives [Bundestag] so demands.

(3) In derogation of Paragraph I, the application of such legal provisions is also

debates surrounding the adoption of these amendments, the "trauma of Weimar"⁵⁰ was ever-present, since the Weimar Constitution's infamous Article 48 detailing a constitutional procedure for a state of emergency had assisted the dissolution of the constitution in 1933 and permitted the rise of Nazi government.⁵¹ As a result, the present Basic Law requires approval of both houses of Parliament for the declaration and maintenance of states of defense, taking such discretion out of the hands of the executive.⁵² If the Parliament cannot meet, a joint

admissible by virtue of and in accordance with a decision taken with the consent of the Government by an international body within the framework of a treaty of alliance. Any measures taken pursuant to this paragraph have to be revoked whenever the House of Representatives [Bundestag] so demands with the majority of its members.

Id. art. 80a, translated in THE BASIC LAW, *supra* note 45, at 88-93.

Article 115g [Functions of Federal Constitutional Court]

The constitutional status and the performance of the constitutional functions of the Federal Constitutional Court and its judges may not be impaired. The Federal Constitutional Court Act may not be amended by a statute enacted by the Joint Committee except insofar as such amendment is required, also in the opinion of the Federal Constitutional Court, to maintain the capability of the Court to function. Pending the enactment of such a statute, the Federal Constitutional Court may take such measures as are necessary to maintain the capability of the Court to carry out its work. Any decisions by the Federal Constitutional Court in pursuance of the second and third sentence of this Article requires a two-thirds majority of the judges present.

Id. art. 115g, translated in THE BASIC LAW, *supra* note 45, at 59-60.

A number of the permissible limitations on rights that are later discussed were also part of the 1968 amendments. It may be useful in the present context to note that 1968 was a year of substantial domestic upheaval in Germany and the amendments were immensely controversial when they were adopted. However, the major domestic terrorism campaigns in Germany by the Baader-Meinhof Gang and the Red Army Brigades did not start until 1970.

50. C. C. Schweitzer, *Emergency Powers in the Federal Republic of Germany*, 22 W. POL. Q. 112, 113 (1969).

51. *Id.*

52. *Article 115a [State of Defence]*

(1) The determination that federal territory is being attacked by armed force or that such an attack is directly imminent (state of defence) are made by the House of Representatives [Bundestag] with the consent of the Senate [Bundesrat]. Such determination are made at the request of the Government and require a two-thirds majority of the votes cast, which include at least the majority of the members of the House of Representatives [Bundestag].

(2) Where the situation imperatively calls for immediate action and where insurmountable obstacles prevent the timely assembly of the House of Representatives [Bundestag], or where there is no quorum in the House of Representatives [Bundestag], the Joint Committee makes this determination with a two-thirds majority of the votes cast, which includes at least the majority of its members.

(3) The determination is promulgated in the Federal Law Gazette by the President pursuant to Article 82. Where this cannot be done in time, the promulgation is effected in another manner; subsequently, it has to be printed in the Federal Law Gazette as soon as circumstances permit.

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committee of members of both chambers can perform the functions that would normally be performed by the whole of each body, but the executive cannot act alone.⁵³

In addition to the substantial protections against arbitrarily declared or executive-dominated states of defense, the German Basic Law is unusually precise in indicating what can and cannot be done domestically in the name of national defense with respect to infringement on fundamental rights. For example, Article 17(a) of the Basic Law indicates that statutes enacted for national defense in order to protect the population may place limited restrictions on two of the fundamental rights—that of freedom of movement (Article 11) and inviolability of the home (Article 13).⁵⁴ Through this precise accounting, it is clear that other basic rights cannot be restricted in exceptional ways even in the name of national defense.⁵⁵ As part of the constitutional elaboration of the

(4) Where the federal territory is being attacked by armed force and where the competent bodies of the Federation are not in a position at once to make the determination provided for in Paragraph 1, such determination is deemed to have been made and promulgated at the time the attack began. The President announces such time as soon as circumstances permit.

(5) Where the determination of the existence of a state of defence has been promulgated and where the federal territory is being attacked by armed force, the President may, with the consent of the House of Representatives [Bundestag], issue declarations under international law regarding the existence of such state of defence. Where the conditions mentioned in Paragraph 2 apply, the Joint Committee acts in substitution for the House of Representatives [Bundestag].

GRUNDGESETZ [GG] [Constitution] art. 115a (F.R.G.), *translated in* THE BASIC LAW, *supra* note 45, at 90-91.

53. *Id.* art. 115(a)(2).

54. Article 17a(2): "Statutes serving defence purposes including the protection of the civilian population can provide for the restriction of the basic rights of freedom of movement (Article 11) and inviolability of the home (Article 13)."

Id. art. 17a(2), *translated in* THE BASIC LAW, *supra* note 45, at 26-27.

55. Article 19 of the Basic Law governs how rights may be limited in normal times. Judicial review is always available to determine whether rights have been limited in appropriate ways, save in cases of alleged violation of the right of privacy of communication, which substitutes a form of parliamentary review for the usual judicial review.

Article 19 [Restriction of Basic Rights]

(1) Insofar as a basic right may, under this Constitution, be restricted by or pursuant to a statute, such statute must apply generally and not solely to an individual case. Furthermore, such statute must name the basic right, indicating the relevant Article.

(2) In no case may the essence of a basic right be infringed.

(3) Basic rights also apply to domestic corporations to the extent that the nature of such rights permits.

(4) Should any person's rights be violated by public authority, recourse to the court is open to him. Insofar as no other jurisdiction has been established, recourse is available to the courts of ordinary jurisdiction. Article 10(2) is not

state of defense under Article 115, the Basic Law is explicit that the Constitutional Court must remain open and functional during the crisis.⁵⁶

This three-part structure—renouncing war while adopting international law, providing substantial separation-of-powers barriers against arbitrariness and executive overreaching in declaring domestic states of defense, and protecting individual rights during states of crisis—has strong implications for anti-terrorism activities. It tends to channel anti-terrorism measures from a war footing to a criminal-law footing because the defense-based measures are nearly impossible to invoke. Thinking of the anti-terrorism campaign after September 11 as a “war” was simply not an obvious constitutional possibility.⁵⁷

As a result, anti-terrorism campaigns have been handled largely through criminal law and criminal procedure. But if one goes looking through the Basic Law for the constitutional anchor for specific rights of criminal defendants, one will find few. Specifically, constitutional provisions regarding judicial review of arrests and detention can be found in Article 104, which indicates that those detained must be brought before a judge before the end of the day after detention, if the arrest is made without prior warrant or provisionally on “suspicion of [the individual] having committed an offense.”⁵⁸ No detention can be continued without

affected by the provisions of this paragraph.

GRUNDGESETZ [GG] [Constitution] art. 115g (F.R.G.), *translated in* THE BASIC LAW, *supra* note 45, at 31.

56. *Id.* art. 115g, *translated in* THE BASIC LAW, *supra* note 45, at 93.

57. As Oliver Lepsius explains, “In Germany, the attacks [of September 11] were perceived as a qualitatively new type of an act of terrorism, not as an act of war. For Germans a dividing line between terrorism and war was maintained.” Lepsius, *supra* note 44, at *6.

58. *Article 104 [Legal Guarantees to Protect Liberty]*

(1) The liberty of the individual may be restricted only by virtue of a formal statute and only in compliance with the forms prescribed therein. Detained persons may not be subjected to mental or to physical ill-treatment.

(2) Only judges may decide on the admissibility or continuation of any deprivation of liberty. Where such deprivation is not based on the order of a judge, a judicial decision has to be obtained without delay. The police may hold no one on their own authority in their own custody longer than the end of the day after the day of apprehension. Details are regulated by legislation.

(3) Any person provisionally detained on suspicion of having committed an offence has to be brought, not later than the day following the day of apprehension, before a judge who has to inform him of the reasons for the detention, examine him, and give him an opportunity to raise objections. The judge, without delay, has to either issue a warrant of arrest setting forth the reasons therefor or order his release from detention.

(4) A relative or a person enjoying the confidence of the person detained has to

judicial approval and no detention can be effected at all unless pursuant to a properly enacted statute.⁵⁹ Additionally, no detainee may be subjected to either mental or physical abuse.⁶⁰ Beyond these provisions, the constitution says little about the rights of criminal suspects.⁶¹ However, this is only the surface of the Basic Law.

Instead of including rights like the presumption of innocence and the right to counsel in the Basic Law, the German Code of Criminal Procedure regulates such things.⁶² The Code, however, is considered to be the "constitutionalization" of this area of law since both the rule-of-law clause and the fundamental rights listed in the Basic Law permeate the Code.⁶³ Behind the Code is a constitutionally required respect for basic principles of the fundamental rights, such as the principle that human dignity is inviolable and without limitation.⁶⁴ Fundamental rights do not altogether block investigative methods or surveillance, but they greatly limit the extent to which such methods can be used. For example, the protection of liberty⁶⁵ and privacy of

be notified without delay of any judicial decision imposing or ordering the continuation of his deprivation of liberty.

GRUNDGESETZ [GG] art. 104 (F.R.G.), *translated in* THE BASIC LAW, *supra* note 45, at 78-79.

59. *Id.*

60. *Id.*

61. Article 103 of the Basic Law protects due process, including the right to a hearing, the right not to be tried twice for the same offense and the right to be tried only for criminal offenses defined as such when the act in question was committed:

Article 103 [Due Process]

(1) In the courts, everyone is entitled to a hearing in accordance with the law.

(2) An act can be punished only where it constituted a criminal offence under the law before the act was committed.

(3) No one may be punished for the same act more than once under general criminal legislation.

Id. art. 103, *translated in* THE BASIC LAW, *supra* note 45, at 78.

62. An English translation of the German Code of Criminal Procedure can be found at <http://www.iuscomp.org/gla/statutes/StPO.htm> (last visited June 19, 2004).

63. See, e.g., Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 814 n.29 (2000).

64. *Article 1 [Human Dignity]*

(1) Human dignity is inviolable. To respect and protect it is the duty of all state authority.

(2) The German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world.

GRUNDGESETZ [GG] art. 1 (F.R.G.), *translated in* THE BASIC LAW, *supra* note 45, at 18.

65. *Article 2 [Liberty]*

(1) Everyone has the right to free development of his personality insofar as he

communications⁶⁶ are to be read throughout the criminal procedure code as substantial barriers on police and prosecutorial activity. When any right is infringed, the Basic Law requires that such infringement never touch the “essence” of the right.⁶⁷ However, in the case of privacy of communications in Article 10, there was a lively debate as to whether constitutional amendments made in 1968 themselves infringed the essence of the right. The 1968 amendments allowed infringement on privacy of communications if the restriction “serves the protection of the free democratic basic order or the existence or security of the Federation”⁶⁸ Moreover, the amendment substituted parliamentary oversight for judicial review to rule on cases of individual violation.⁶⁹ The result was the creation of Article 10 review bodies, which is further discussed below.⁷⁰

This limitation on privacy of communications is uncharacteristically broad and vague in the German constitutional scheme of things. The amendment was therefore itself constitutionally challenged before the Federal Constitutional Court in the *Klass* case.⁷¹ Because of this extraordinary limitation on a constitutionally protected right and the fact that judicial review of violations of the right was to be barred in these cases, the dissenting judges were willing to

does not violate the rights of others or offend against the constitutional order or morality.

(2) Everyone has the right to life and to physical integrity. The freedom of the person is inviolable. Intrusion on these rights may only be made pursuant to a statute.

Id. art. 2, translated in THE BASIC LAW, *supra* note 45, at 18.

66. Article 10 [Letters, Mail, Telecommunication]

(1) The privacy of letters as well as the secrecy of post and telecommunication are inviolable.

(2) Restrictions may only be ordered pursuant to a statute. Where a restriction serves the protection of the free democratic basic order or the existence or security of the Federation or a State [Land], the statute may stipulate that the person affected shall not be informed and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament.

GRUNDGESETZ [GG] [Constitution] art. 10 (F.R.G.), translated in THE BASIC LAW, *supra* note 45, at 21.

67. *Id.* art. 19(2), translated in THE BASIC LAW, *supra* note 45, at 27.

68. *Id.* art. 10(2), translated in THE BASIC LAW, *supra* note 45, at 21.

69. *Id.*

70. See *infra* notes 103-07 and accompanying text.

71. *The Klass Case*, Judgment of 15 December 1970, BVerfGE 30, 1. An edited English translation can be found at Privacy of Communications (*Klass*) case, COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES 660 (Walter F. Murphy & Joseph Tanenhaus trans. & eds., 1977).

declare that the constitutional amendment allowing infringement of the privacy of communications was itself unconstitutional.⁷² The majority, however, was evidently persuaded to uphold the amendment against the challenge on the grounds that the Parliament had at least substituted a form of individualized parliamentary review for judicial review.⁷³ The majority rejected the part of the statute that prohibited notification of the target of the surveillance after the surveillance was completed, indicating that a targeted person had to be informed of such surveillance, otherwise the right to challenge it would effectively be taken away.⁷⁴ It seems that the idea that a constitutional amendment could be unconstitutional was too radical for the majority. This decision was followed by a confirming ruling from European Court of Human Rights, reaching the same conclusion that the parliamentary mechanisms were enough to ensure the realization of the right to privacy.⁷⁵ The European Court of Human Rights, however, expressed some concern that judicial review had been expressly blocked in this area.

The amendment to Article 10 of the Basic Law later produced another Constitutional Court challenge. This time the challenged practices related to "strategic surveillance" of wireless communications.⁷⁶ In American terms, strategic surveillance would be called signals intercepts, and it would, as in Germany, be used for the more diffuse purpose of national security protection, rather than for the more concrete search for evidence of crime.⁷⁷ In Germany, the challenged form of surveillance involved computer screening of international communications to determine whether certain key words or phrases appeared in these communications. If such clues appeared, then individually identifiable communications might be subjected to human review. If evidence of a crime were found through such surveillance, it could be turned over to the relevant state agencies for further

72. *The Klass Case*, BVerfGE 30, 1. See *infra* notes 303-08 for further discussion of the *Klass* case.

73. *Id.*

74. *Id.*

75. *Klass v. Germany*, 2 Eur. H.R. Rep. 214 (1979).

76. *The Case of Professor Dr. K*, Judgment of 14 July 1999, BVerfGE 100, 317, translation of the Federal Constitutional Court. I would like to thank Russell Miller for providing me with this translation of the decision.

77. See generally for the United States, William C. Banks and M.E. Bowman, *Executive Authority For National Security Surveillance*, 50 AM. U. L. REV. 1, 7-10 (2000).

action even though the procedures through which the evidence was gathered in the first place involved no individuated suspicion that the target of the surveillance had done anything wrong before the surveillance was undertaken. Strategic surveillance, according to the Federal Constitutional Court, was permissible in theory, but the state had to take more measures than it presently had to ensure that data collection, transfer, and retention of individually identifiable information were kept to a minimum. Such measures also had to be continually reviewed so that they remained narrowly tailored to achieve the legitimate statutory objectives of the security agencies and of any other state agencies to which individually identifiable information might be passed on.⁷⁸ Restrictions on the right to privacy of communications guaranteed in the Basic Law were only permissible if they were proportional to the objectives, a balance which, the court said, the challenged law had not struck properly because it allowed the relatively easy distribution of personally identifiable information for a wide variety of purposes.⁷⁹ Either the Parliament had to restrict the range of purposes for which the data could be used if the data transfers were to be as easy as they were in the challenged law, the court said, or the data transfers had to be made much more difficult to accomplish if the purposes for which the data could be used were of such great breadth. Consequently, the court declared parts of the surveillance law to be unconstitutional.⁸⁰

In another area where fundamental rights might bear on criminal investigation and surveillance, Article 13(1) says plainly, "The home is inviolable."⁸¹ In 1998, this article of the Basic Law was amended to allow electronic bugging of a home, but only under highly restricted circumstances.⁸² The amendment, now Article 13(2)-(7), indicates that surveillance inside a home might be undertaken only "If specific facts lead to the assumption that

78. *The Case of Professor Dr. K*, BVerfGE 100, 317, *supra* note 76.

79. *Id.*

80. *Id.*

81. Article 13(1): "The home is inviolable."

GRUNDGESETZ [GG] art. 13(1) (F.R.G.), *translated in* THE BASIC LAW, *supra* note 45, at 23.

82. Article 13(2): "Searches may be ordered only by a judge or, in the event of danger resulting from any delay, by other organs legally specified, and they may be carried out only in the form prescribed by law."

Id. art. 13(2), *translated in* THE BASIC LAW, *supra* note 45, at 23.

someone has committed a very grave crime.”⁸³ Furthermore, surveillance may be conducted only on the order of a three-judge panel for a limited duration upon the showing that other methods of discovering the information are unlikely to be successful.⁸⁴ However, in an urgent situation, a single judge may approve such an order.⁸⁵ Information gained through such surveillance may only be used “to conduct criminal prosecution or to avoid danger, and only if the legality of the measure has been stated by court order.”⁸⁶ Before 1998, bugging of a home was considered to be a violation of Article 13 and, at least according to one judge, “judges were not competent to authorize such investigative measures. And, self-evidently, the police and the public prosecutor were thus not allowed to implement them. Our [German] criminal prosecution authorities have obeyed this.”⁸⁷

The German Constitution guarantees judicial review of all alleged rights violations with the exception of those specifically exempted in the amendment to Article 10.⁸⁸ The aggressive protection of basic rights, which has been exercised by the Federal Constitutional Court in particular, has had a strong

83. Article 13(3):

If specific facts lead to the assumption that someone has committed a very grave crime, technical means of eavesdropping in homes where that person probably stays may be ordered by court if the investigation by other means would be unproportionally obstructed or without chance of success. The measure has to be limited. The order is issued by a court of three justices. In the event of danger resulting from any delay, the order can be issued by a single judge.

Id. art. 13(3), translated in THE BASIC LAW, *supra* note 45, at 23-24.

84. GRUNDGESETZ [GG] art. 13(3) (F.R.G.), translated in THE BASIC LAW, *supra* note 45, at 23.

85. *Id.*

86. Article 13(5):

In the case of technical means being exclusively ordered for the protection of investigators during their activity in homes, the measure can be ordered by those authorities empowered by law. Evidence from such investigation may be used for other purposes only to conduct criminal prosecution or avoid danger and only if the legality of the measure has been stated by court order; in the event of danger resulting from any delay, a subsequent court order has to be arranged for without delay.

Id. art. 13(5), translated in THE BASIC LAW, *supra* note 45, at 24.

87. Volker F. Krey, *Characteristic Features of German Criminal Proceedings—An Alternative to the Criminal Procedure Law of the United States?*, 21 LOY. L.A. INT'L & COMP. L.J. 591, 594 (1999). Volker F. Krey served on the German Court of Appeals from 1978 to 1998. *Id.* at 591 n.1. A later Constitutional Court decision indicates that judges still find such methods constitutionally problematic, even with the constitutional amendment. See *infra* note 149.

88. GRUNDGESETZ [GG] art. 19(4) (F.R.G.), translated in THE BASIC LAW, *supra* note 55, at 27. For the amendments to art. 10, see THE BASIC LAW, *supra* note 45, at 21.

effect on other public institutions.

In light of these strong constitutional commitments, both to anti-militarism and to human rights, how can Germany defend itself, either against crime of the ordinary sort or against terrorism on a grander scale? The first line of defense is through the ordinary police who, in the scheme of German federalism, tend to be strongest at the state (Land) level because they have the capacity to enforce not only state law, but federal law as well.⁸⁹ While there is a Federal Criminal Police Office (the Bundeskriminalamt or BKA), it is relatively weaker than the American FBI. The BKA is limited to: (1) matters that cross the borders of states and that therefore cannot be controlled by the state-level police alone and (2) investigation of international crimes over which the separate states have no jurisdiction.⁹⁰ As we have already seen, the constitutionalized Code of Criminal Procedure contains relatively strict regulation of police conduct in investigations.

Germany has three major intelligence services, though with the end of the Cold War and the unification of Germany some have challenged the need to have intelligence institutions at all.⁹¹ The intelligence services are not only institutionally separated from the police and from each other, but they are also physically separated in different cities as well.⁹² The attacks of September

89. See Nelson, *supra* note 43, at 577-79 (providing an overview of the German agencies charged with fighting terrorism).

90. *Id.* at 578-79.

91. Shlomo Shpiro, *Parliament, Media and Control of the Intelligence Services in Germany*, in DEMOCRACY, LAW AND SECURITY: INTERNAL SECURITY SERVICES IN CONTEMPORARY EUROPE 294, 295 (Jean-Paul Brodeur et al. eds., 2003) [hereinafter Shpiro, *Parliament, Media and Control of the Intelligence Services in Germany*].

92. One of the interesting aspects of German separation of powers, copied by a number of countries, is that institutional separation of powers is often accompanied by physical separation of the institutions in different geographical locations. This means that the occupants of the various offices tend not to socialize with each other, which increases the institutional separation. As Jane Kramer, writing in the *New Yorker*, states:

In a country still so nervous about displays of power that it is considered unseemly even to talk about turning Berlin's Philharmonic into a national orchestra, it isn't surprising that most of the people charged with identifying, investigating, arresting, and prosecuting terrorists don't usually get anywhere near the capital, or even anywhere near one another. Germany has as many spies and cops as the next country. Eight thousand people are attached to the Verfassungsschutz and the B.N.D., five thousand to the B.K.A. But the old Allied imperative of 1949—power in Germany must never again be centralized—still holds. The Verfassungsschutz is headquartered in Cologne; the B.N.D. in Pullach, about half an hour from Munich; the Federal Prosecutor

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11 resulted in some expansion of their previous powers, but by and large the basic structure of the intelligence services remains the same.

The Federal Intelligence Service (Bundesnachrichtendienst or BND) is tasked with collecting and analyzing security-related information originating outside Germany, including signals intelligence.⁹³ It is institutionally housed in the Office of the Federal Chancellor and is physically located just outside of Munich.⁹⁴ The BND has no domestic jurisdiction. The Military Counter-Intelligence Branch (Militaerischer Abschirmdienst or MAD) deals with security issues within the military and has no civilian jurisdiction.⁹⁵ Therefore, the institution of most interest to us in considering investigation and surveillance within Germany is the domestic security service, named appropriately enough, the Office for the Protection of the Constitution (Bundesamt für Verfassungschutz or BfV). The BfV is responsible for counter-espionage activities within Germany and is also supposed to monitor a wide variety of domestically based extremist groups.⁹⁶ It is institutionally housed within the Federal Ministry of the Interior and is physically based in Cologne.⁹⁷ It works with counterparts at the state level, but the federal level is by far the more powerful.

The BfV's statutory mandate is explicit and limited.⁹⁸ The office carries out its investigations primarily through the use of publicly available documents and methods available to all (for example, attending public meetings, reading newspapers, carrying out surveillance of subjects in public places or through

in Karlsruhe; the B.K.A. in Wiesbaden; and the state security offices of the B.K.A. in a town called Meckenheim, in North Rhine-Westphalia, which most Germans have yet to locate on a map.

Jane Kramer, *Letter from Europe: Germany's Troubled War on Terrorism*, NEW YORKER, Feb. 11, 2002, at 36.

93. See Shlomo Shpiro, *Parliamentary and Administrative Reforms in the Control of Intelligence Services in the European Union*, 4 COLUM. J. EUR. L. 545, 550-51 (1998) [hereinafter Shpiro, *Parliamentary and Administrative Reforms*] (discussing the structure of the German Intelligence Service).

94. *Id.* at 551.

95. Shpiro, *Parliament, Media and Control of the Intelligence Services in Germany*, *supra* note 91, at 296.

96. *Id.*

97. *Id.*

98. [Federal Constitution Protection Law] (BVerfSchG), v. 20.12.1990 (BGBl. I S. 867), *translation available at* <http://www.fas.org/irp/world/germany/docs/bverfg.htm> (last visited May 12, 2004).

voluntary interviews). The organization may also use agents to infiltrate groups, engage in postal checks or electronic surveillance (subject to the procedures of Article 10 of the constitution, elaborated below) and use secret photography.⁹⁹ However, the BfV does not “carry out any executive measures (arrests, search of premises, interrogations, confiscation of items). If the BfV establishes that judicial and police measures are required, the matter is handed over to agencies with appropriate legal powers (the courts, public prosecutors, police) which decide independently what action is justified.”¹⁰⁰

This organization of intelligence agencies has a substantial system of parliamentary checks, even though the agencies themselves are located within the executive branch. The Parliamentary Control Commission consists of nine members from the lower house of the parliament, five elected from within the governing coalition, and four elected from the opposition.¹⁰¹ The chairmanship of the committee rotates at six month intervals between the government and opposition parties.¹⁰² The government must report all intelligence activities to this committee which must itself report to the Bundestag once every two years.¹⁰³ The committee has access to a substantial amount of classified information that is excised from its required public reports.

In addition to the Parliamentary Control Commission, there are two committees that were required under the controversial amendments to Article 10 of the Constitution, which protects privacy of communications. These committees review surveillance practices of both the intelligence services and the police. The G-10 Gremium (named in honor of Article 10 of the Constitution) consists of nine members of the Bundestag. It meets every six months to review and direct general policies about interception of mail, wiretaps and other forms of electronic intercepts.¹⁰⁴ The G-10 Commission consists of four legal experts

99. [Federal Constitution Protection Law] (BVerfSchG), *supra* note 98.

100. Office for the Protection of the Constitution, *Tasks, Organization and Working Methods*, at http://www.verfassungsschutz.de/info/bfv/bfv_engl.htm (last visited May 12, 2004).

101. Shpiro, *Parliament, Media and Control of the Intelligence Services in Germany*, *supra* note 91, at 298.

102. *Id.*

103. *Id.*

104. *Id.* at 300.

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(and four alternates) who are nominated by their political parties and meet together with representatives from the intelligence services about once per month.¹⁰⁵ This group reviews the legality of each domestic communications intercept and has the right to suspend any individual intercept if it appears that the evidence sustaining it is weak or if the intercept infringes any law.¹⁰⁶ The committee even reviews the list of "hit words" that computers use in strategic surveillance to determine which specific conversations to turn over for human attention.¹⁰⁷ In addition to these ways of reviewing surveillance strategies, there is also the permanent possibility for the Parliament to set up a special investigating committee if any particular surveillance practice generates concern.¹⁰⁸

Outside of the parliamentary mechanisms, the press in Germany enjoys substantial constitutional and statutory protection to investigate intelligence and policing practices. Not only is press freedom guaranteed in the Constitution,¹⁰⁹ but there is an explicit constitutional prohibition on censorship.¹¹⁰ By statute, the press is guaranteed confidentiality of sources and informants, as well as immunity from police eavesdropping and searches of editorial offices.¹¹¹ As a result, media coverage of the police and intelligence services is quite common, detailed, and critical. And because the intelligence services have not been scandal-free, this media check has been quite useful.¹¹²

With this background, we can assess the changes made to Germany's security laws after September 11. The "first security

105. Shpiro, *Parliament, Media and Control of the Intelligence Services in Germany*, *supra* note 91, at 301.

106. *Id.*

107. *Id.* at 301-02.

108. Two separate parliamentary committees are charged with overseeing the budgets of the intelligence agencies, and the books of the agencies can be reviewed as well by a select group within the Federal Audit Office. *Id.* at 302-04.

109. *Article 5 [Expression]*

(1) Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There may be no censorship.

GRUNDGESETZ [GG] art. 5(1) (F.R.G.), *translated in THE BASIC LAW*, *supra* note 45, at 19.

110. *Id.*

111. Shpiro, *Parliament, Media and Control of the Intelligence Services in Germany*, *supra* note 91, at 306.

112. *Id.* at 305-08.

package,” sent to the parliament by the German cabinet on September 19, 2001, modified the criminal code, among other things.¹¹³ The criminal code was amended to punish creation of terrorist organizations, including foreign organizations for the first time. The amendments also forbid any participation in a criminal organization on German territory, even if the planned criminal acts were to take place outside of Germany.¹¹⁴ In addition, the first security package eliminated the previous exemption from criminal prosecution of extremist organizations that had a religious basis.¹¹⁵ Now extremist religious organizations can be prohibited on the same basis as other extremist groups. Finally, the first security package increased security checks for airport personnel.¹¹⁶ Most of these provisions were uncontroversial when passed and, coming as they did before either Security Council Resolution 1373 or the European Framework Decision on Combating Terrorism, they could be explicit responses to neither of them.

It is the “second security package” that should interest us because its provisions were primarily directed at the earlier detection of terrorist threats.¹¹⁷ And the second security package was by far the more controversial in Germany.¹¹⁸ Most of the provisions seem to have been a response to the UN Security Council resolution, something that can be seen not only from their concrete content, but because they came into effect on January 1, 2002, the deadline set out in the Security Council resolution. But the provisions passed only after fierce parliamentary debate that resulted in a weakening of a number of its central provisions. Even so, the second security package amended “nearly one hundred regulations in seventeen different statutes and five statutory orders.”¹¹⁹

The main provisions of the second security package increased the responsibilities and powers of the security agencies.

113. Lepsius, *supra* note 44, at *5.

114. *Id.* This last addition simply brought the German criminal code into line with what EU member states had obliged themselves to do by an agreement in December 1998. *Id.*

115. *Id.* at *6.

116. *Id.* at *5-6.

117. *Id.* at *6, *10-17. The “second security package’ has also been termed the counter-terrorism law.” *Id.* at *10.

118. *See* Lepsius, *supra* note 44, at *6.

119. *Id.* at *6.

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The BfV, the BND,¹²⁰ and the MAD¹²¹ were given the power to demand financial information about individuals from banks and other financial institutions, as well as from post offices, telecommunications companies and airlines, after having proved to a court the specific suspicion of terrorist activity that grounded the request.¹²² Those whose information has been turned over to the security authorities must not be notified that this exchange of data has occurred.¹²³ In addition, the BfV's jurisdiction was enlarged to enable it to gather information on organizations and individuals who "disturb the international understanding or peaceful cohabitation of peoples," the first time that the BfV had been given authority to investigate anything other than purely domestic organizations.¹²⁴ The various federal agencies responsible for tracking foreigners were given more powers to set up a central database containing a variety of personal information, including fingerprints, religious identification and the results of "language identity tests" designed to uncover the country of origin of an alien.¹²⁵ Police and security agencies were then given relatively unfettered access to this database. "Grid searches"¹²⁶ (or what Americans might call computer profiles) were given statutory approval and some government ministries with relevant personal information in their files were required to

120. Because the BND's jurisdiction is entirely focused on foreigners, this provision has to be intended to allow the BND access to information that is held within Germany about foreigners (for example, their bank accounts).

121. MAD's jurisdiction extends only to those in the military, so this information could pertain only to those within its ambit.

122. Lepsius, *supra* note 44, at *10-11.

123. *Id.* at *11.

124. *Id.* at *12.

125. *Id.* at *11.

126. Grid searches try to narrow down a group of suspects from a variety of demographic and personal data—say, on religion, age, sex, area of residence and immigration status. The objection to them typically is that someone falls into the category of suspicion not because of a reason that is particular to the person, but instead because that person shares with those who might be reasonably suspected a certain abstract characteristic. The Federal Constitutional Court, in the *Case of Professor Dr. K*, Judgment of 14 July 1999, BVerfGE 100, 313, discussed the problem of individuated suspicion and indicated that the standards for disseminating, storing and using information obtained in such a way had to be higher than if the information had been collected based on individuated suspicion. But the Court did not shut the door on such practices so it is unclear whether the Court would find grid searches similarly acceptable, if used within clear limits. A translation of the case is on file with the Loyola Law Review. *See also* Lepsius, *supra* note 44, at *15 (discussing the Court's decision).

give this information to the BKA.¹²⁷ New identity cards for Germans are now authorized to include biometric data like fingerprints.¹²⁸ The second security package also authorized both greater protection of sensitive sites like power stations and the use of air marshals in airline security.¹²⁹

The constitutional and rights-protection worries about the second security package center on three concerns. The first worry is the increased coordination allowed between the security services and the police, though this is limited to information-sharing based on strong showings of relevance to particular investigations and is not a blanket approval of anything like joint investigations.¹³⁰ This level of information-sharing was clearly encouraged both by the Security Council resolution and by the European Union anti-terrorism measures taken after September 11. Both sets of external measures encouraged the increase information-sharing across state borders so that security services and police would have access to terrorism-relevant information.¹³¹ Much criticism of the second security package focuses on the way in which this information-sharing undermines the strict separation of security and police agencies, which had been characteristic of post-war German public law.¹³²

The first worry is connected to a second—that the information collected in terrorism investigations can be stored for longer periods of time in databases with broader rules of access than has been customarily allowed in German law. European data privacy laws in general, and German laws in particular, confer protection far greater than anything Americans may expect on personal data, and the idea that personal information may be collected and stored for a period of months without an

127. Grid searches had been used to apprehend members of the Red Army Faction, a domestic terrorist group operating in Germany in the 1970s. While this practice was used on occasion before the second security package, the legitimacy of grid searches had not been definitively established. See Klaus Jansen, *Fighting Terror in Germany* (Am. Inst. for Contemporary German Studies Working Paper 2003) (discussing the German legal framework in Germany with reference to terrorism), available at <http://www.aicgs.org/publications/PDF/jansen.pdf> (last visited May 13, 2004).

128. Lepsius, *supra* note 44, at *7.

129. *Id.*

130. See *id.* at *9-10.

131. S.C. Res. 1373, *supra* note 11; Framework Decision on Combating Terrorism, *supra* note 31.

132. Lepsius, *supra* note 44, at *10.

individual's knowledge sets off alarm bells in a privacy-sensitive public. In addition to lowering barriers between police and security agencies, data storage also represents an independent intrusion into the privacy of individual life. But these provisions also were responses to both Security Council and EU instructions, which saw database improvement as an important way to combat terrorism.¹³³

Finally, there is a concern over the "de-individuation" of suspicion.¹³⁴ German criminal procedure has typically required that information collection about particular suspects as well as their arrest and detention rely solely on reasonable suspicion that can be tied to incriminating evidence about that person in particular.¹³⁵ The codification of grid searches and the criminalization of mere membership in terrorist organizations appears to weaken this requirement that proof be obtained in an individualized way. To the critics, mere association or the coincidence of correlating characteristics with terrorists appears now to be sufficient for the authorities to open a dossier and to eventually arrest and detain a suspect.¹³⁶ This is a tremendous cause for concern in Germany which has generally required high and individuated standards of proof before surveillance or investigations can be undertaken.

Still, in international comparison, the changes made by the post-September 11 security packages in Germany seem like modest measures in comparison with the British post-September-11 anti-terrorism law,¹³⁷ but they set off a storm of protest and had to be substantially softened before they could pass through the German Parliament.¹³⁸ Most of the expansion of the

133. S.C. Res. 1373, *supra* note 11; Framework Decision on Combating Terrorism, *supra* note 31.

134. *See* Lepsius, *supra* note 44, at *13-17 (referring to changes in the law that allow a person to be the subject of security measures without being concretely suspected of any particular offense). Examples of this include random identity checks, general monitoring of international radio telephone traffic, and data-mining grid searches based on association with certain social groups or possession of certain abstract characteristics, none of which require that the target of the measures be specifically suspected of having done anything wrong. *Id.*

135. *Id.* at *14.

136. *See id.* at *16-17 (noting that District Courts in Wiesbaden and Berlin as well as the Court of Appeal in Dusseldorf have questioned the constitutionality of grid searches).

137. *See infra* Part III.B.

138. Lepsius, *supra* note 44, at *22-25 (discussing the adoption of the "second

intelligence services' powers is limited by a sunset provision in the second security package that will automatically take effect in five years.¹³⁹ The structural protections against abuse of these powers—Parliamentary review, G-10 review and ordinary judicial as well as Constitutional Court review—remain in place.

There are a number of signs that the courts in Germany are resisting some of the most worrisome aspects of the new post-September 11 laws, aggressively affirming that September 11 cannot cause Germany to lose its human rights bearings.¹⁴⁰ Two men were charged with participation in the Hamburg cell of al Qaeda that planned the September 11 attacks. They were tried in Germany's ordinary courts.¹⁴¹ The first defendant, Mounir El Motassadeq, was convicted of more than 3,000 counts of accessory to murder.¹⁴² The second defendant, Abdelghani Mzoudi, was nearly convicted on similar charges before the case against him fell apart when the state could not produce potentially exculpatory evidence requested by the judge.¹⁴³ In both cases, the American government refused to provide the German government with information acquired as a result of the interrogation of Ramzi bin al Shibh, a man who had personally taken credit for plotting the September 11 attacks and who was in US custody.¹⁴⁴ Eventually, the conviction of Motassadeq was quashed and the case sent back for trial.¹⁴⁵ In both cases, German courts refused to convict if potentially exculpatory evidence were withheld in violation of German law.

Then, in a case whose facts date from before September 11, the Federal Constitutional Court ruled on March 3, 2004 that a

security package" in Parliament).

139. Lepsius, *supra* note 44, at *7.

140. *See id.* at *16-17 (discussing various decisions holding parts of the anti-terrorism surveillance laws unconstitutional).

141. Richard Bernstein, *Germans Blame U.S. for Qaeda Acquittal; Americans Refused to Supply Evidence*, INT'L HERALD TRIB., Feb. 7, 2004, at 3.

142. *Id.*; Peter Finn, *Moroccan Convicted in Sept. 11 Attacks; German Court Delivers Maximum Sentence for Aiding Hamburg Cell*, WASH. POST, Feb. 20, 2003, at A1.

143. Bernstein, *supra* note 141, at 3; John Burgess, *Verdict Postponed in German 9/11 Case; Prosecution Claims Eleventh Hour Evidence Against Moroccan Defendant*, WASH. POST, Jan. 22, 2004, at A22.

144. John Burgess, *German Court Orders New Trial for 9/11 Suspect*, WASH. POST, Mar. 5, 2004, at A16.

145. Luke Harding, *First and Only 9/11 Conviction Overturned by German Court*, GUARDIAN (London), Mar. 5, 2004, at 17.

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federal law passed pursuant to the 1998 constitutional amendment allowing electronic surveillance of the home was unconstitutional.¹⁴⁶ The majority agreed that the statute had intruded too far upon the inviolability of the home by allowing surveillance of private conversations among family members and between the target of the surveillance and his or her lawyer, doctor, or clergyperson.¹⁴⁷ Moreover, the statute had not sufficiently required there to be “concrete evidence of a crime” before the surveillance could be authorized. The statute had also failed to specify that the underlying crime had to be serious enough to warrant at least five years in prison before intrusive surveillance could be used at all.¹⁴⁸ The limitations that the Court placed on the government were so severe that it is unlikely electronic surveillance of homes can be used at all in the future. These two indications—that ordinary courts would not convict without all of the evidence and that the Constitutional Court would insist on upholding personal privacy against security interests—indicate that Germany has not fallen into a state of emergency after September 11, even as it has tried to comply with the new international law.

B. THE UNITED KINGDOM

Britain's constitutional structure could hardly be more different from that of Germany's. Britain has a constitutional government without a written constitution. In general, Britain's unwritten constitution has been characterized by a high degree of continuity, by contrast with the repeated political collapses that have led to new constitutions in Germany's past. This continuity persists to the point where the present British Constitution consists of very ancient and very modern rules mixed together.¹⁴⁹ Perhaps the most important principle of the contemporary British Constitution is parliamentary supremacy, which tends to work at cross-purposes with the claim of an ancient constitution, because

146. Bundesverfassungsgericht [BVerfG] 1 BvR 2378/98 v. 3.3.2004, available at <http://www.bverfg.de/cgi-bin/link.pl?aktuell> (last visited May 13, 2004); *German Court Attacks Law on Bugging Criminal, Terror Suspects*, AGENCE FRANCE PRESSE, March 3, 2004.

147. BVerfG, 1 BvR 2378/98 v. 3.3.2004.

148. *Id.*

149. As of 1995, “constitutional law” in the volumes labeled as such and published by Her Majesty's Stationery Office, contained the text of 138 Acts of Parliament and the human rights volumes added another 32 Acts. But whether all of these laws are really constitutional or not is a lively subject of scholarly debate.

a single valid vote of that constitutional entity known as the Queen-in-Parliament,¹⁵⁰ is enough to change even long-standing constitutional norms. Compared with Germany, where legal clarity is considered an important constitutional value in and of itself, Britain's constitution is less than clear. As some influential constitutional commentators have remarked, the British Constitution is "indeterminate, indistinct, and unentrenched."¹⁵¹

An intensely debated legal puzzle has been created by the European Union. By entering the European Community in 1973, Britain committed itself to the principle that community law is supreme over domestic law in those areas where it operates.¹⁵² As a result, presumably there are some parts of British law, including some of its constitutional laws, which now cannot be changed with a single vote of the parliament.¹⁵³ But, this has not yet fully been taken on board in British constitutional theory. Moreover, Britain is a common law country with a long history of valid judge-made law existing beyond the edges of statutory enactments. In Britain, as a result, there is a debate, familiar to Americans but quite foreign to Germans, over the extent to which any statute has been modified by court interpretation, or indeed about the extent to which one court decision has modified, supplanted, or nullified another. This applies to constitutional laws, as well as to any other. In short, the British Constitution is a complex, continuing, and amorphous entity but it can be changed root and branch overnight. And, indeed, in recent years it has been.¹⁵⁴

150. The Queen-in-Parliament is typically constituted by a majority vote of both houses of parliament and nominal assent of the Queen, though under certain circumstances, the House of Lords, the upper house of the British parliament, can be bypassed in this process. The monarch last vetoed a law in 1707, which makes the non-assent of the Queen a practical impossibility. As a result, the House of Commons, led by the government it elects, has practical control of all constitutional matters.

151. S.E. FINER ET AL., *COMPARING CONSTITUTIONS* 40 (1995).

152. See David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 *VAND. J. TRANSNAT'L L.* 863, 953-55 (2003) (discussing the supremacy of Community law under the European Communities Act).

153. *Id.*

154. Britain has seen a great deal of constitutional change in the last few years: the devolution of parliamentary authority to Scotland and Wales, the abolition of hereditary peerage in the House of Lords as well as the substantial reduction of the number of life peers who can serve as members, the introduction of limited judicial review through the Human Rights Act of 1998 that formally incorporated much of

Crises like the September 11 terrorist attacks, which were sharply felt in Britain, have the potential to create radical changes in a short time without many constitutional circuit breakers to stop the surge of panic. Critics claim that this is exactly what has happened when the British Anti-Terrorism, Crime and Security Act of 2001¹⁵⁵ was passed quickly in the fall of 2001.¹⁵⁶ But before reviewing recent British terrorism laws, it should first be established what controls on policing and intelligence were in place prior to the new laws because the new laws can only be understood against the background of existing practices.

Like the British Constitution itself, the specific mandates and separation of functions between the security and police agencies of Britain was—from their origins and continuing to the present day—indeterminate, indistinct, and unentrenched.¹⁵⁷ Local police departments in Britain, originally too small and with too few powers to do much damage, have grown into large bureaucracies with ever-increasing powers of surveillance. The police have themselves been policed (or not, as the case may be) primarily through various evidentiary exclusionary rules enforced by judges when cases come to trial. These rules include a ban on forced confessions, but the same judges that have enforced this exclusionary rule traditionally permitted admission of other information gathered through police overreaching.¹⁵⁸ However, as with all common-law-like criminal procedure, a great deal of case-by-case specificity in these determinations has made it difficult to

the European Convention on Human Rights into British law, but which only came into effect in October 2000. Most recently, the government has floated a proposal to abolish the position of Lord Chancellor, a position which united the parliament and the executive with the judiciary, and to replace this post with a Secretary for Constitutional Affairs, who has the powers of an ordinary minister.

155. Anti-Terrorism, Crime and Security Act, 2001, c. 27 (Eng.), available at <http://www.legislation.hmsso.gov.uk/acts/acts2001/20010024.htm> (last visited June 19, 2004).

156. The only substantial barrier in the way of passing the bill was the opposition of the House of Lords, which was overcome within a few days by a government reversal on the provision that would have criminalized inciting religious hatred. See *Chronology of Home Secretary's Battle Over Anti-Terrorism Bill*, TIMES (London), December 15, 2001.

157. Peter Gill, *Security and Intelligence Services in the United Kingdom*, in DEMOCRACY, LAW AND SECURITY: INTERNAL SECURITY SERVICES IN CONTEMPORARY EUROPE, *supra* note 91, at 267.

158. Kuk Cho, *Reconstruction of the English Criminal Justice System and its Reinvigorated Exclusionary Rules*, 21 LOY. L.A. INT'L & COMP. L.J. 259, 265-67 (1999).

elucidate general policies that police could follow as bright-line rules. They got away with aggressive policing often enough to keep it up.

In general, the surveillance procedures used by both police and security services were governed by no discernible legal regime at all (unless one counts unpublished guidelines of the Home Office as a legal regime) until the passage of the 1985 Interception of Communications Act.¹⁵⁹ This Act permitted both police and the security services to engage in telephone tapping, mail opening, and electronic communications interception through a "warrant" issued by the Secretary of State on any of the following grounds: "(a) in the interests of national security; (b) for the purpose of preventing or detecting serious crime; or (c) for the purpose of safeguarding the economic well-being of the United Kingdom."¹⁶⁰ The Act has been widely criticized for failing to have any separation of powers check in the warrant procedure, since only the executive branch authorizes and executes such warrants.¹⁶¹ In addition, the Act has been criticized for failing to have any criteria capable of clear delineation for issuing these warrants.¹⁶²

Historically, when there have been domestic disturbances in Britain, police departments have created "special branches" which could, without much additional guidance, investigate these threats both as crimes and for intelligence purposes. The first such special branch was created as part of the Metropolitan Police in 1883 during a wave of Irish Nationalist terrorist bombings in London. Other police departments followed suit.¹⁶³ These special branches were largely unregulated until 1970, when the Home Office issued unpublished guidelines on special branch activities, and then revised and published guidelines in 1984 in response to a parliamentary inquiry into domestic

159. Interception of Communications Act of 1985, ch. 56 (Eng.), available at <http://www.archive.official-documents.co.uk/document/cm47/4778/4778.htm> (last visited June 19, 2004).

160. *Id.* c. 56, § 1(2)a.

161. J.R. Spencer, *The Case for a Code of Criminal Procedure*, CRIM. L. REV. 2000, July, 519, 522-23. See also Simon A. Price, *The Interception of Communications Act 1985: An Examination of the Government's Proposals for Reform*, COMPUTER & TELECOM. L. REV. 1999, 5(6), 163, 163-64 (discussing proposed amendments to the law).

162. Spencer, *supra* note 161, at 522-23.

163. Gill, *supra* note 157, at 268.

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intelligence institutions.¹⁶⁴ Only then was it possible for the public to see what the special branches were tasked with doing. This turned out to be primarily “defending the realm”¹⁶⁵ in regards to espionage, sabotage, terrorism, and subversion. This broad, lightly defined mission has routinely enabled these police units to engage in surveillance of a great deal of legal political activity and virtually anything else that in the police's view might constitute a threat. In 1994, revised guidelines were issued, but they did not change this vague and egregious assignment of powers.¹⁶⁶

The intelligence agencies were similarly governed quite casually. Both MI5 (the domestic security agency) and MI6 (the foreign security agency, more properly called the Secret Intelligence Service, or SIS) were established in 1909 when there was a German spy scare that panicked government officials.¹⁶⁷ The intelligence agency that collects foreign electronic intercepts, or signals intelligence, is the Government Communications Headquarters (GCHQ), which started for obvious reasons during World War I.¹⁶⁸ The intelligence unit for the military services, the Defense Intelligence Staff (DIS), was started during the 1960s when the intelligence services of the various military commands were unified in a wave of military reform.¹⁶⁹ Foreign-, signals- and military-intelligence information are routinely reported to the Joint Intelligence Committee (JIC) which, since its founding in 1936, has analyzed this information and reported it to relevant government officials for use in policymaking.¹⁷⁰ Since 1957, the JIC has been part of the Cabinet Office.

In general, the JIC gives assignments to the foreign-, signals- and military-intelligence agencies, instructing them in

164. Gill, *supra* note 157, at 269.

165. Home Office Guidelines on the Work of a Special Branch, 1984, para. 6, available at <http://www.statewatch.org/news/2004/mar/special-branch-1984.htm>.

166. A summary of the main points in the 1994 guidelines can be found at <http://www.statewatch.org/news/2004/mar/special-branch-1995.htm>. As this article was going to press, new guidelines were issued by the Home Office in March 2004. Guidelines on Special Branch Work in the United Kingdom. They can be found at http://www.homeoffice.gov.uk/docs3/special_branch.pdf.

167. Gill, *supra* note 157, at 265, 267; *A Brief History of the Security Service*, at <http://www.mi5.gov.uk/output/Page120.html> (last visited May 13, 2004).

168. Gill, *supra* note 157, at 267.

169. *Id.* at 267-68.

170. *Id.* at 268.

what the policymakers need to know.¹⁷¹ But the control of MI5 is less structured. As a result, MI5 has been largely “self tasking.”¹⁷² MI5 didn’t even have a statutory basis for its existence until 1989.¹⁷³

The first mandate for MI5 was written by the Home Office in 1945 but never published; another directive from the Home Office was issued in 1952, but it too was not published until a judicial inquiry released it more than a decade later in its report on a security scandal.¹⁷⁴ This was the first time that the public could see that MI5’s charge was essentially the same “defense of the realm” language that had controlled the special branches of the police—a mandate highly subject to abuse. MI5 did not get full statutory authorization until the passage of the Security Service Act of 1989,¹⁷⁵ and then only because Britain rightly feared that its minimal human rights guarantees surrounding surveillance would be found wanting by the European Court of Human Rights.¹⁷⁶ The Security Service Act now gives MI5 jurisdiction over “national security,” as opposed to “defense of the realm.” But the vague term “national security” covers issues like espionage, terrorism, sabotage, and subversion, the very same tasks that used to appear under the heading of “defense of the realm.” The

171. Gill, *supra* note 157, at 270.

172. *Id.*

173. *Id.*

174. *Id.* at 270-71.

175. *Id.* at 271. Security Service Act 1989, c. 5, available at http://www.legislation.hmso.gov.uk/acts/acts1989/Ukpga_19890005_en_1.htm.

176. Even with the passage of the Security Service Act, the European Court of Human Rights continued to find Britain’s surveillance practices to be insufficiently regulated. The major decisions finding that Britain violated Article 8 of the European Convention of Human Rights through police violation of individuals’ rights of personal privacy are *Malone v. UK*, [1984] ECHR 8691/79 (Feb. 8, 1984), *Halford v. UK*, (1997) 3 BHRC 31 (June 25, 1997), *Khan v. UK*, (2000) 8 BHRC 10 (May 12, 2000), *P.G. & J.H. v. UK* [2001] ECHR 44787/98 (Sept. 25, 2001), *Armstrong v. UK* [2002] ECHR 48521/99 (July 16, 2002), *Taylor-Sabori v. UK*, [2002] ECHR 47114/99 (Oct. 22, 2002), *Allan v. UK* [2002] ECHR 48539/99 (Nov. 5, 2002), *Chalkley v. UK* [2003] ECHR 63831/00 (June 12, 2003), *Perry v. UK* [2003] ECHR 63737/00 (July 17, 2003); *Lewis v. UK* [2003] ECHR 1303/02 (Nov. 25, 2003). Significantly, the number of ruling against Britain accelerated after September 11, 2001, though all of these rulings to date judge practices under the law before Britain introduced the Regulation of Investigatory Powers Act (RIPA) of 2000, ch. 23, available at <http://www.hmso.gov.uk/acts/acts2000/20000023.htm> or the various anti-terrorism laws. RIPA has been taken note of by the court (in *Allan v. United Kingdom* [2002]), but the court has not yet had an opportunity to rule on facts arising under that law nor under the post-September 11 anti-terrorism law that takes many of those protections back.

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statute adds to the old mandate the new task that MI5 can take on investigation of threats to the "economic well-being of the UK."¹⁷⁷ Rather than constraining MI5's mandate, the Security Service Act seems to have expanded it without making it a great deal clearer, or more rights-protective. And the mandate has since been expanded even further. In 1992, MI5 took responsibility for countering the paramilitary groups in Northern Ireland, a lead role it took away from the special branch of the Royal Ulster Constabulary.¹⁷⁸ In 1996, the Security Service Act was amended to increase MI5's role in the "prevention and detection of serious crime."¹⁷⁹

What controls are there over these processes? Until the Human Rights Act of 1998 went into effect in October 2000, British judges relied upon their understanding of the common law in assessing whether evidence gathered through various intrusive methods would be admissible at trial.¹⁸⁰ If cases never went to trial, there was little practical review available for individuals who might claim their rights were violated; even if a case did go to trial, it was far from certain that, absent the constitutional status of defendants' rights, judges would accord them pride of place. Still there was a sense that the historic rights of Englishmen included some defendants' rights. Venerable though such rights may have seemed, however, they have been vanishing through statutory intervention. For example, the British government in 1994 abolished the right to remain silent and, more recently, the Blair government pushed through the Parliament the abolition of the rule against being tried twice for the same offense.¹⁸¹

177. Gill, *supra* note 157, at 271.

178. *Id.* at 272, 277.

179. *Id.* at 277.

180. For example, the right to remain silent was established as a result of Star Chambers abuses in the late seventeenth century when criminal cases were moved to common-law courts. But since in the common law of that time defendants were presumed incompetent to testify, the right gradually atrophied because it was never invoked. The right to remain silent was restored formally again only in the late nineteenth century, along with the prohibition against adverse inferences from silence. Abusive police practices were not considered until the rise of formal police departments in the early twentieth century, but judges were not particularly keen to inquire into how the police had treated a suspect in order to obtain his evidence. Carol A. Chase, *Hearing the "Sounds of Silence" in Criminal Trials: A Look at Recent British Law Reforms With an Eye Toward Reforming the American Criminal Justice System*, 44 KAN. L. REV. 929, 933-38 (1996).

181. On the right to remain silent, *id.* at 937-42. On the Blair government's

Parliamentary controls over general intelligence policy have theoretically ensured that the security services stay within bounds. This review, however, generally has worked only over the foreign security services, only recently and only sporadically. In 1965, a Security Commission was established to review the intelligence agencies, but since it had to be convened by the Prime Minister who was typically making use of the intelligence products at the time, it rarely met.¹⁸² The system was revised in the Security Service Act of 1989, through which the security services were to be kept in check by a commissioner and a tribunal.¹⁸³ The tribunal consists of three lawyers who are empowered to determine whether individual public complaints about improper surveillance are warranted.¹⁸⁴ The commissioner has the power to determine whether the surveillance warrants issued by the Secretary of State have complied with procedures outlined in the Act.¹⁸⁵ In the first decade that the system operated, about two hundred complaints were filed but none were upheld.¹⁸⁶ One might therefore be forgiven for thinking that the system did not seem to provide effective oversight. A later act, the Intelligence Services Act of 1994, set MI6 (SIS) and the GCHQ on a firm statutory basis (similar to what the 1989 act did

abolition of the double jeopardy rule, see Robert L. Weinberg, *Try, Try Again: If at First They Don't Succeed, Criminal Prosecutions in England Now Get a Second Chance*, LEGAL TIMES, Feb. 16, 2004, at 52. The European Convention on Human Rights may permit the abolition of double jeopardy in the way the British did it—which is to permit the reopening of a case only upon the discovery of substantially new evidence. See Protocol No. 7, art. 4:

Article 4 – Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.

Protocol No. 7 to the European Convention on Human Rights, November 22, 1984. available at <http://www.echr.coe.int/Convention/webConvenENG.pdf>.

182. Gill, *supra* note 157, at 282-83.

183. *Id.* at 283.

184. *Id.*

185. *Id.*

186. *Id.*

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for MI5).¹⁸⁷ This act also created the Intelligence and Security Committee (ISC) of the Parliament with the jurisdiction to review all of the intelligence agencies.¹⁸⁸ Despite some difficulties getting access to information, the Intelligence and Security Committee has been quite active in reviewing the intelligence services.¹⁸⁹ The increasing boldness of the ISC shows some signs of exercising true separation-of-powers control over the intelligence agencies for the first time.¹⁹⁰

Of course, Britain's experience with domestic surveillance grows out of its experience in Northern Ireland. Northern Ireland has been dealt with simultaneously as a policing problem managed through the special branch of the Royal Ulster Constabulary, as a domestic security problem managed through MI5 and also as a military problem that involved calling in the British Army.¹⁹¹ In addition, because of terrorist attacks in London and other cities within England, controlling domestic terrorism outside of Northern Ireland has been a task shared by various special branches of local police forces operating closely with MI5.¹⁹² Many of the special anti-terrorism laws that preceded the general codification in 2000 had applied only in Northern Ireland. But the effects of these special terrorism laws spread to criminal law and criminal procedure generally within Northern Ireland and the bombings outside of Northern Ireland caused separate terrorism laws to be passed that applied to the rest of Britain.¹⁹³ In short, the effects of the "special laws" spread. The special regime of legal regulation started with a bifurcation between the Northern Ireland (Emergency Provisions) Act of 1973 which made unique rules for Northern Ireland and the more general Prevention of Terrorism Act 1974 which set forth legal procedures for the rest of the UK.¹⁹⁴ Various updates and

187. Gill, *supra* note 157, at 284.

188. *Id.* at 284.

189. Most recently, it played an important role in reviewing the intelligence basis on which the British government went to war with Iraq in spring 2003. See Paul Waugh and Kim Sengupta, *The ISC Report: Intelligence Worries Vindicated As MPs Put Dossier Under the Microscope*, INDEPENDENT (London), Sept. 12, 2003, at 4.

190. See Gill, *supra* note 157, at 285 (expressing optimism with the future of the ISC).

191. See *id.* at 272 (describing the intelligence agency structure in Northern Ireland).

192. *Id.* at 272-73.

193. *Id.* at 273.

194. The anti-terrorism campaign in Northern Ireland had a dire effect on criminal

amendments to these two acts have been in effect ever since. The new fight against terrorism after September 11, with its focus on radical Islamist groups operating both domestically and from foreign bases, has been fought on terrain largely mapped out for another purpose.

As this brief review indicates, policing functions and intelligence functions have been mixed together in the history of British security policy and until recently none of them has had either an explicit statutory basis or substantial external review. There has been no clear division of labor between police and intelligence agencies (in fact, MI5 has always worked closely with the special branches of the various police forces), and no clear division between domestic and foreign responsibilities (police spy on foreign groups resident in Britain; the army participated with MI5 and the police in Northern Ireland). As demonstrated below, the main impetus to the reform that had been accomplished before September 11 has been the persistently negative judgments of British practice on the part of the European Court of Human Rights.

The Terrorism Act 2000, initiated when Tony Blair's Labour government came to power in the 1990s, began as a good-government measure. At a time when Britain was experiencing less domestic terrorism than it had in decades, the Labour government (which had also engineered the passage of the Human Rights Act) attempted to codify Britain's myriad of crisscrossing and conflicting anti-terrorism statutes into one code that would meet human rights standards.¹⁹⁵ The "special regime" that applied to Northern Ireland through the Northern Ireland (Emergency Provision) Acts was to be softened. Then, it would be

law and criminal process in Northern Ireland generally outside the field of terrorism. Peter G. Eikenberry et al., *Northern Ireland: A Report to the Association of the Bar of the City of New York From a Mission of the Committee on International Human Rights*, 54 THE RECORD 426 (1999). Through most of the time that the Irish Republican Army conducted a campaign involving violence in both Northern Ireland and in the United Kingdom outside Northern Ireland proper, two different legal regimes were introduced for dealing with terrorism offenses. These two regimes magnified differences between Northern Ireland and the rest of the UK, among other things because the UK would banish suspected terrorists back to Northern Ireland where they could be dealt with more harshly under a different legal regime. For a history of the two separate systems of terrorism laws in Britain, see Fionnuala Ni Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353 (1996).

195. Terrorism Act 2000, c. 11 (Eng.), available at <http://www.legislation.hmso.gov.uk/acts/acts2000/20000011.htm> (last visited May 13, 2004).

combined with relevant bits of the Prevention of Terrorism Acts that applied elsewhere in Britain and made into law that applied to the whole of the UK, thereby avoiding the need for special measures justifiable only in extreme situations.¹⁹⁶ In fact, one of the stated goals of the codification was enabling Britain to withdraw from its derogation under Article 15 of the European Convention on Human Rights (ECHR) with respect to police detention powers governed by Article 5.¹⁹⁷ Britain removed its derogation when the Terrorism Act 2000 came into force in early 2001. But then September 11 occurred. The 2000 statute was so closely followed by the Anti-Terrorism, Crime and Security Act

196. When the European Court of Human Rights considered Britain's use of "special powers" in Northern Ireland, it initially approved them precisely because of the dire situation that held sway in the North:

Unquestionably, the exercise of the special powers was mainly, and before 5 February 1973 even exclusively, directed against the IRA as an underground military force. The intention was to combat an organisation which had played a considerable subversive role throughout the recent history of Ireland and which was creating, in August 1971 and thereafter, a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants. Being confronted with a massive wave of violence and intimidation, the Northern Ireland Government and then, after the introduction of direct rule (30 March 1972), the British Government were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for.

Ireland v. United Kingdom, (1980) 2 Eur. H.R. Rep. 25, [1978] ECHR 5310/71, para. 212.

Allowing this special legislation by according to Britain a "margin of appreciation" within which it could act, the Court's reasoning also made it clear that only such an extreme situation would justify special legislation of this sort.

197. WALKER, *supra* note 42, at xi. Pursuant to Article 15 of the European Convention on Human Rights, states are allowed to derogate from their obligations under specific provisions of the Convention by making up-front declarations of both their reasons for doing so and the specific articles from which they want to derogate. Such derogations are allowed only "in time of war or other public emergency" and only "to the extent strictly required by the exigencies of the situation." Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature*, Nov. 4, 1950, arts. 46, 50, 53, E.T.S. No. 5, [hereinafter European Convention on Human Rights or ECHR], *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>. The European Court of Human Rights reserved the power to review whether the reasons for derogation are sufficient and whether the derogations are narrowly crafted to serve legitimate purposes. For a recent example of the Court's thinking on these question see *Ozkan v. Turkey*, [2004] ECHR 21689/93 (reiterating from which provisions of the European Convention it was not possible to derogate under any circumstances and also judging the acceptability of particular practices used in what the respondent country had claimed was a state of emergency).

2001 (ATCS)¹⁹⁸ and its new derogation from Article 5 of the ECHR that the new period of non-derogation seemed merely a continuation of the previous one.

The two anti-terrorism laws are enormous (together consisting of 250 pages of small type),¹⁹⁹ and so it is impossible to go into all of their details. The Terrorism Act 2000 includes a new, broad definition of terrorism; substantial sections on proscribed organizations and the methods of their proscription; a section on terrorist property, including prohibitions on fund raising and support for terrorist causes, as well as provisions for seizing money used for such purposes; and intricate regulations of terrorist investigations and counter-terrorism powers.²⁰⁰ There is a still separate section for provisions applying only in Northern Ireland even though most of the law now applies everywhere in the UK.²⁰¹ And, there are a number of general and miscellaneous provisions that create new crimes (weapons training, incitement to terrorism, bombing and terrorism financing) and give guidance for when the police may use “reasonable force” in terrorism investigations²⁰² as well as indicating when they may stop and search both terrorism-related suspects and containers.²⁰³

The 2000 law was praised for deleting a number of notable violations against human rights that had existed in previous legislation—the power to issue “exclusion orders” (which typically removed terrorism suspects from Britain back to Northern Ireland), the power to intern suspects indefinitely without trial (which was an important cause of the ECHR Article 5 derogation, even though the power had not been used since 1975), and the criminalization of withholding information from terrorism investigations (which had been used to jail those who seemed to be collaborating with the Irish Republican Army and other terrorist groups by remaining silent about their activities). Some of these much-hated provisions reemerged in the 2001 anti-terrorism law. For now, the focus here will be only on those provisions that affect investigation and surveillance of suspected terrorists.

198. Anti-Terrorism, Crime and Security Act 2001, *supra* note 155, at c. 24.

199. WALKER, *supra* note 42, at 291-541.

200. Terrorism Act 2000, *supra* note 195.

201. *Id.* §§ 65-80.

202. *Id.* § 114.

203. *Id.* § 116.

Under the Terrorism Act 2000, no powers that are given to the police by common law or by other statutes are diminished; the powers given to police under the Act are in addition to those given to the police elsewhere.²⁰⁴ The 2000 terrorism law adds that, in terrorism investigations, a constable could search homes upon getting a warrant from a justice of the peace based on demonstration of "reasonable suspicion."²⁰⁵ This codified the trend toward removing warrant power from the Secretary of State and internalizing the standard of the European Convention on Human Rights, which requires individualized and specifiable suspicion for searches, surveillance, arrests and detention. If a search involves something other than a private residence—for example, in an area cordoned off because it poses an immediate danger—the approval of a police superintendent (or someone of higher rank) would be enough to authorize the search.²⁰⁶ For deliberate seizure and retention of material that might be used as evidence, approval of a circuit judge is required, but such material can be taken as a byproduct of the search as long as acquisition of such materials was not the primary focus going into a search.²⁰⁷ In addition, a police officer can compel explanations of seized materials from suspects and witnesses, upon getting an order from a circuit judge. If there is an emergency, however, a police superintendent can authorize any of the above searches, as long as notice is made after the fact to the Secretary of State.²⁰⁸ Specifically, with regard to Northern Ireland, the Secretary of State is authorized to issue all of these warrants and orders in lieu of judicial review.²⁰⁹

In addition to being able to search places and seize things, police may be authorized through a disclosure order issued by a circuit judge in England and Wales (a sheriff in Scotland or a Crown Court judge in Northern Ireland) to acquire information from financial institutions pertaining to accounts that may be relevant to a terrorism investigation. A disclosure order allows information to be acquired about the identity of account holders, as well as specific transactions on the accounts.²¹⁰ In addition,

204. Terrorism Act 2000, *supra* note 195, § 114.

205. *Id.* § 42.

206. *Id.* §§ 33-35.

207. *Id.*

208. *Id.* § 87.

209. *Id.*

210. Terrorism Act 2000, *supra* note 195, §§ 15-18.

public authorities who hold information relevant to a police investigation (here, the statute is not limited in its wording to terrorism investigations only) may volunteer this information to the police (or should turn it over upon being asked), without risking sanction under the Data Protection Act 1998.²¹¹ Such information may include details provided under compulsion to state officials, like income disclosures made for tax purposes. This provision was first included in the 2000 Act, but the number of state agencies that must provide information upon request to criminal investigators was increased in the 2001 Act.²¹²

The provision of the 2000 anti-terrorism law that caused the most controversy allows arrest of a terrorism suspect without requiring the police to first obtain a warrant. Section 41(1) of the 2000 law is quite blunt: "A constable may arrest without warrant a person whom he reasonably suspects to be a terrorist."²¹³ There is no requirement, as there would be for an ordinary arrest, that there be suspicion of a specific offense that the suspect has committed or is about to commit. Mere suspicion of being a terrorist is enough. This is where the particularly broad definition of terrorism outlined in the 2000 Act becomes important—terrorism-related offenses not only include having committed or having actively planned to carry out a terrorist attack, but also include various forms of membership, support and other relatively passive forms of being on the fringes of terrorist groups.²¹⁴

Moreover, when suspects are apprehended under Section 41, they do not have to be informed of the reasons for detention, as would be required in a normal arrest. Under Section 41, detention can last up to forty-eight hours without bringing the suspect before a judge, but this period is extendable up to five days depending on a complicated formula for review that depends upon the circumstances and place of the arrest (different rules apply in Northern Ireland).²¹⁵ A request for an extension of detention without charges can be made to a judge (different types of judges are specified for the different parts of the UK) by someone at the rank of police superintendent or higher. Upon

211. Terrorism Act 2000, *supra* note 195, §§ 20-21.

212. Anti-Terrorism, Crime and Security Act 2001, *supra* note 155.

213. Terrorism Act 2000, *supra* note 195, § 41(1).

214. *Id.* § 1.

215. For more analysis of Section 41, see WALKER, *supra* note 42, at 119-23.

such a request, a judge may extend the period of detention for up to an additional five days.²¹⁶ Combining the original forty-eight hours with the additional five-day extension means that suspects can be held for an entire week without being charged, or in fact, without the police ever having to show that there was reasonable suspicion that the suspect committed or was about to commit any criminal offense.²¹⁷

Another feature of Article 41 that provoked criticism involved the right to counsel. While detained persons in Britain generally have the right to counsel from the start of their detention, such rights may be suspended for terrorism suspects for up to forty-eight hours under Article 41 upon showing that providing access to such counsel may interfere with the police's ability to gather information about the commission, preparation or instigation of acts of terrorism or if consultation with counsel would tip off someone and make it more difficult to prevent an act of terrorism or apprehend other suspects.²¹⁸ For similar reasons, access to the telephone to notify family members or counsel may also be denied for up to forty-eight hours. And, when access to counsel is finally granted, a detainee may be allowed to consult counsel only within the sight and hearing of an inspector, which means that the meeting cannot be private.

Criticism of the right-to-counsel provisions centered on the worry that intrusive and pressured interrogation would occur in the period before the detainees were allowed to see a lawyer. Even when a lawyer was allowed to be present, frank consultation might reveal to the police further evidence to use against the detainee. The provisions for arrest without warrant together with the ability of the police to detain suspects and deny them counsel for forty-eight hours, all before bringing them

216. Terrorism Act 2000, *supra* note 195, § 41.

217. It was this change in the structure of the detention period that allowed Britain to withdraw its derogation from Article 5 of the European Convention of Human Rights. The European Court of Human Rights had held, most saliently in Britain's case in *Brogan v. United Kingdom*, 11 Eur. Ct. H.R. (Ser. A) 117 (1988), that the shortest of the detention periods at issue in that case—four days and six hours—was too long to comply with Article 5(3), which provides that “Everyone arrested or detained . . . shall be brought promptly before a judge . . .” *Id.* Critics of the 2000 law thought that a week of detention without proof of reasonable suspicion that the detainee had committed or was about to commit an offense would still run afoul of European Court of Human Rights' mandates, regardless of whether or not some of the detention had been approved by a judge. See WALKER, *supra* note 42, at 123-24.

218. Terrorism Act 2000, *supra* note 195, § 41.

before a judge, present a most unattractive package in human rights terms. And that was the pre-September-11 law.

The 2001 Act adds provisions that allow the police to take extraordinary means to identify suspects, including those arrested without warrant. These extraordinary means, including fingerprinting and intimate searches to discover birthmarks and other distinctive bodily markings, can occur without the consent of the person searched.²¹⁹ In addition, police are permitted to take photographs of both the detainee and their distinctive bodily markings.²²⁰ To aid in identification, police may remove “disguises” that block a clear view of the suspect’s body, particularly the face.²²¹ The reference here could be to Islamic scarves, the hijab, or other forms of dress that devout Muslim women wear and that would cause enormous embarrassment and a sense of being disrespected if removed. Given its potential to be used for harassment of particular segments of the population, this provision has come under criticism.

In Section 44 of the 2000 terrorism law, any constable in uniform is authorized to stop and search both vehicles and pedestrians, including anything carried by either. A constable can do this without concrete suspicion of the specific persons or cars stopped, as long as the place where the stop occurs is specified in an authorization received beforehand.²²² This section of the law was designed to handle threats of vehicle bombs in particular. The authorization to search cars, passengers, and pedestrians may be given by a police officer who is at the rank of assistant chief constable or higher.²²³ The Secretary of State must be informed of such authorizations, and may cancel any

219. Anti-Terrorism, Crime and Security Act 2001, *supra* note 155, §§ 89-91.

220. *Id.* §§ 92-93.

221. *Id.* §§ 94-95.

222. Terrorism Act 2000, *supra* note 195, § 44. This provision has been used in dramatic ways. For example, the Metropolitan Police Department covering the London metropolitan area declared its entire jurisdiction a stop-and-search zone for an entire month in August and September 2003. Michael Paterson, *Terror Laws Used on Arms Protesters*, DAILY TELEGRAPH (London), Sept. 11, 2003, at 6. This was challenged in court both by a journalist, who was trying to cover a demonstration against an arms-sale fair being held in London, and by one of the demonstrators. Both had been stopped and searched without any individuated suspicion that they were involved in criminal activity. The court upheld these searches. *R (on the application of Gillan and another) v. Metropolitan Police Commissioner*, [2003] EWHC 2545 (Admin), [2003] All ER (D) 526 (Oct), (Approved judgment).

223. Terrorism Act 2000, *supra* note 195, § 44.

authorization if he sees fit.²²⁴ While this review is better than nothing, it does not have the independence guaranteed by judicial review. Beyond these powers, the 2001 Act allows the British Transport Police or the Ministry of Defense to specify places where vehicles and pedestrians can be stopped for up to twenty-eight days at a time.²²⁵ Under both the 2000 and 2001 laws, these authorizations can result in “blanket searches”—that is, searches carried out without the police having to show reasonable suspicion that the specific cars or persons searched have any connection to either terrorism or crime.

The immigration-related sections of the 2001 law have received the most condemnation and have required that Britain once again derogate from Article 5 of the European Convention on Human Rights. Under the post-September 11 law, the Secretary of State may certify a person as a suspected international terrorist. The Secretary may do so if he “a) believes that the person’s presence in the United Kingdom is a risk to national security and b) suspects that the person is a terrorist.”²²⁶ The evidentiary basis for such a judgment is not specified in the law. The effect of such certification is to allow indefinite detention, without trial, of those suspects who are not British subjects.²²⁷ There is an appeal to the Special Immigration Appeals Commission (SIAC), which can quash any individual certification that it believes not to be sustainable.²²⁸ However, since the statute expressly permits indefinite detention of aliens pending removal, there is little else the Commission can do once it finds that the Secretary of State meets the low standards.²²⁹ Under

224. Terrorism Act 2000, *supra* note 195, § 46.

225. Anti-Terrorism, Crime and Security Act 2001, *supra* note 155, § 98.

226. *Id.* § 21(1). Since the operative terms here are “believes” and “suspects,” it puts the legal onus on the proof of the Secretary of State’s mental state rather than on what the detainee has done.

227. *Id.* § 23.

228. *Id.* § 25.

229. Nonetheless, in a decision of the Special Immigration Appeals Commission (SIAC) of July 30, 2002, the Commission found Part IV of the Anti-Terrorism, Crime and Security Act of 2001 to be in breach of the Human Rights Act 1998, particularly those provisions that brought into British law Article 5 and Article 14 of the European Convention of Human Rights. SIAC reasoned:

We have decided that the Government was entitled to form the view that there was and still is a public emergency threatening the life of the nation and that the detention of those reasonably suspected to be international terrorists involved with or with organisations linked to Al Qa’ida is strictly required by the exigencies of the situation. However, there has been no derogation from Article 14 which prohibits discrimination in the application of the ECHR. The Act

SIAC procedures, there is a limited ability for a detainee to challenge the evidence that is presented against him, and because of the sensitive nature of the information that may be presented, the detainee may not necessarily be represented throughout the process by counsel of his choosing, but must instead be represented by someone appointed by SIAC with the relevant security clearance. Both the detainee and his chosen counsel may be excluded from all or part of any hearing on the detainee's case.²³⁰

The issue that gave rise to this framework for indefinite detention arose from facts that became clear in the case of *Chahal v. United Kingdom*²³¹ before the European Court of Human Rights. In *Chahal*, Britain had determined that Chahal was a suspected terrorist and should be deported back to his home country of India.²³² However, Chahal, being a Sikh activist, had already been beaten at the hands of Indian police, and he faced the very real possibility of such treatment again.²³³ As a result, the European Court of Human Rights indicated Britain would violate Article 3 of the Convention (on the prohibition of torture as well as degrading and inhuman treatment) if it

permits the detention of non-British citizens alone and it is quite clear from the evidence before us that there are British citizens who are likely to be as dangerous as non-British citizens and who have been involved with Al Qa'ida or organisations linked to it. It is not only discriminatory and so unlawful under Article 14 to target non-British citizens but also it is disproportionate in that there is no reasonable relationship between the means employed and the aims sought to be pursued. On that ground, we have decided that the 2001 Act, which is the measure derogating from the obligations under the Convention, to the extent that it permits only the detention of foreign suspected international terrorists is not compatible with the Convention.

Summary of SIAC judgment, available at <http://www.statewatch.org/news/2002/jul/SIAC.pdf>.

This case was appealed by the government to the court of appeal which, in *A and others v. Secretary of State for the Home Department*, [2002] EWCA Civ 1502, [2003] 1 All ER 816, 13 BHRC 394, determined that the government had good reason to believe that emergency conditions prevailed, and therefore the UK's derogation from Article 5 was valid. The court of appeal further determined that distinctions between citizens and aliens did not run afoul of the ECHR Article 14 prohibition on discrimination. *Id.* So, while the British courts ultimately rejected SIAC's challenge to the law, it was astonishing that the court charged with review of the immigration cases found parts of the 2001 law to be in violation of human rights standards.

230. See Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, 65 MOD. L. REV. 724, 740-41 (2002) (providing details of the procedures under SIAC).

231. *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1997).

232. *Id.* at 423.

233. *Id.* at 424.

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deported Chahal to India.²³⁴ Britain, having determined that Chahal was dangerous, did not want to release him either.²³⁵ The British government decided to keep him in indefinite detention even though Chahal had not been found guilty of violating any law in Britain. One obvious solution, that Chahal be put on trial in Britain, was rejected by the government, which cited both the sensitivity of the evidence that would have to be presented and the high standard of proof that would have to be met.²³⁶ The solution to this conundrum—where the British government was unwilling to put a suspect on trial and unable to deport him to his home country—was indefinite detention without trial.²³⁷

Since the 2001 anti-terrorism law was passed, at least fourteen people have been indefinitely detained under these provisions.²³⁸ Most have been held for more than two years already in harsh conditions, confined to their cells for at least twenty-two hours a day.²³⁹ According to press reports, one has had polio since childhood and is steadily getting worse, another entered detention having already lost two limbs and a third has attempted suicide. Several of the detainees were held because they had been involved in fundraising to help the Chechen side of the war in Chechnya; others are suspected of being members of the GIA, an Algerian group linked to terrorist incidents in France, Canada and the United States.²⁴⁰ But their identities, and the allegations against them, have never been made public in any official way.

Another change in the 2001 anti-terrorism law that has caused concern is Section 117. While the 2000 law was lauded for dropping the obligation of bystanders to assist the police in their inquiries, at the expense of being forced under penalty of law to inform on friends and relatives, the 2001 anti-terrorism law brought this measure back again.²⁴¹ Now those who merely keep silent instead of volunteering active assistance to the police

234. *Chahal*, 23 Eur. H.R. Rep. at 436.

235. *Id.* at 425.

236. Fenwick, *supra* note 230, at 731.

237. *Id.*

238. Martin Bright, *Revealed: Shocking Truth of Britain's 'Camp Delta'*, OBSERVER (London), Dec. 14, 2003, <http://www.guardian.co.uk/humanrights/story/0,7369,1106666,00.html> (last visited May 13, 2004).

239. *Id.*

240. *Id.*

241. Anti-Terrorism, Crime and Security Act 2001, *supra* note 155, § 117.

subject themselves to criminal liability if they are in possession of any facts material to a terrorism inquiry.

With the start of 2004, the Blair government was floating a series of proposals that would result in far more draconian exercises of state power as part of its war against terrorism. The government proposed to overhaul the Civil Contingencies Law, which outlined the legal conditions for declaring and maintaining a state of emergency in Britain.²⁴² In this law, an emergency was defined rather loosely as an “event or situation which threatens serious damage to human welfare . . . the environment . . . or the security of . . . a place in Britain.”²⁴³ However, if an emergency were to be declared, authorized measures would include instituting public curfews, banning public meetings, and seizing private property without compensation.²⁴⁴ The government could take control of major financial institutions, declare a bank holiday, and allow ministers to amend any act of parliament in order to deal with an emergency.²⁴⁵ The bill stirred up substantial public concern and the government seemed inclined to back off some of its more astonishing claims of power, agreeing, for example, to say that any temporary legislation adopted without parliamentary approval (another power authorized in the draft bill) would have to be retrospectively approved by the parliament within thirty days or it would sunset.²⁴⁶ But the government has not withdrawn the bill.²⁴⁷

More recently, Home Secretary David Blunkett has made a series of proposals that would affect the protections given criminal defendants, particularly terrorism suspects. In addition to proposing that the standard of proof be lowered in criminal cases involving terrorism charges and that the government be allowed to act “preemptively” against terrorism suspects, Blunkett also suggested that courts accept evidence from

242. United Kingdom, A Draft of the Civil Contingencies Law, at <http://www.publications.parliament.uk/pa/cm200304/cmbills/014/2004014.htm> (last visited May 13, 2004).

243. *Id.* § 1(1).

244. *Id.* § 21.

245. *Id.*

246. Matthew Tempest, *Government Backs Down on Terror Bill*, *GUARDIAN* (London), Jan. 7, 2004, available at <http://politics.guardian.co.uk/attacks/story/0,1320,1117712,00.html>.

247. Mike Merritt, *Isles Could be Terror Attack Refugee Camps*, *MAIL ON SUNDAY* (London), June 6, 2004, at 25.

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electronic surveillance, something courts in Britain presently do not do.²⁴⁸ These proposals also prompted an outcry, but the proposals are still under review.

As can be seen from this quick review of Britain's recent anti-terrorism laws, separate legal regimes of surveillance, arrest, and detention have been instituted for those suspected of terrorism offenses. While the laws speak of giving these new powers to the police, it is clear from the history of British counter-terrorism policy that the police have, in general, worked hand in hand with MI5, exchanging information, personnel and investigatory strategy. Given the relative powerlessness of British courts to challenge statutes, it appears that the only substantial check on these procedures will come from the European Court of Human Rights.

IV. THE COUNCIL OF EUROPE INSTITUTIONS

Within the Council of Europe, a political community comprising forty-five countries, efforts to fight terrorism go back several decades with the centerpiece being the European Convention for the Prevention of Terrorism of 1977.²⁴⁹ After September 11, a new Protocol amending this treaty was opened for signature, in order to "strengthen the fight against terrorism, while respecting human rights."²⁵⁰ This Protocol updated the list of terrorism offenses to include those incorporated since the time of the original agreement in various conventions of the United Nations and made the further amendment of this Convention easier in order to take new developments into account.²⁵¹

Perhaps more importantly, given the Council of Europe's primary mandate to ensure human rights protection, the Committee of Ministers adopted Guidelines on Human Rights and the Fight against Terrorism.²⁵² While recognizing that

248. Alan Travis & Richard Norton-Taylor, *Blunkett Wants Big Expansion of MI5 and New Security Laws to Counter Terror Threat*, GUARDIAN (London), Feb. 23, 2004, available at <http://www.guardian.co.uk/terrorism/story/0,12780,1153808,00.html>.

249. European Convention on the Suppression of Terrorism, Jan. 27, 1977, T.S. No. 90, 15 I.L.M. 1272 (1976), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/090.htm>.

250. Protocol Amending the European Convention on the Suppression of Terrorism, Treaty Open for Signature by Member States Signatories to Treaty ETS 90 on May 15, 2003, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/190.htm>.

251. *Id.* art. 1-2.

252. Council of Europe, Guidelines on Human Rights and the Fight Against

terrorist attacks are themselves violations of the human rights of affected populations and that states not only have the right, but also the obligation, to protect their populations against these attacks, the guidelines set out ground rules that states must follow in fighting terrorism. It is these ground rules that ensure respect for human rights in the fight itself. In particular, the guidelines require that all states' measures to fight terrorism be free of arbitrariness and discrimination, and that the measures be "subject to appropriate supervision."²⁵³ In addition, all measures that the states take to combat terrorism must themselves be lawful, and when any measure restricts human rights, those restrictions must "be defined as precisely as possible and be necessary and proportionate to the aim pursued."²⁵⁴ The guidelines also establish an absolute prohibition on torture, from which derogation is not possible,²⁵⁵ as well as clear rules about the collection of personal data.²⁵⁵ There are minimum standards for arrests, requiring "reasonable suspicion."²⁵⁶ The guidelines require judicial supervision of the processes of arrest and detention and permit no detentions without judicial review.²⁵⁷ They set fixed limits for police custody and require guarantees of independence and impartiality of the judges in any legal proceeding.²⁵⁸ The guidelines maintain that there should be right to counsel (with some restrictions on free communication with counsel in the interests of security).²⁵⁹ They also urge cooperation of countries in extradition proceedings (except where the suspect may face the death penalty, torture or persecution for discriminatory reasons in the receiving country).²⁶⁰ And they recommend compensation for victims of terrorism.²⁶¹ Broadly speaking, the guidelines follow the same general principles enunciated by the European Court of Human Rights in their long line of terrorism cases.

Terrorism, adopted by the Committee of Ministers of the Council of Europe on July 11, 2002, available at [http://www.coe.int/T/E/Human_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf).

253. Guidelines on Human Rights and the Fight Against Terrorism, *supra* note 252, art. II.

254. *Id.* art. III.

255. *Id.*

256. *Id.* art. VII.

257. *Id.* arts. VII, VIII.

258. *Id.* art. IX.

259. Guidelines on Human Rights and the Fight Against Terrorism, *supra* note 252, art. IX.

260. *Id.* art. XIII.

261. *Id.* art. XVII.

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Neither Germany nor Britain's anti-terrorism responses can be understood in full without reference to the European Convention of Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR) that binds both countries in a common commitment to protect human rights.²⁶² When domestic mechanisms fail to keep a country's practices in accord with the ECHR, individuals whose rights have been violated may appeal against the state to the ECtHR in Strasbourg. Given our brief surveys of the anti-terrorism policies of Germany and the UK, it will not be surprising to discover that the ECtHR has had a far greater direct impact on the UK than on Germany, if only for the simple reason that the UK's domestic institutions, including the courts, do not yet reliably produce results in compliance with the court's view of the ECHR. Germany, on the other hand, is rarely reprimanded with a negative judgment in this area.

Cases take a long time to reach final decision at the ECtHR,²⁶³ so there are no cases arising on post-September-11

262. The European Court of Human Rights is a creature of the Council of Europe, not the European Union. Council of Europe, *The European Court of Human Rights: Historical Background, Organisation and Procedure*, at <http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm> (last visited May 14, 2004). In practice, however, all of the member states (and all of the accession states) of the European Union are also member states in the Council of Europe. The Council of Europe, however, encompasses not only the twenty-five member states of the European Union, but also includes twenty additional states, most in Eastern Europe. Council of Europe, *About the Council of Europe*, at http://www.coe.int/T/e/Com/about_coe (last visited May 14, 2004). In addition to the forty-five member states, there are also five states or entities with observer status: the United States, Canada, Japan, Mexico and the Holy See. *Id.* Membership in the Council of Europe requires a country to enter the European Convention on Human Rights. *Id.* European Convention on Human Rights, *supra* note 197. The jurisprudence of the European Court of Human Rights is technically binding only on the parties to the specific cases, but it is advisable for other countries whose practices may raise similar issues to adjust their laws and practices to comply with the norms that may one day be applied in a concrete case to them.

263. In most countries, petitioners have to have exhausted all domestic remedies before lodging a valid appeal at the ECHR. The court then issues an admissibility decision, which is akin to a certiorari decision of the U.S. Supreme Court, except that such admissibility decisions generally come with opinions of their own. The case, if admitted, will then be slated for a hearing, which can take time because of the court's heavy workload. As a result, the process typically takes from five to seven years from the time a case is filed to the time it reaches final disposition. Cases now being decided by the court typically refer to facts that arose nearly a decade ago. *See generally* Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN ST. INT'L L. REV. 101 (2002) (discussing the burden the expanding caseload places on the fulfillment of

facts that have generated judgments yet. Nonetheless, terrorism and its attempted control are nothing new in the states under the jurisdiction of the court, so there have been a number of terrorism-related issues that have been decided since September 11 on facts that arose years ago. None show a major change in the court's firm commitment to the preservation of human rights of potential suspects, even after that watershed date.

The ECtHR's jurisprudence on terrorism, outlining the legitimate methods for fighting terrorist threats, covers a wide variety of areas. Through a series of cases arising out of the Turkish Security Courts, where terrorism-related trials are conducted, the court has held that special tribunals on which military judges may sit are inappropriate for trying civilian defendants because military judges are not impartial as between an individual and the state.²⁶⁴ The European Convention in Article 6(1) requires that hearings be conducted by an "independent and impartial tribunal established by law,"²⁶⁵ and in the view of the court, military tribunals or civilian tribunals with military judges, violate the requirement of impartiality.²⁶⁶ The court has retained this view, even after September 11. In a high-profile case involving Turkey's most well-known terrorist, Abdullah Ocalan, the court still insisted that Turkey's system of military tribunals did not provide adequate guarantees of judicial independence.²⁶⁷

The court has developed a substantial jurisprudence on the acceptable length of detention, interpreting the provision of European Convention Article 5(3) that everyone arrested or detained "shall be brought promptly before a judge."²⁶⁸ Britain's regime of extended detention in terrorism cases in Northern

the court's mission).

264. See, e.g., *Sener v. Turkey*, App. No. 26680/95, [2000] ECHR 26680/95, July 18, 2000.

265. European Convention on Human Rights, *supra* note 197, art. 6(1).

266. The court concluded:

certain aspects of these judges' status made their independence and impartiality questionable . . . for example, the fact that they are servicemen who still belong to the army, which in turn takes its orders from the Executive; the fact that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army . . .

Sener, [2000] ECHR 26680/95.

267. *Ocalan v. Turkey*, App. No. 46221/99, [2003] ECHR 46221/99, Mar. 12, 2003.

268. European Convention on Human Rights, *supra* note 197, art. 5(3).

Ireland was found to be inconsistent with the Article 5(3) in *Brogan v. United Kingdom*.²⁶⁹ In that case, various detainees were held under anti-terrorism laws for periods ranging from four to six days and were released without ever having been charged or brought before a judge to have their detentions reviewed.²⁷⁰ Without defining a bright-line number of hours or days, the court held that detention periods of this length without judicial review were too long.²⁷¹ There is, however, a bright line with respect to unacknowledged detention, which is, in the view of the court, a "grave violation" of Article 5.²⁷² In *Orhan v. Turkey*, relatives of the petitioner had been taken away by the security forces in Turkey, never to be seen again. One of the many violations the court found on these facts was the lack of acknowledgement that those taken were in detention at all.²⁷³

The ECtHR also has weighed in on the acceptability of pretrial detention in a case from France, in which the petitioner had been held for trial for five years and seven months before finally being acquitted.²⁷⁴ According to the court, this delay was a breach of both Article 5(3) under which a defendant is "entitled to trial within a reasonable time or to release pending trial"²⁷⁵ and Article 6(1) under which a defendant is entitled to a fair and public hearing "within a reasonable time."²⁷⁶

The specific treatment of those in state detention has also been the subject of a number of ECtHR rulings. In a case growing out of the "troubles" in Northern Ireland, the court found that Britain's treatment of detainees, who had been held under the early terrorism laws, violated Article 3 of the Convention because the detainees had been subjected to inhuman and degrading treatment.²⁷⁷ The detainees were subjected to hooding, sleep deprivation, food deprivation, "wall standing" (being made

269. *Brogan v. United Kingdom*, App. No. 11209/84, 11 Eur. H.R. Rep. 117 (1988).

270. *Id.* at 120-22.

271. *Id.* at 135-36.

272. *Orhan v. Turkey*, App. No. 25656/94 [2002] ECHR 25656/94, June 18, 2002. It might also be noted that this was a case decided after September 11 and after widespread publicity surrounding the American detention of "enemy combatants" at Guantánamo.

273. *Id.*

274. *Tomasi v. France*, App. No. 12850/87, 15 Eur. H.R. Rep. 1 (1993).

275. European Convention on Human Rights, *supra* note 197, art. 5(3).

276. *Id.* art. 6(1); *Tomasi*, 15 Eur. H.R. Rep. at 36, 39.

277. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980).

to stand in a position that induced pain when held over a long period of time) and sustained exposure to stressful noises before and during their interrogations.²⁷⁸ This treatment was held to fall short of torture,²⁷⁹ but was aimed at causing disorientation and sensory deprivation to weaken the resolve of the detainees during interrogation. As a result, the use of these techniques violated Article 3 because they constituted degrading and inhuman treatment.

Techniques causing sustained pain can give rise to a finding that a state has engaged in torture under Article 3.²⁸⁰ Turkey has been found in violation of Article 3 in a case involving a man suspected of being a member of the PKK, the Kurdish separatist group that had committed a number of terrorist acts in Turkey.²⁸¹ The court found that the man had suffered loss of the use of his hands and nerve damage in both arms as a result of being hung for extended periods of time and exposed to electric shocks, treatment which amounted to torture.²⁸² No criminal case was ever brought against him, nor were investigations conducted into his allegations of torture at the hands of the state. The court held that “the treatment was of such a serious and cruel nature that it could only be described as torture” and a breach of Article 3.²⁸³ Because the petitioner had been held for fourteen days without being brought before a judge, Turkey was also found in breach of Article 5(3), though it had explicitly derogated from this article.²⁸⁴ Another Turkish case involved a human rights worker who had been suspected of involvement with the PKK.²⁸⁵ The petitioner claimed that while she had been detained by the police, she had been tortured by being hung naked and subjected to electric shocks, threatened with rape and even death.²⁸⁶ Although the court in this case could not resolve the factual issue concerning

278. *Ireland*, 2 Eur. H.R. Rep. at 81-85.

279. *Id.* at 80.

280. European Convention on Human Rights, *supra* note 197, art. 3.

281. *Aksoy v. Turkey*, App. No. 21987/93, 23 Eur. H.R. Rep. 553 (1997).

282. *Id.* at 560-61.

283. *Id.* at 585.

284. *Id.* at 590. Turkey derogated under Article 15 of the Convention, which allows a country in time of war to take measures contrary to the Convention to the “extent strictly required by the exigencies of the situation” *Id.* at 586 (quoting European Convention on Human Rights, *supra* note 197, art. 15). But the Convention does not permit derogation from Article 3. *Id.* at Art. 15(2).

285. *Veznedaroglu v. Turkey*, App. No. 32357/96, 33 Eur. H.R. Rep. 59 (2001).

286. *Id.* at 63.

whether or not the treatment she had alleged had occurred, the court found that the state nonetheless had obligations under Article 3 to investigate the allegations, which the state had not done.²⁸⁷ Consequently, Turkey was found to be in breach of the Convention.²⁸⁸

According to the ECtHR jurisprudence, the right to counsel applies even in terrorism cases. In two British cases, *Averill v. United Kingdom*²⁸⁹ and *Murray v. United Kingdom*,²⁹⁰ it was determined that Britain was in violation of Article 6, which guarantees the right to defend oneself through legal assistance. The facts of the cases arose out of the same basic circumstances under similar legal regimes. Petitioners were detained under the Prevention of Terrorism (Temporary Provisions) Act 1989 for crimes committed growing out of the situation in Northern Ireland, and in both cases, they were told that adverse inferences could be drawn if they remained silent.²⁹¹ Both petitioners asked for legal counsel, which was refused in both cases under provisions of the terrorism laws.²⁹² Murray was interrogated for twenty-one hours without counsel and refused to answer questions.²⁹³ He was denied access to a lawyer for forty-eight hours. His refusal to answer questions was then introduced as evidence against him at trial and the judge was permitted to draw an adverse inference from his silence.²⁹⁴ Averill was sent for forensic examination during which hairs were taken from his head and fibers were recovered from his clothes.²⁹⁵ He refused to answer questions either about the actions for which he was arrested or about the hairs and fibers that were later used as evidence.²⁹⁶ His request for a lawyer went unfulfilled for more than twenty-four hours.²⁹⁷ Later, his silence was presented against him at trial and an adverse inference requested.²⁹⁸ He

287. *Vezenardoglu*, 33 Eur. H.R. Rep. at 67.

288. *Id.*

289. *Averill v. United Kingdom*, App. No. 36408/97, 31 Eur. H.R. Rep. 36 (2000).

290. *Murray v. United Kingdom*, App. No. 18731/91, 22 Eur. H.R. Rep. 29 (1996).

291. *Id.* at 46; *Averill*, 31 Eur. H.R. Rep. at 40.

292. *Murray*, 22 Eur. H.R. Rep. at 32; *Averill*, 31 Eur. H.R. Rep. at 41.

293. *Murray*, 22 Eur. H.R. Rep. at 32.

294. *Id.* at 33.

295. *Averill*, 31 Eur. H.R. Rep. at 40.

296. *Id.*

297. *Id.* at 43.

298. *Id.* at 44.

was convicted.²⁹⁹ In both cases before the ECtHR, the court found a violation of Article 6.³⁰⁰ Precisely because the terrorism law allowed adverse inferences from silence, the court explained that petitioner had an especially urgent right to have access to counsel from the beginning of an interrogation.

Perhaps the densest jurisprudence in the area of criminal procedure relates to the permissible conditions for electronic surveillance under Article 8 of the Convention, which provides a right to respect for private and family life, home, and correspondence.³⁰¹ This article includes a second section that allows interference with the right "in accordance with the law" but only where "necessary in a democratic society in the interests of national security, public safety or the economic well-being of a country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others."³⁰² Nonetheless, something still remains of the privacy protections identified in the first section of Article 8.

The *Klass*³⁰³ case, arising out of the German law on electronic surveillance, was heard by the Federal Constitutional Court in Germany. The case involved a challenge to the law passed subsequent to the constitutional amendment of Article 10, which concerned privacy of communications and allowed electronic surveillance in the absence of judicial review as long as some sort of parliamentary review was available.³⁰⁴ Despite vigorous dissents, the Federal Constitutional Court upheld most of the law, ruling that the G-10 committees described above were sufficient guarantors of legality in the administration of the surveillance procedures.³⁰⁵ Finding the part of the statute that barred notification to be unconstitutional, the Federal Constitutional Court held that the target of the surveillance had to be notified once the surveillance was over.³⁰⁶ The petitioners

299. *Averill*, 31 Eur. H.R. Rep. at 40.

300. *Id.* at 54; *Murray*, 22 Eur. H.R. Rep. at 40-41.

301. European Convention on Human Rights, *supra* note 197, art. 8.

302. *Id.*

303. *The Klass Case*, Judgment of 15 December 1970, BVerfGE 30, 1. *See also* discussion of this case *supra* notes 69-74.

304. *Id.*

305. *Id.*

306. "By judgment of 15 December 1970, that Court held that Article 1(5), subparagraph 5 of the G 10 was void, being incompatible with the second sentence of Article 10(2) of the Basic Law, in so far as it excluded notification of the person

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went to the European Court of Human Rights, which agreed with the Federal Constitutional Court.³⁰⁷ The ECtHR found that some surveillance was indeed necessary to preserve national security and to protect against crime, but

The Court, being aware of the danger such a law poses of undermining and even destroying democracy on the ground of defending it, affirms that Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate. The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse.³⁰⁸

While the ECtHR noted that judicial review is usually preferred, it found that the German alternative had sufficient protections, including individualized review, that enabled it to pass muster under the European Convention.

The ECtHR elaborated its views about the legality of surveillance under the European Convention in a series of later cases, of which *Huvig v. France*³⁰⁹ presents the best overview of the court's requirements. The court found that telephone tapping was a violation of Article 8, which might nonetheless be justified if it were "necessary in a democratic society" and "in accordance with law."³¹⁰ Even though France had no statutory basis for telephone tapping, it had case law that could amount to a legal basis for such practices.³¹¹ Nonetheless, the application of the law would not be foreseeable since actual wiretaps were done in secret and no one could know whether their actions put them at risk of being tapped.³¹² According to the court, the case law was uncertain and allowed too much discretion to each judge who was permitted to issue wiretap warrants, and citizens had to have an adequate indication of the circumstances in which such practices could be permitted.³¹³ In particular, the law had to specify the

concerned about the measures of surveillance even when such notification could be given without jeopardising the purpose of the restriction." *Klass v. Germany*, App. No. 5029/71, 2 Eur. H.R. Rep. 214 (1979).

307. *Id.*

308. *Id.* at 232.

309. *Huvig v. France*, App. No. 11105/84, 12 Eur. H.R. Rep. 528 (1990).

310. *Id.* at 540.

311. *Id.* at 541.

312. *Id.*

313. *Id.* at 544-45.

offenses for which warrants could be issued, the permissible duration of the surveillance and the limits on what could be done with the results of such wiretaps.³¹⁴ Having a particularly precise law that contained safeguards for the personal privacy of citizens was a necessity under the European Convention.

Since September 11, the European Court of Human Rights has issued a number of decisions that provide reason to believe that the court will not allow its jurisprudence to bend in the face of the terrorist attacks. In fact, in a case issued just two weeks after September 11, the court found that a listening device installed in a prison cell violated Article 8 of the Convention, and the court repeated its criteria for legitimate electronic surveillance without flinching in light of recent events.³¹⁵

September 11 seems to have had no discernible impact on the jurisprudence of the court, which has insisted in previous terrorism cases that terrorism offenses provided no special grounds for deviation from the Convention's requirements. Despite the large number of legal changes that are taking place in response to September 11, it is clear that the European Court of Human Rights believes fighting terrorism need not be done by changing the standards of protection for human rights.

V. CONCLUSIONS

After September 11, international pressures emanating from the UN Security Council have required all states to take steps to fight terrorism. Within the European Union, actions of various EU bodies have also encouraged member states to modify their domestic laws in response to September 11. But the examination of what Britain and Germany have done in the wake of September 11 reveal that transnational pressures explain very little of the specific responses of these two states. While both Britain and Germany enacted major anti-terrorism laws after September 11, the specifics of those laws were very different, even as both faced identical international mandates. In particular, Britain continued its own past practices of treating terrorism offenses in an exceptional manner with methods that have in the past been held to violate the standards of the European Convention on Human Rights and will probably be held

314. *Huvig*, 12 Eur. H.R. Rep. at 544-45.

315. *P.G. & J.H. v. United Kingdom*, App. No. 00044787/98, [2001] ECHR 44787/98 (Sept. 25, 2001).

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in the future to do so as well. Germany, by contrast, maintained careful constitutional protections even while responding to the demands of transnational institutions to revise its laws. Germany, too, continued along the lines it had previously followed in its own constitutional development, being particularly cautious in the context of its post-war constitution to maintain clear checks on potentially abusive powers.

The reactions of transnational institutions to September 11 varied as well. While the Security Council and the EU took steps to toughen anti-terrorism efforts, the Council of Europe institutions in general, and the European Court of Human Rights in particular, reinforced their commitment to upholding high human rights standards. Understanding the difference in the responses of international institutions also requires that we examine what each of these institutions was doing before September 11. The Security Council's mandate involved dealing with threats to international peace and security, so terrorism appeared first and foremost as a threat of the sort that results-driven hard-edged measures could be used to address. The Security Council had little experience in considering human rights, and September 11 did not make the Security Council move into a direction that it had previously never gone. Similarly with the European Union. EU institutions had been presiding over ever-increasing cooperation among European member states without having their own rights charter or specialist bodies charged with defending rights as their primary task. Not surprisingly, the EU responded by doing more of what it had done before—creating more common institutions and procedures, increasing cooperation across a wider range of topics, and trying to define more of their joint legal space as common legal space. Finally, the European Court of Human Rights, with the primary responsibility for upholding human rights norms given in the European Convention, seemed to see September 11 as something that required no changes in its own doctrine.

It is often said that September 11 “changed everything.” But from what we have seen in our survey of a number of major legal shifts akin to the USA PATRIOT Act in the United States, September 11 may have changed specific legal responses to terrorism, but it did not fundamentally change the legal character of those institutions and states that reacted to the terrorist attacks. Instead of making everything different, September 11 made the institutions and states whose reactions

we have reviewed here even more like themselves.