

Striking a Balance in the Age of Terror:

How are civil liberties protected in the constitutional frameworks of the United States and Germany and how are they affected by Anti-Terror Legislation?

Erica Root

A thesis submitted to the faculty of the University of North Carolina at Chapel Hill in partial fulfillment of the requirements for the degree of Masters of Transatlantic Studies in the Department of Political Science.

Chapel Hill
2009

Approved By:

Donald Searing

Milada Vachudova

John Stephens

ABSTRACT

ERICA ROOT: Striking A Balance in the Age of Terror: How are civil liberties protected in the constitutional frameworks of the United States and Germany and how are they affected by Anti-Terror Legislation?

“Under the direction of Professor Donald Searing”

Governments play a multitude of roles in the lives of their citizens. The roles of security and protection for citizens have always been prime concerns of the State. However, the way in which States look to protect its citizens has changed because of the September 11th attacks and the growing uncertainty of stateless combatants forming terrorist cells with mounting Anti-western sentiment. The vulnerability experienced as a result of these attacks allowed many governments to implement policies that normally not be deemed constitutional by either the United State or German governments. This paper examines what rights and liberties are granted to U.S. and German citizens in their respective Constitutions and how those civil liberties have been challenged and even diminished by anti-terror legislation. I believe that the inherent civil liberties of citizens have been greatly abused by the United States and Germany and that these policies are counter productive in the fight against terrorism.

TABLE OF CONTENTS

I. Introduction	1
II. How Are Civil Liberties Protected Within the Constitutional Framework of the U.S. and Germany	4
III. Post 9/11 Anti Terror Laws In The United States	
Background	9
USA Patriot Act	11
IV. Post 9/11 Anti Terror Laws In Germany	
Background	14
Security Package I	15
Security Package II	16
V. Comparing U.S. and German Legislation	19
VI. Accounts of Violations	23
VII. Conclusion: Why Are These Findings Important?.....	27
VIII. References	31

Introduction

National security comes with a cost, literally and figuratively. When compared with other countries, the United States makes up an alarming 46% of the world's total defense spending. (Global Issues Online) The financial burden of combating terrorism and protecting the State makes up only one part of the equation. Another significant aspect needs to be discussed when talking about the "costs" of protection: the cost to liberty that the citizen pays personally for this "added" security. Are the rights the individual abdicated to his or her government in the name of 'national security' purposes? Or are they simply stripped away at the discretion of the government? Weighing the costs and benefits of new legislation needs to take place with regard to how Anti-Terror Legislation will impede upon the rights of its citizens, whether they be in the United States, Germany or anywhere else. I will take a look at the effectiveness of this legislation in tracking down terrorists and examine whether or not potential terrorists are the only ones targeted by the legislation. Essentially, are the 'costs' of abdicating personal freedoms worth the 'benefit' of national security?

This paper seeks to understand, first of all, how civil liberties and freedoms are protected within the U.S. and German Constitutions. What measures have been established to prevent the abuse of citizens' rights by the State? Secondly, civil liberties have undoubtedly been curtailed by recent Anti-Terror legislation. This may be a result of an increased state of fear and an increased trust in the government. (Davis 2007) In what ways, then, has this fear resulted in government changes and increased security measures and more importantly, how

do the two states differ in their constitutional setups and how does this impact the degree to which civil liberties are protected?

Before investigating these questions it is important to define clearly what is meant by “civil liberties.” In this paper, civil liberties are defined as the freedom of a citizen to exercise customary rights like speech or assembly without *unwarranted* or *arbitrary* interference from the government. Dirk Haubrich at the University of Oxford expands upon this common definition and states that civil liberties “entails principles such as the right to privacy and informational self-determination; right to freedom of the person, freedom of expression, the right to property; the right to public movement; right to due process; and the proper delineation of the jurisdiction of the secret services.” (Haubrich 2006) This seemingly long list of civil liberties is protected by the Bill of Rights in America and in the Grundgesetze in Germany. Yet despite the safety precautions inscribed within the two Constitutions to protect against abuse of these liberties, these two nations have been able to implement policies that fundamentally contradict the basic democratic constitutional order. These indiscretions will be examined in further detail below. But first I would like to take a closer look at the Constitutional framework of each of these States individually. Following this examination of the individual constitutions I will compare and contrast the anti-terror legislation implemented after September 11th, specifically in the realm of definitions, surveillance and racial profiling. Thirdly I will discuss whether or not the outcomes are surprising, or not, based on how civil liberties are supposed to be protected within the respective constitutions, and for this purpose I will provide accounts of civil liberty violations.

Due to the time period in which the German Constitution was written, when compared to the American Constitution, I believe it be a stronger, more iron-clad document,

in which separation of powers are more fully recognized. The executive branch is split in an effort to prevent one person gaining full power, as did Hitler under the Weimar Republic. Ultimately, I predict that the historical basis under which the German Constitution was written will be seen to have strengthened the constitutional protections on civil liberties compared to the situation in the United States.

How are Civil Liberties Protected within the Constitutional Frameworks of the United States and Germany?

The United States

In contrast to Germany, the U.S. Constitution is a “charter of negative rather than positive liberties.” These liberties, as detailed in the U.S. Bill of Rights, serve to protect the American citizen and were written to firmly establish the role of the government and its role in the lives of its citizens. The rights guaranteed to the citizens vary from everything including freedom of speech to the right to bear arms. A few amendments in particular are more relevant than others in the discussion of anti-terror legislation, including: the First amendment which protects the freedom to speech, assembly, religion and press. (U.S. Bill of Rights); The Fourth Amendment which protects from unreasonable search and seizure; The Fifth Amendment, which ensures the maintenance of due process and lastly, the Sixth Amendment, which provides that an accused has the right to a trial by jury. In combination these rights serve as a protective barrier from unjustified interference from the government and the preservation of the fundamental rules of law.

The function of the Fourth Amendment, in particular, is highly relevant to the anti-terror legislation imposed after September 11th because its stipulations are broadened well beyond the reasonable exceptions covered by the amendment. In its untainted form, the Fourth Amendment protects the American citizen from “unreasonable search and seizure.” The Supreme Court’s main function is to decipher the Constitution and that includes

determining what is and what is not “reasonable.” Several exceptions have been recognized by the Court in which warrantless search and seizure does not need probable cause in order to be reasonable. (Monk 2000) These exceptions include the following:

1. *Stop and Frisk*- In Terry v. Ohio- police are allowed to frisk suspects, pat them down and look for weapons
2. *Airport Searches*- to prevent against hijacking
3. *Sobriety checkpoints*
4. *Consent Searches* – probable cause is unnecessary if a person consents to a search
5. *Drug Testing* – some employees maybe drug tested by the government
6. *Student Searches*- public officials do not need probable cause in order to search students. However, police officers do need probable cause before conducting a search on school premises

These exceptions have been modified by the USA Patriot Act, so much so that it effectually nullifies the meaning of “probable cause.” However, this is not the only amendment affected by anti-terror legislation. The Fifth Amendment has also been avoided by new Anti-Terror legislation.

The Fifth Amendment works in coordination with the Fourth Amendment to ensure that the rights of citizens are preserved and to limit the power of the government to take action against the individual. Commonly known for its advocacy for the due process of law, the Fifth Amendment explicitly states that citizens have the right to a presumption of innocence until the government can prove its case “beyond a reasonable doubt.” (Monk 2000: 171) These protections should be sturdily set in place. However, these seemingly strict rules come under fire and are often compromised in a state of emergency by those eager to gain and maintain power. This overzealous grasping for power may claim to be in the best interest of the people, but how can this be proven? Is this really a sacrifice the American people need to make to be safe?

Germany

After World War II, the Allied forces sought to divide Germany to ensure the weakened State did not regain its former power. However, the Allies still had to create a proper functioning state as well. Britain, France and the United States pooled their talents to establish a new democratic state, with a constitution purposefully crafted to ensure that power could never fall into the hands of one single person again. With lessons from the Weimar Constitution, the newly drafted German Constitution served as a temporary answer to the divided state. In the Constitution, known as the Grundgesetz, many provisions were created to separate the powers of policy-making and help maintain opposition powers for a strong system of checks and balances. Most importantly, the Constitution included a set of basic rights of citizens to protect individuals from unnecessary abuse of their privacy from the government.

The primary function of any constitution is to establish a framework of laws within which the proposed government can operate. Ground rules are set and a contract created to define what role the government will play in the lives of its citizens. Liberal democracies go to great lengths to inscribe protective clauses within a constitution in order to prevent the abuse of citizen rights. But first, those rights need to be clearly defined in the founding literature.

The guaranteed rights of the German Constitution do not differ greatly from those of the U.S. Constitution. A series of basic human rights found in the Constitution provide persons, regardless of nationality or origin irrefutable rights. These include the 1) free development of one's personality; 2) the right to life and physical integrity as well as freedom of the person; 3) freedom of faith, conscience and creed; 4) and freedom of expression.

(German Ministry of the Judiciary) This standardized definition echoes international thinking in the United Nations Universal Declaration of Human Rights. Two important articles in the Universal Declaration of Human Rights are Article 3, which states that, “everyone has the right to life, liberty and security of person” and Article 6, which affirms that, “everyone has the right to recognition everywhere as a person before the law.” (UN Online)

While these guaranteed rights appear at the international level, preservation of the rights is a responsibility at the national-level and need to be binding in all three branches of government. This means that the branches need to uphold the inherent system of checks and balances so that one branch does not gain the power to avoid international and national obligations. It is vital to take the basic rights defined above into consideration when creating and implementing new legislation. While the government is accountable for implementing new laws, the citizens must fulfill their duties and question laws that may impede upon their basic rights. The ability to question government actions is protected within Article 93(1) no. 4a of the Basic Law. Without this balance, the government may create policies as they please without repercussions. Therefore, both the government and the citizens need to hold each other accountable for the constitution to work effectively.

The German Constitution consists of a variety of positive and negative rights. The negative function works as a barrier between the government and its citizens, preventing the State from intruding into personal liberties. However, the German government also included positive rights in its constitution, which is in contrast to its U.S. counterpart. These positive rights recognize the State’s role in protecting the lives of German citizens on a day-to-day basis and call for the protection of one citizen against another. (German Ministry of the Judiciary) This is significant in that the Constitutional Court of Germany requires the

perpetuation of human dignity. Another important positive right is the right to broadcasting freedom, which has been stringently upheld to ensure that all interests are able to voice opinions. Essentially, protection of the individual is paramount within the German Constitution.

Post 9/11 Anti Terror Laws In The United States

Background

The significance of the changes made in surveillance can best be understood by briefly discussing the legislation that was in place before the implementation of the Patriot Act. Title III and the Foreign Intelligence Surveillance Act served as the control and protection functions of government surveillance prior to 2001. Many strict stipulations could be found within Title III in an effort to protect citizens from overzealous government surveillance. For instance, Title III limited the government's ability to obtain communication content. Interception was only permissible after issuance of a court order based on probable cause to believe that one of the following would occur:

1. an individual is committing one of a list of specifically detailed crimes
2. communications concerning the specified offense will be intercepted
3. pertinent facilities are commonly used by the alleged offender are being used in connection with offense

These strict criteria are amended heavily under the Patriot Act. (Electronic Information Policy Center) Now, with help from the Patriot Act and the use of 'pen register' certification that "information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation" is necessary, this undermines the previous conditions held under Title III to protect citizens from extensive and expansive government surveillance.

The Foreign Intelligence and Surveillance Act (FISA) created in 1978 sought to prevent the government from intruding on the lives of its citizens. FISA authorized surveillance when certain conditions were met. Searches intended to simply gather information in a prosecution do not meet the necessary requirements under the FISA guidelines. (Darmer 2004; 92) Prior to 9/11 FISA databases only maintained certain information on persons, limiting the information that could be gathered to travel industry businesses. Since changes have been made, the information accessed has increased tremendously to now include all business and non-business entities. (-----.) Not only did the information provided increase, but so did those targeted. Originally, the Act targeted foreign spies and international terrorists, and also US citizens who might be taking part in suspicious activities with foreign organizations. Once permitted by a neutral judicial office, the searches conducted could become quite invasive. The Patriot Act greatly alters these conditions. First, it minimizes the requirements necessary to access the data. This is problematic because it allows government agencies to use databases for purposes other than combating terrorism. (-----.) Second, the amendments made to FISA breaks down the walls between law enforcements and government counter-intelligence. Overall, the changes made to FISA because of the Patriot Act greatly expand the powers of the federal government, not only in the realm of terrorism, but in domestic crime fighting as well.

Immediately following the attacks on American soil; Attorney General John Ashcroft tendentiously portrayed those who actively sought to protect civil liberties as supporters of terrorism. (Neier, in *Civil Liberties vs. National Security* 2005: 39) This implication ran deep and, as in crises of the past, major violations of civil liberties were allowed to occur. In fact, only one Senator, Russ Feingold from Wisconsin, voted against the Patriot Act, and no major

newspaper challenged the legislation before it was brought to a vote. (Neier 30) These scare tactics succeeded in preventing any major revolt or opposition and enabled the most comprehensive attack on civil liberties to take place.

USA Patriot Act

The most significant piece of legislation implemented by the U.S. government after the September 11th attacks is known as the USA PATRIOT ACT, which went into effect a mere 6 weeks after the attack on October 26, 2001. (Haubrich 2006) An expansion in the definition of terrorism is clearly stated within the legislation. It effectually expands terrorism law to include “domestic terrorism,” which potentially has the ability to subject political or religious organizations to surveillance. This definition falls under Section 802 of the Patriot Act. A broad clarification is used within the text citing that any person who commits an act ‘dangerous to human life’ is considered guilty of domestic terrorism. Three violations fall under this heading, they include:

1. Intimidation or coercion of the civilian population
2. Influencing the policy of the government by intimidation or coercion
3. Affecting the conduct of government by mass destruction, assassination or kidnapping.

Essentially, this section expands the definition of terrorism providing government agencies with expansive powers. Blurring the lines effectually enables the government to extend their search for suspecting terrorists and leaves little differentiation between terrorism and domestic criminal activity.

Another major aspect of the Patriot Act is the expansion of rights provided to law enforcement agencies to conduct searches. Section 215 is one of the most contested sections

of the Patriot Act because it empowers agencies such as the FBI to have more authority in their investigations. First, Section 215 grants the FBI permission to spy on both citizens and permanent residents of the United States. This differs from previous legislation in that the FBI no longer needs to show probable cause for these “sneak and peek” tactics. (ACLU accessed 2009) Criminal activity does not need to have been committed in order to perform such surveillance. Theoretically, investigation can take place based on the exercise of first amendment rights. Finally, the orders served under this section may not be disclosed. Therefore, subjects are not notified that they are being investigated, and thus are unable to challenge the government, as would normally take place in investigations.

Increased access to private information plays a large role in the Patriot Act. Personal information such as educational and health records, which had previously been held under strict confidentiality, are made more readily available by the anti-terror bill. This disclosure can be found under sections 507 and 508. Section 507, entitled Disclosure of Educational Records states that the government is permitted to obtain private educational records, should the attorney general certify that the documents are necessary for a domestic terrorism investigation. (-----.) Prior to this amendment, an independent judicial finding was required to verify the relevance of the documents before the information could be handed over. Similarly, Section 508 enables the government to obtain records that have been collected under the National Education Statistics Act (NESA). Yet again, such disclosure requires a judge’s signature to certify that information is relevant to a terrorism related investigation. Access to NESA provides the government with information including a person’s academic performance, health information, family income, and race.

Although the first section of the Patriot Act denounces the discrimination against Arab and Muslim Americans (Section 102 entitled Sense of Congress Condemning Discrimination Against Arab and Muslim Americans), contradictory legislation has been passed that undermines this goal. (Hosein 2005) The government has pre-selected ethnicities they deem suspicious, and people who fall into these categories fall prey to the overbearing investigations. A prime example of this discrimination appeared in 2002 when the U.S. Immigration and Naturalization Service adopted the “Special Call-In Registration Program.” This piece of legislation requires nationals of 25 countries, all of which are Arab or Muslim (with the exception of North Korea) to send supplemental information about themselves to the government for their database. Photographs, fingerprints and the successful completion of an interview under oath are all required and failure to do so is a deportable offense. (Haubrich 2006) Section 102 affirms that the U.S. Congress wants to protect the civil liberties of all Americans regardless of their ethnic backgrounds; however, implementation of the Registration Act described above does not support Congress’s policy.

Ultimately, this legislation grants the government the ability to look at purchases, internet searches and library loans of its citizens. Also, surveillance of citizens who are not currently under criminal investigation can be carried out with ease if the government deems a citizen’s first amendment activities a threat to national security. Prior to the Patriot Act, government agencies could only gain this information when probable cause had been demonstrated. Essentially, federal investigations are undermining the restrictions that protect the citizen from interference from the government. This pattern can be seen in both American and German legislation and many complaints have been made by major organization in and effort to counteract the Anti-terror legislation.

Post 9/11 Anti Terror Laws In Germany

Background

Immediately following the attacks in New York and Washington D.C., German Innenminister Otto Schily from the SPD demanded that Germany react with appropriate security measure to ensure the safety of German citizens. (Lepsius 2004) Many changes were implemented in Germany, the most significantly being the two “security packages” which are a compilation of laws and regulations created by the government to ensure safety. Germany however differs from the United States in that the country had already experienced acts of terrorism on its soil a good thirty years before the attacks on September 11th. During this time “security” was officially declared as a “basic right,” which therefore empowered the government to act with more leeway to prevent further attacks.

Germany’s previous experience with terrorism shapes how it treats terrorism today. Since changes had already been made to German legislation in the 1970s, it can be said that the changes implemented after September 11th were more of a response to the “new” form of terrorism, as described above. The following legislation that Germany passed is rather an adaptation to the modern world with new technologies and globalization. (Lepsius 2004) That said, the new German laws enacted after the attacks on America were not a direct response to the attacks of September 11th, but rather a reaction to an the emerging ill understood threat facing western democracies.

Another important factor to take into consideration is the discovery of the Islamic terrorist cells within Germany in early 2000. Four members of the so-called “Melani Group” were discovered in Frankfurt, where they had been planning to detonate a bomb at the Christmas market in Strasbourg. This was the first incidence that alerted the German government that they had been infiltrated by Islamic terrorists and that changes needed to be made to combat this asymmetrical form of warfare. Additionally, the shock of discovering the Hamburg-based terror cell around Muhamed Atta further jarred Germany into implementing stricter regulations. (Zimmerman 2007: 62)

Security Package I

The first substantial security package enacted by the German government is considered to be a “repressive” response to terrorism, as opposed to the “preventative” nature of the second security package. For instance, this legislation placed stricter limits on forming associations within Germany. One important change punishes the creation of terrorist groups by making the planning stage of terrorist activities illegal, something which had previously not been a punishable offense. Additionally, there was a limitation clause (Gesetzvorbehalt) of the constitutional right to form associations which should be protected by Art. 9 II of the Grundgesetz. Essentially, all associations can be prohibited if their goals contravene those of the land or the constitutional order. This abolished the privileged position of religious groups within the country (Zimmerman 2007: 64). Prior to the amendment of the law, the government was unable to prevent the formation of extremist religious communities.

Limitations on associations were not the only points made by the first security package. Other considerations were addressed in the area of aviation policy. Essentially, tighter restrictions were put in place regarding access to planes, and air marshals were

introduced to buttress air traffic security. Tightened regulations of airport personnel became mandatory by way of a stricter and more thorough screening process.

Budget increases enabled these measures to take effect in Germany and were provided for in the legislation itself. Security services including financial and personnel resources were granted under the First Security Package to protect the borders and increase surveillance. (Zimmerman, 2007, p. 65) In summation, the First Security Package provides the monetary means to enact stricter aviation controls and domestic personnel resources, all the while restricting the privileges of group formation. The Second Security Package expands greatly on this in its attempt to thwart off the transnational threat.

Security Package II

On January 1, 2002, the second security package took effect in Germany, amending and adjusting more than 100 regulations and 17 laws. It is regarded as the most “wide ranging package of laws directed at civil liberties in the history of the Bundesrepublik Deutschlands.” (-----) (Lepsius 2004) This package was passed alarmingly quickly in both houses of the German parliament with an overwhelming majority from all 5 parties. (Lepsius 2004) Three major objectives can be identified within the package: increasing the competencies of security organizations; improving cooperation among federal and local law enforcement agencies; and preventing infiltration of potential terrorists into Germany. Emphasis is placed on using technology to its greatest potential in stopping terrorism in its beginning stages. It focuses greatly on combating terrorism by increasing the government’s ability to use surveillance technology on its citizens. Among the changes were an enlargement in the range of security authorities and an ease in the transfer of information among security agencies.

Three main agencies are granted more power from the second security package, they include: Bundesamt für Verfassungsschutz (Federal Office for the Protection of the Constitution), die Bundesverfassungs Gericht (Federal Constitutional Court), and the Bundesnachrichtendienst (Federal Intelligence Service). The new laws empower the agencies to demand information about bank accounts, other financial institutions, the post office, telecommunications and airline companies. Easing the restrictions of information gathering is in direct conflict with Article 10 of the Grundgesetz, which protects the citizen's right to self-determination. (Lepsius 2004) This is highly controversial because such information gathering is difficult to detect and therefore difficult to prosecute against, particularly because it does not fall under judicial control. Instead, a legislative committee is responsible for such complaints. Art. 19 of the Grundgesetz states that German citizens have a "legal protection guarantee," which that citizens have the right to bring their claim to court if their rights have been interfered with by the government. Restricted transparency makes combating such civil liberty offenses difficult.

What is interesting is that, before the September 11th attacks, the German government was pushing for increased leniency in surveillance. However, this was always blocked by deeming it to be an inappropriate course of action, and by citing consumer privacy issues and the exorbitant costs of implementing such security surveillance systems. (Haubrich 2003) The attacks on America were therefore a catalyst enabling the German Parliament to finally push through legislation that had been a topic of discussion for years.

The "IMSI Catcher" is a controversial piece of legislation that was unable to garner enough support before September 11th because of its possible conflict with civil liberties, yet this changed dramatically in the wake of the attacks. Changed opinions resulted in the

legalization of the “IMSI Catcher” which became another by-product of the second security package. This portable electronic device emulates a base station for cellular phones and can identify all mobile phones within a 200-meter radius of the base station. (Haubrich 2003) Information discovered by the device is easily stored and may be used in future investigations. However, this can be very dangerous and put those within the 200-meter radius in a precarious position. Those within the radius may be subject to criminal prosecution and may not be granted “assumption of innocence” instead, there is now a presumed “general suspicion,” which is in conflict to an underlining principle of the democratic state. (Haubrich 2003)

The formation of an Anti-Terror Database was very controversial in Germany. Rather than being introduced by the executive and pushed subsequently through the Bundestag and Bundesrat, the legislation originated within the legislative branch itself. The Social Democrats insisted that restrictions be placed on the access of information available in this database to ensure that the civil liberties of the public were not being abused. The compromise between the Social Democrats and the Christian Democrats ensured that a person’s religion would not be readily available when accessing the database. Only in cases of extreme terrorist threat would more information, such as religion, be made available to those using the database. (*Fighting Terrorism* 2006) Restricting the access of the database helps preserve civil liberties as much as possible and doesn’t allow for unnecessary violations of these rights. This differs greatly from the U.S., whose policies have made lots of information readily available and which allows for domestic crime matters to become entangled with foreign intelligence.

Comparing U.S. and German Legislation

There is a high likelihood of another terrorist attack occurring in the West. Therefore States need to adapt as they see fit to protect their citizens and prevent as many attacks as possible from being carried out. The so-called “new” form of terrorism forces the West to reconsider previous strategies. Anti-terrorism strategies can either be reactive, proactive, or preventative; long term or short term; and only rarely coercive, because of the potential ramifications of such response, particularly the backlash from undermining legitimacy of rule by loosening rules that inhibit personal freedoms. What I have found in my research is that the strategies employed by the United States and Germany do not differ immensely; rather, there is considerable overlap, specifically when it comes to coordinating databases, importing newer and more advanced surveillance technologies, and targeting specified races in the quest to find terrorists living in country. Although similar in nature and design, the German legislation was created independently from that of the US Anti- Terror legislation.

Many similarities can be drawn between the USA Patriot Act and the Second Anti-Terror Package in Germany. The major objectives identified within the Second Security Package more closely resemble that of the American program because of their focus on inter-agency coordination. Prior to the Patriot Act, the various law enforcement and intelligence agencies did not exchange information as readily as they do today. Data collection among the various agencies is deemed to be imperative to cracking down on terrorists and has therefore become a common thread in the two countries.

Database information has thereby become more readily available because of these legislative changes. However, it is not limited to merely sharing the information among the different agencies; rather, it extends to gathering more information from the general population for the purposes of increasing the information available to the State. For instance, in Germany the immigration laws have been tailored in such a way that foreigners need to provide a substantial amount of supplementary information. This includes, “voice recordings of asylum seekers and their fingerprints to be stored for a decade and online access of the police to the data of the immigration and naturalization services.” (Zimmerman 2007: 66) In the United States, supplementary legislation has been passed to increase the State’s access to information. However, only people of certain ethnic backgrounds are subject to providing this information. Clearly, both States are targeting specific persons in an effort to prevent infiltration of terrorists into their borders; but the United States is taking this one step further by having the legislation directly impact persons who may already have permanent citizenship rights.

Both States have pursued policies that make general technological surveillance much easier. Information such as library check-outs and credit card purchases may now be tracked easily by both governments. However, the extent to which this issue is covered in the legislation is clearly greater in the case of the United States. The literature on the various policies concentrates very much on the ways in which the U.S. government can monitor various electronic purchases of its citizens. In Germany the restraints on accessing such information have been loosened; however the extent to which the Germans inspect these various electronic footprints is downplayed in comparison to that of the Americans.

Not all policies adopted by the Americans have been put into the two German security packages. One distinct difference was the American implementation of ‘sneak and peek’ investigations. This appears to be unique to the United States, at least when compared with Germany. Essentially, the ‘sneak and peek’ policy of the United States allows government agencies to track citizens should the attorney general certify that is relevant to an investigation. This however leaves much room for debate, particularly because potential participation in terrorist activities is not clearly stipulated in the Patriot Act as a necessary prerequisite to conduct invasive searches. Therefore ‘sneak and peek’ operations can extend to situations where terrorism is not the goal, which may conjure up ethical questions with regards to policies of due process.

One major option in combating terrorism available to the United States is deemed unconstitutional in Germany: taking the War on Terror outside the country’s boundaries. (Beckman 2007) Clearly the United States has sought to combat terrorism by going to nations which the U.S. government believes are responsible for breeding anti-American plots. This tactic remains unconstitutional in Germany. Article 26 of the German Constitution specifically states that the “intent to disturb peaceful relations between nations, especially for the preparation of war, are unconstitutional.” Therefore German participation in the War in Iraq is strictly forbidden, much to the dismay of the U.S. State Department, which claims that these Constitutional limitations are limiting the success of reigning in international terrorists. (Beckman 2007) Despite this one point of difference, there still remains a high correlation between the U.S. and German legislation and the infringements to civil liberties.

Overall both the United States and Germany rely heavily on invasive technology as a primary means to stop terrorism. Finding patterns and tracking curious behavior domestically

has been the primary focus of the legislation. In general, stricter changes in aviation security has occurred and of course profiling, but these go hand in hand with using technological innovation to its greatest capacity to catalogue movements of peoples. Requiring photos, fingerprints and other supplemental information from people of specific ethnic backgrounds may easily be accessed because of these policies.

Many parallels can be drawn between the anti-terror legislation of the United States and Germany. In the general sense, both countries pushed through legislative changes very soon after the September 11th attacks. They found it imperative to assemble legislation that would try and prevent any similar events from transpiring again. The speed and ease with which legislation was passed has generated many criticisms since its introduction.

Accounts of Violations

There is a significant amount of literature suggesting that there have been civil liberty and human rights violations as a direct result of Anti-Terror Legislation in the United States and Germany. Human rights organizations have been outspoken in their dismay over the laws in various Western lands.

United States

Many major organizations have spoken openly about their frustration with the USA Patriot Act; Amnesty International, which strives to protect human rights and civil liberties finds many points of contention with the anti-terror legislation because of its infringements in these areas. The organization recommends several actions take place to regain control over civil liberties and individual rights. First, it urges Congress to pass reforms to safeguard individual human rights, such as the End of Racial Profiling Act. Also it calls to for revoking clauses in the Patriot Act which are in breach of constitutionally protected rights. One important measure Amnesty encourages is the enforcement of SUNSET provisions, which are parts of law automatically repealed on a certain date. (Amnesty International Online) This is to ensure that restrictive and problematic provisions do not remain in place for an extended period of time and encroach upon civil liberties unnecessarily. Finally, Amnesty encourages individuals to initiate efforts to “uphold civil and human rights as defined in the U.S. Constitution and international law.” Without citizen participation, liberties may be vulnerable to obstruction from the government.

There are several examples of a breach in civil liberties resulting from the USA Patriot Act. One involves an Oregon man named Brandon Mayfield who was wrongly arrested for involvement in the 2004 Madrid bombings. (CNN Online) Mayfield, an attorney, claimed that the FBI secretly searched his office in the middle of the night, examined client files, and made copies of personal documents. Once acquitted from involvement in the bombings, Mayfield opted to go after the government for invading his privacy under the protection of the Fourth Amendment. Judge Ann Aiken of the U.S. District Court for the District of Oregon presided over Mayfield's case. In her ruling she referenced the Foreign Intelligence Surveillance Act (FISA), stating FISA "holds that the Constitution need not control the conduct of criminal surveillance in the United States." Aiken decided that two provisions stipulated in the USA Patriot Act were unconstitutional. She emphasized the importance of the Fourth Amendment and suggests that the Patriot Act asks her "to amend the Bill of Rights, by giving it an interpretation that would deprive it of any real meaning." This is something she is unwilling to do, and she finds the elimination of interplay between the three branches to be detrimental to American citizens and to the civil liberties of citizens.

Not only has the requirement for a search and seizure warrant been blurred or eliminated completely, but there has been a significant increase in the misuse of database information for non-criminal activity. By amalgamating and aligning databases, significant amounts of information can easily be accessed by several government departments. This is extremely significant in the case of immigration matters and has been flagged by several domestic groups whose primary concern is to ensure the rights of immigrants and permanent citizens. The National Council of La Raza, the New York Immigration Coalition, the American-Arab Anti-Discrimination Committee, Latin American Workers Project and

UNITE have all openly accused former Attorney General John Ashcroft and the FBI of misusing the crime database to enforce non-criminal civil immigration laws. (Bernstein NY Times Online) Traditionally, immigration matters such as visa expiration are not considered criminal and are not handled by federal agents. However, federal agents have, since the inception of the Patriot Act, taken it upon themselves to access the database and arrest people for such violations. It is dangerous to permit federal agents and agencies to assume responsibility in areas not traditionally governed by them. A bill promoting such actions has been proposed and immediately received heavy criticism and was shut down by with strong opposition in cities across the country including LA, New York City and Miami.

Germany

As stated above, one major criticism of both American and German Anti-Terror legislation is its use of surveillance techniques and databases to combat domestic crimes. In preparation for the G8 Summit in Heiligendamm in 2005, German police and secret service members launched an investigation against political activists. New Anti-Terror policies such as expanding wiretapping capabilities and house raids were used against the political activists to gather personal documents, records, and computers in an effort to build a case. The German Constitution Court declared these investigations unconstitutional and severely lacking in probable cause. Specific political beliefs were targeted by the German government under the veil of terrorism and Anti-Terror based legislation. (Statewatch News Online) Essentially this is an attack on freedom of speech rights. Despite the Court's ruling, the government still had gained valuable information about these activists, whose information and personal data are undoubtedly in a German database, ready to be mined. Independent reports claim that this is continuing to occur. More and more political activists are being

placed under the same umbrella as terrorists. This is disconcerting because it not only takes the focus away from terrorists, but it place at risk individuals whose beliefs simply differ from those approved by the government. (Irons 2005)

Major German political parties such as the Social Democrats and the Greens have expressed concerns regarding Anti-Terror Legislation, particularly legislation that expands upon the two major Anti- Terror packages put into effect just weeks after the 9/11 attacks. The laws approved in Germany's Upper House (Bundesrat) in December 2006 consolidate banking, telecommunication, and internet information into a central location. This is significant because it further combines personal information and it grants access to police and intelligence forces, who have had distinctly different levels of access to personal information since Hitler's Weimar Republic. (Deutsche Welle, 12/19/2008) Changing laws have significantly distorted competencies of police and intelligence agents which may negatively impact the civilian population as it has done so in the past.

Conclusion: Why Are These Findings Relevant?

The attacks of September 11th enabled the United States and Germany to implement policies that were inconceivable before the events transpired. This is largely due to innovative and devastating nature of the terrorist attacks. They proved that western democracies were not indeed as secure as they may have believed. The respective governments took it upon themselves to combat the “new” threats posed by terrorists to establish an array of surveillance-based laws. The ISMI Catcher in Germany is a prime example of legislation that would have not been passed prior to September 11th; however, after the attacks a new set of opportunities presented itself in terms of permitting government agencies to carry through with proposed procedures to stop terrorism, but also domestic crime.

The impression the attacks made on domestic and international policies is wide-ranging. The legislation discussed above is evidence of this. Changes were made in several different policy areas, in a multi-pronged approach to combat terrorism. Western nations scrambled to put together packages to fight the emerging threat. Ultimately, these states demanded “more efficient measures in order to deprive terrorism of its worldwide breeding ground.” (Zimmerman 2007: 59) Thus, the legislative response discussed above is limited to the domestic changes made and does not delve into the changes made in terms of international collaboration in the fight against terrorism.

Terrorism can be fought in a multitude ways. The United States and Germany implemented alarmingly similar policies in the post-9/11 period. Similarities end however when comparing other counter-terrorism efforts in Germany and in the United States under the Bush Administration. The counterterrorism efforts in the United States emerged as a two-step process. Not only did the Bush administration work to stop the beginning stages of terrorism, but they took it one step further by trying to actively combat terrorism abroad. Germany found this second step to be counter-productive and ultimately feared it would only cultivate more animosity towards the West. (-----.) Thus it is interesting that with such differing opinions on how to combat terrorism abroad, that the domestic changes made in both States were so similar.

Evidently the counter-terrorism policies are not identical in the United States and Germany despite the many similarities that emerge while simply comparing post-9/11 legislation. These two States provide an interesting comparison because both have experience with extremist Islamic terrorist group infiltration. While the terrorist cells in Germany have been intercepted by the government, and therefore a large scale terrorist attack has not been carried out, there is still a terrorist presence in the country. The need for counter-terrorism legislation remains. However, what are the greater implications of these policies?

Many significant implications arise from these findings. First the emergency powers used by both the American and German governments suggest that the more acts of terror these States encounter, the greater the likelihood that civil liberties will further be encroached upon. Second, there is no steadfast means of preventing politicians and their respective governments from exploiting momentary panic, to impose long lasting limitations on freedom. (Leone 2003)

Another primary concern is the adherence to common law practices and use of criminal law in terrorist proceedings. What is meant by this is the practice of apprehending potential terrorists and proceeding by means of the framework provided by the laws of the land. Since September 11th, a new terminology has emerged to describe people who are or may be involved in terrorism. These “enemy combatants,” as they have been named, are thus no longer subject to the due process rules that these States have been founded on. Therefore, the punishment for such persons is beyond the laws of the land. Governments effectually rid suspected terrorists of their rights and try them as the government sees fit.

The most notorious example of this is the creation of the American prison at Guantanamo Bay. This U.S. owned piece of land enabled the U.S. Government to send the most “dangerous” of criminals (i.e. terrorists) to live in inhumane conditions without regard to International Human Rights and with no chance of a trial by jury or access to a lawyer.

Not only has due process been avoided in many cases concerning terrorist activities, but so have fourth amendment rights. Utter disregard for the fourth amendment, which protects against unlawful search and seizure, is commonplace in the post-9/11 world. These principles have slowly been eroding in the last ten to twenty years, as technological innovation makes it easier to maintain databases and link databases together for easier access. Available information is much greater today than it was when the Bill of Rights was conceived. However, no adjustments have been made to limit the attack on personal privacy. On the contrary, the courts have allowed for greater surveillance and have increasingly allowed for warrant-less searches when suspects are outside their homes and “in public.” (Stanley, in *Civil Liberties vs. National Security*: 2005) Essentially, no significant moves have been made to counter the increased use of technology as a means of intelligence

gathering. Boundaries need to be drawn to protect citizens from such intrusions and constitutional violations.

Ultimately we need to ask ourselves if this increase in information available to governments and the decrease in civil liberties are justifiable. Have these measures made the U.S. and Germany more secure? Probably. But it is difficult to say how much more secure. It is the ambiguity of this situation that leads both legislators and judges to err on the side of being safe rather than sorry. What is in any event certain is that a balance needs to be struck in the quest to thwart terrorism in Western lands, and that in striking that balance some civil liberties are bound to be compromised and some politicians are bound to exploit the situation to gain power and retain it.

REFERENCES

- "American Civil Liberties Union : USA PATRIOT Act." *American Civil Liberties Union*. Retrieved June , 2009 (<http://www.aclu.org/safefree/resources/17343res20031114.html>).
- "Anti-Terrorism Laws of France & Germany (FAQs) - IslamOnline.net - European Muslims." *IslamOnline.net- Islamic News, Shari'ah, Society, Family, Culture, Science, Youth, and Health*. Retrieved June 6, 2009 (http://www.islamonline.net/servlet/Satellite?c=Article_C&cid=1237705691997&pagename=Zone-English-Euro_Muslims%2FEMELayout).
- Beckman, James. 2007. *Comparative Legal Approaches to Homeland Security and Anti-Terrorism*. England: Ashgate Publishing Company.
- Bernstein, Nina. 2003. "Crime Database Misused for Civil Issues, Suit Says." *The New York Times Online*. Retrieved September 5, 2009 (<http://www.nytimes.com/2003/12/17/politics/17IMMI.html?pagewanted=print&position=>).
- "Bill Of Rights." Retrieved September 2, 2009 (http://www.constitution.org/billofr_.htm).
- "Civil Rights and the War on Terror." *Amnesty International USA*. Retrieved September 5, 2009. (<http://www.amnestyusa.org/war-on-terror/civil-rights/page.do?id=1108209>).
- Darmer, Katherine, Robert M. Baird, and Stuart E. Rosenbaum, eds. 2004. *Civil Liberties vs. National Security in a Post-9/11 World*. Prometheus Books.
- Davis, Darren. 2007. *Negative Liberty: Public Opinion and the Terrorist Attacks on America*. New York: Russell Sage Foundation.
- "EFF: How PATRIOT Threatens Online Civil Liberties." *Electronic Frontier Foundation / Defending Freedom in the Digital World*. Retrieved June 5, 2009 (<http://w2.eff.org/patriot/why.php>).
- "EPIC USA PATRIOT Act Page." *Electronic Privacy Information Center*. Retrieved June 6, 2009 (<http://epic.org/privacy/terrorism/usapatriot/>).
- "Federal judge rules 2 Patriot Act provisions unconstitutional." *CNN International*. Retrieved September 10, 2009 (<http://edition.cnn.com/2007/US/law/09/26/patriot.act/index.html>).

- “German Police Get New Powers in Terrorism Fight.” (2008) *Deutsche Welle Online*. Retrieved September 6, 2009 (http://www.dw-world.de/popups/popup_printcontent/0,,3888772,00.html).
- Grundgesetze für die Bundesrepublik Deutschland*. German Ministry of the Judiciary. Retrieved August 2009 (http://www.bundesregierung.de/nn_774/Content/DE/StatischeSeiten/Breg/informationen-ueber-das-grundgesetz.html?).
- Haubrich, Dirk. 2003. “September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared.” *Government and Opposition* 38 (1):3-28.
- Haubrich, Dirk. 2006. “Modern Politics in an Age of Global Terrorism: New Challenges for Domestic Public Policy, Volume 54.” *Political Studies Association*. Blackwell Publishing Limited.
- Heymann, Philip and Juliette Kayyern. 2005. *Protecting Liberty in an Age of Terror*. Massachusetts: MIT Press.
- Hosein, Gus. “Threatening The Open Society: Comparing Anti-Terror Policies and Strategies in the U.S. and Europe.” *Policy International Online*. Retrieved June 30, 2009 (<http://www.privacyinternational.org/issues/terrorism/rpt/comparativeterrorreportdec2005.pdf>).
- Irons, Peter. 2005. *War Powers*. New York: Metropolitan Books.
- Jaeger, Paul und John Bertot und Charles McClure. 2003. *The impact of the USA Patriot Act on collection and analysis of personal information under the Foreign Intelligence Surveillance Act*. Retrieved March 20, 2009 (https://blackboard.unc.edu/webapps/portal/frameset.jsp?tab=courses&url=/bin/common/course.pl?course_id=287997_1).
- Leone, Richard and Greg Anrigh, Eds. 2003. *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*. New York: Public Affairs.
- Lepsius, Oliver. 2004. “Liberty, Security, and Terrorism: The Legal Position in Germany.” *German Law Journal*, Retrieved February 27, 2009 (germanlawjournal.net).
- Monk, Linda. 2000. *The Words We Live By: Your Annotated Guide To The Constitution*. New York: Astonesong Press Book.
- Pious, Richard M. 2007. *The War on Terrorism and the Rule of Law*. New York: Oxford University Press.

“The Universal Declaration On Human Rights”. *United Nations Online*, Retrieved October 16, 2009 (<http://www.un.org/en/documents/udhr/#atop>).

Wilkinson, Paul. 2001. *Terrorism Versus Democracy: The Liberal State Response*. London: Roulledge.