Freedom and Security in Constitutional Democracies: A Transatlantic Dialogue*

Dieter Feddersen

Welcome Address

More than 35 years ago—in 1974—the Dräger Foundation was inaugurated by Heinrich Dräger, the then-chairman of the Drägerwerk company in Lübeck, Germany. The Foundation is a non-profit institution and exclusively and directly pursues non-profit ends.

The Foundation regards itself primarily as an operational foundation which develops and implements its own programs, sometimes in co-operation with other organizations. It regards its role as that of an initiator, and addresses topical and future-oriented subjects at its conferences, symposia, and other events.

One of our major concerns in this respect has always been the promotion of transatlantic relations, i.e. not only German-American relations, but increasingly also European-American relations, and we are very pleased that this conference is following our tradition: the conference was prepared and organized—and is realized—in close transatlantic co-operation. Through our joint endeavor to bring together judges and experts from the United States and Europe we want to strengthen existing networks and develop new bonds across the Atlantic. We are convinced that we will have very intense, open—and confidential—debates on important constitutional questions of mutual concern and that we will learn from each other.

Today's conference is the fourth conference on constitutional issues initiated by the Dräger Foundation with the participation of Supreme Court justices, justices of the Federal Constitutional Court in Germany and judges of the European Court of Justice.

Our 1989 and 1999 conferences coincided with the 40th and 50th anniversaries of the German Constitution. In 1989 the conference in Washington was attended by the President of the Federal Republic of Germany, Prof. Herzog. A couple of months later the Berlin Wall fell.

In 1999 we held the conference jointly with the American Institute of Contemporary German Studies. The third conference on constitutional issues in 2004 was carried out in cooperation with the Dedman School of Law at the Southern Methodist University in Dallas. It was held at All Souls College at Oxford and dealt with questions of subsidiarity and federalism, the division of powers, and national and international law.

Among the participants we welcomed at these two conferences were Jutta Limbach and Ernst Benda, former presidents of the Federal Constitutional Court, Justices Brun-Otto Bryde and Rudolf Mellinghoff of the German Constitutional

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Court, Justices Sandra Day O'Connor, Ruth Bader Ginsberg, Stephen Breyer, and Antonin Scalia of the United States Supreme Court, and from the academic world Dieter Grimm, Donald Kommers, Rudolf Dolzer, and Matthias Herdegen. It is with great pleasure that we see quite a number of our 1999 and 2004 participants attending this conference too.

We are grateful to Prof. Mellinghoff, who was substantially involved in the preparation of this conference and has dedicated many hours of his limited time.

I also want to thank the Fritz Thyssen Foundation and the Georgetown University Law Center, Mrs. Meryl Chertoff, and Mrs. Vicki Jackson for their excellent cooperation and, last but not least, His Excellency Dr. Klaus Scharioth, German Ambassador to the United States, for his invitation to dinner at his residence.

Constitutional freedom and domestic security are fundamental requirements for a democratic state based on the rule of law. The conflicts between security and freedom are one of the key issues of constitutional law, dominate the political discussion of police action, and are the subject of important decisions taken by constitutional courts. New challenges, especially those related to international terrorism, have shown that Americans and Europeans have different views on questions like: how much power should governments have, and what needs to be done to protect civil rights?

Security questions of international significance and the protection of civil liberties and rights must, however, also be reconciled at an international level. This is why a dialogue focusing on the differences and similarities in the way global challenges posed by international terrorism are tackled is particularly important.

We are looking forward to two exciting days. Thank you all for attending.

Jurgen Chr. Regge

Welcome Address

Professor Areen, [Interim Dean, Georgetown University Law Center], Secretary Napolitano, [U.S. Department of Homeland Security], Federal Minister de Maizière, [Federal Minister of the Interior], Professor Voßkuhle, [President of the Federal Constitutional Court], Members of the Supreme Court of the United States and the Federal Constitutional Court, ladies and gentlemen, on behalf of the Fritz Thyssen Foundation, Cologne, I would like to welcome you here at Georgetown University Law Center to the conference "Freedom and Security in Constitutional Democracies: A Transatlantic Dialogue." The Draeger Foundation, located in Lübeck, and the Fritz Thyssen Foundation from the Rhineland have together done the groundwork to enable this outstanding conference on "Freedom and Security in Constitutional Democracies: A Transatlantic Dialogue" to take place over the next two days.

Both foundations are committed not only to furthering science and research, but also in particular to enhancing transatlantic relations and dialogue. Exchange of information and scientific cooperation have always proved to be a stimulus for advancing research and theory. Consequently the Fritz Thyssen Foundation has since the 1960s continued to develop its ties to American universities such as

Georgetown University, Johns Hopkins University, Harvard University, the University of Chicago, Berkeley, Stanford, and others.

In this connection, questions of law have repeatedly played a crucial role. During the Cold War, it was mostly a case of external security topics; these were largely replaced later by legal issues concerning the global order, the securing of supplies in the energy sector, and environmental protection.

Now, in today's conference, we once again return to the theme of security, this time, however, under the aspect of the balance between civil liberties and the necessity of state action to establish internal and external security, to protect the state, and to protect the citizens themselves. Increasingly, the highest courts are being called upon to bring about a just balance. In this context, quite differing views have emerged between what the legislative and executive branches deem necessary and what case law has declared to be constitutional or unconstitutional to protect basic rights. Recently, the German Federal Constitutional Court has repeatedly had to deal critically with laws in the field of public security passed by the federal government in Berlin, and therefore the comparative law dialoge planned for today and tomorrow may truly claim to be highly topical.

Even some sixty years after the Federal Republic of Germany's constitution came into effect, whenever there is pressure to take action, faultlines become apparent between the constitutional bodies, and repeatedly these have to be closed. To put it bluntly, the question could be asked which constitutional body has the higher level of legitimacy: Parliament, which can base its opinion on the citizens' decision in elections, or the Constitutional Court, whose members are appointed.

This is where I see an assignment for independent private foundations: they can enable exchanges on neutral ground, so to speak, and at the same time can advance international perspectives. It is not only my expectation but also my desire that this will be achieved at this conference and that the participants from the U.S., from Germany, from the highest courts, from the public sector, and from academia will perceive a benefit for themselves and their work.

I wish you good speeches, good discussions, and good results.

Rudolf Mellinghoff

Introduction

Freedom and Security in Constitutional Democracies

The tension between constitutional freedom and internal security in constitutional democracies is one of the fundamental issues which concern the Western community of states; it dominates the political discussion on police measures and is the subject of important judgments of the constitutional courts. At the same time, there are certainly different approaches in America and Europe as to the permissibility of state action and the protection of civil rights. And it is necessary to find a just balance between the two viewpoints on an international level.

I. The Tense Relationship Between Freedom and Security

Freedom and security are two terms highly charged with emotions, which have a polarizing effect. The supporters of both sides tend to conjure up potent images in garish colors. One side bears "in dubio pro libertate" ("…if in doubt, favor liberty") on its banner and regards freedom and security as irreconcilable antagonists. It argues that the functional logic of the liberal constitutional state, oriented towards the freedom and autonomy of the individual, and the logic of the security or preventive state are mutually exclusive. Above all in times of counterterrorism, there is the risk that a non-attainable security ideal might be pursued to excess. If there is a promise of fundamentally unlimited and never-ending state activity to protect the citizen against risks and dangers that are conditional on social, technological, environmental, and even criminal factors, this is the expression of an "eschatological and utopian character of the concept of security," and this is reinforced even further in the idea of a "fundamental right to security."[1] This side warns against what it calls securitization, which gnaws at the substance of constitutional achievements of the security under the rule of law. Ultimately, it states, there is always the fear in the background of an Orwellian Big Brother state. It laments a desperate constraint of data protection and an excessive transformation of criminal law into a form of law designed to ward off danger.

On the other side we encounter attitudes—with reference to particular forms of serious crime—which coalesce in the call: "Lock them up for life!" Indignation at particular crimes leads to the call for the legislature to aggravate sentences, for blacklists of expert witnesses, or for mitigation of the requirements for preventive detention of habitual offenders. Internal security is broadened so that the state assumes ecological and social risks. The state acquires responsibility for ensuring "existential certainty."[2]

II. The Constitutionally Guaranteed Equilibrium Between Security and Freedom

The relationship between security and freedom is one of tension, but they also complement each other. Each is conditioned on the other, and yet at the same time they are poles which repel each other. The specific characteristics of the relationship between security and freedom cannot be resolved by one simple formula. Instead, it is necessary to find an equilibrium between these two values. A constitutional state under the rule of law creates the best conditions for finding such an equilibrium. Neither freedom nor security has absolute priority. The pursuit of absolute security results in the suppression of freedom. Conversely, unlimited freedom results in a maximum degree of insecurity and thus ultimately also to a state in which freedom is annihilated.

1. *See* Erhard Denninger, *Freiheit durch Sicherheit? [Freedom through Security?], in* Terrorismus—Rechtsfragen der äusseren und inneren Sicherheit [Terrorism—Legal Aspects of External and Internal Security] 83, 90 (Hans-Joachim Koch ed., 2002).

2. *See* Uwe Volkmann, *Sicherheit und Risiko als Probleme des Rechtsstaats [Security and Risk as Problems for the Rule of Law]*, 59 JuristenZeitung [JZ] 696, 700 (2004).

1. Security as a Precondition of Freedom

Freedom, which is the essential quality of the constitutional state, is conditional on security. No one who is in constant fear and anxiety for life and health, reputation and property can be free in any meaningful sense of the word. Existential concern as to the continuation of one's own physical existence and its material basis gives a person a sense of helplessness and leads to the loss of self-respect. The destruction of the sense of security also deprives society of its social cohesion; it creates fear of the other, suspicion on all sides, and distrust; it prevents the development of fundamental interpersonal trust and unselfconscious social intercourse, without which a free society is impossible. Those who are forced to sit back and do nothing while they see un-avenged murder, brazen fraud, and barefaced humiliation of weaker persons can no longer hold their heads high as free citizens. They lose first the will and ultimately even the ability to shape their lives in a self-determined manner. The free become the driven. Those who are victims of physical injury or suffer damage in a burglary not only experience physical damage and material loss, but at the same time feel that their private sphere has been violated, generating feelings of impotence and abandonment.

2. Constitutional Foundations of the Guarantee of Security

The German Basic Law presupposes the state's guarantee of security as its foundation; it proceeds on the basis of functioning state authority in this respect in the same way as it presupposes the existence of a national territory and people.

This follows from the way the concept of security has been developed in the theory of the state. The English legal theorist Thomas Hobbes based his theory on the "state of nature" which he saw in the religious wars of the early modern period: that often-cited state of the war of all against all (*bellum omnium contra omnes*), in which every person is a wolf to the next person (*homo homini lupus*). The intolerability of this state resulted in Hobbes' hypothesis, whereby all people, on the basis of a mutual contract, submit to the state as a union which by reason of its authority and power is able to preserve peace and give protection.

In the liberal state theory of the late 18th and the 19th centuruues, the state's purpose in providing security continued in effect, even if the approach to it changed and the restriction of the state to the purpose of security, derived from the idea of individual freedom, predominated. For Wilhelm von Humboldt, security was the "certainty of lawful freedom."[3]

Thus the state monopoly on the right to exercise force is at the same time a constitutive condition of the modern state's entrance into existence. For this reason, one cannot be quite indifferent to the numerous efforts of the state toward priva-

3. *See* Volkmar Götz, *Innere Sicherheit [Internal Security]*, *in* 4 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [HANDBOOK OF THE STATE LAWS OF THE FEDERAL REPUBLIC OF GERMANY] § 85, Rn.19, at 681 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2006); Josef Isensee, *Der Verfassungsstaat als Friedensgarant [The Constitutional State as Guarantor of Peace]*, *in* DIE ERNEUERUNG DES VERFASSUNGSSTAATES: SYMPOSION AUS ANLASS DES 60. GEBURTSTAGES VON PROFESSOR DR. PAUL KIRCHHOF [THE RENEWAL OF THE STATE CONSTITUTION: SYMPOSIUM ON THE OCCASION OF THE 60TH BIRTHDAY OF DR. PAUL KIRCHHOF] 7, 27 (Rudolf Mellinghoff, Gerd Morgenthaler & Thomas Puhl eds., 2003) [hereinafter Isensee 2003].

tization observable today, including the guarantee of internal security by private security services, which, for example, also guard public buildings, even barracks of the German Federal Armed Forces. The private right of self-defense, which the legislature has provided only for the exceptional case where state protection cannot be obtained in good time, and which by its nature may be far less subject to law than state actions, is quietly becoming the norm. The problems which arise when the public interest of internal security is in short supply and can only be afforded by the wealthy will not be considered in detail here.

Early constitutions, such as the Virginia Bill of Rights of 1776 and the New Hampshire constitution of 1792, contained express guarantees of security by the state. The Prussian General Code (Preußisches Allgemeines Landrecht) also stated: "The state is required to care for the security of its subjects, with regard to their person, their reputation, their rights and their property."[4]

Security is a precondition of freedom. In the status naturalis there are no fundamental rights. The state's counterperformance for the citizen's renunciation of the use of force and obedience to the law is the state protection of the citizen's person and rights, and thus a condition necessary for the possibility of freedom.

In the modern constitutional tradition, security is less the subject of the constitution than the necessary precondition of its institutions. It self-evidently precedes the state. But what is self-evident requires no constitutional declaration. The Federal Constitutional Court has also acknowledged the unwritten preconditions of the state. In the 1978 decision on the Communication Ban Act (Kontaktsperregesetz) it is stated:

> "The security of the state as a constituted force for peace and order and the security of its people which it is to guarantee are constitutional values of equal rank with others and inalienable, because the state as an institution derives its actual and ultimate justification from them."[5]

3. Freedom as a Precondition of Security in the Democratic Constitutional State

Correct as it is to state that there can be no freedom without security, it is equally undeniable that there is no security without freedom. Only a person who is free can be certain of security. If, in dictatorial states, security is achieved by repression and arbitrariness, for a person conscious of freedom this is merely a deceptive form of security, because without constitutional safeguards citizens may be deprived of their liberty at any time.

Many citizens long for the greatest possible internal security and fail to realize that real security is inconceivable without freedom. For example, it is a misapprehension to emphasize that the high degree of security felt in dictatorial states is a positive aspect of the state. Thus, for example, in the parts of the Federal Republic of Germany that were formerly the German Democratic Republic, the state's

4. Allgemeines Landrecht für die Preußischen Staaten von 1794 [Prussian General Code], Teil II, tit. 17, § 1, *available at* http://www.smixx.de/ra/Links_F-R/PrALR/PrALR_II_17.pdf.

5. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 1, 1978, 49 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 24, 56-57.

guarantee of the greatest degree of internal security was and is over-hastily booked on the credit side of the former German Democratic Republic (GDR). Certainly, it cannot be denied that the freedom longed for by all to be able to cross national borders at will is also used by those who do this with criminal intentions, for example with drugs in their luggage. There is no doubt that opening a country to the free market also gives rise to fraudulent business concepts. None of this can be candy-coated, nor will it be.

But it must also be considered that in an open society spectacular criminal offenses are the subject of intensive reporting, whereas in dictatorships a pseudo-security arises because particular criminal offenses or prisoner escapes are hushed up. Deceptive propaganda on questions of security is characteristic of dictatorships: in the absence of a critical public, there is no fear of critical analysis.

At best, dictatorships can achieve a kind of graveyard silence, but this—and this is the decisive point—is overlaid by the insecurity that emanates from the rulers themselves. The Ministry for State Security was a guarantor of security only for the government; for the citizens it was a focus of insecurity, a source of fear and distrust. Even if not every citizen experienced concrete reprisals, a sense of helplessness in the face of the rulers developed. For the individual could not foresee whether an unguarded remark, for example telling a joke which by today's standards would be harmless, expressing approval of the western way of life, or involvement in the church would trigger reactions from the state authority. For the individual, it was unpredictable what the results would be of not taking part in an election, missing an International Workers' Day demonstration, or refusing to take part in the youth consecration ceremony.

Freedom is restricted before the state actually intervenes and disciplines. It is enough for a climate to be created in which, for motives which are ultimately externally determined, people reluctantly comply with the expectations of the state in order not to challenge a state which is subject to no restrictions. In his novel "New Lives" ("Neue Leben"), Ingo Schulze describes the gauging of the limits of freedom in everyday life in the GDR. He describes the unpredictability of state reactions, which were often based on fortuitous events, and the feeling of impotence and despondency that arises among the subdued.[6] The subtle influence exercised by the Ministry of State Security on the private and professional lives of the individual is also graphically shown in the Oscar-winning film "The Lives of Others" by the director Henckel von Donnersmarck.

A person who is robbed of his or her freedom by a superior power—of whatever nature—can at no time be really safe. And the institution of amnesty, which prisoners repeatedly refer to—there were sometimes amnesties in the GDR—is only a reversed form of arbitrariness and demonstrates to the subdued persons the omnipotence of the state. For unlike a pardon, it does not consider the individual, but grants freedom with no obligation whatsoever, a freedom which it arbitrarily removes elsewhere.

6. *See, e.g.*, NEW LIVES: THE YOUTH OF ENRICO TÜRMER IN LETTERS AND PROSE 228 (Ingo Schulze ed., John E. Woods trans., Alfred A. Knopf 2008) (describing the interrogation of the hero of the novel by the Ministry of State Security, which was clearly triggered by the accidental denigration of a fellow-student).

In his state theory, the English philosopher John Locke realized as early as in the 17th century that in addition to the state of nature described by Hobbes and the state there must be a third entity in order to counter the danger of misuse of power by the absolute sovereign. Like Hobbes, he saw the state as the guarantor of security, but at the same time Locke saw the state as a threat. His philosophy of freedom imputed to the state which guaranteed security that it was bound by law, and called for limitation of power. In the words of Josef Isensee, Locke's new realization was "that security can be obtained at a lower price than the sacrifice of freedom, that not merely the absolute state, but also the state bound by law and limited in its power can guarantee peace; that security and freedom of the citizens may succeed in coexisting."[7]

4. The Constitutional Equilibrium Between Freedom and Security

Freedom and security are conditional on each other, but there is no resolution of this tense relationship. The constitutional state demands the greatest possible mutual reinforcement of freedom and security and keeps the two poles in equilibrium.

The principle of the state under the rule of law in the Basic Law presupposes that the exercise of state power is permissible only on the basis of the constitution and of formally and substantively constitutional legislation, with the aim of guaranteeing human dignity, freedom, justice, and legal certainty. A state under the rule of law is geared to the guarantee of the fundamental rights. Human dignity and fundamental rights are thus the substantive grounds of validity for state action and their guarantee is the aim of the principle of the rule of law.

It is important for the relationship between freedom and security that the fundamental rights impose a double duty on the constitutional state: it is to restrict state action but at the same time to guarantee it. The constitutional state's double duty, in other words, consists in both disciplining and activating state action. This presupposes that freedom and security are not part of a bipolar relationship between the state and the citizen. Instead, there is a triangular relationship between the state and the citizen who relies on the fundamental rights as defensive rights against the state, and between the state and the citizen who turns to the state for protection against interference by fellow-citizens. The general opinion is that the fundamental rights do not only grant protection against the state, but also impose duties of protection on the state. The citizen may expect to be protected by the state.

According to Isensee, the protective duty combines the state's duty of security with the fundamental rights.[8] In the literature, the constitutional protective duties are today seen as the "core of the constitutional guarantee of internal security."[9] The victim is not granted security as a mere legal reflex; on the contrary, the victim

7. *See* Josef Isensee, Das Grundrecht auf Sicherheit: Zu den Schutzpflichten des freiheitlichen Verfassungsstaates [The Fundamental Right of Safety: On Protecting the Duties of Liberterian Constitutional States] 7 (1983).

8. *See* Isensee 2003, *supra* note 3, at 30.

9. For further references, *see* Götz, *supra* note 3 Rn.24, at 683.

has a personal claim to protection. Admittedly, the citizen cannot normally require the state to undertake quite specific measures for the citizen's protection. The Federal Constitutional Court expressed this in its decision on the abduction of Hanns Martin Schleyer, the President of the German employers' association.[10]

The state under the rule of law is constitutionally required to perform two duties: on the one hand, to protect public security and individual interests, on the other hand to be proportionate in its interventions, that is, to intervene above all only so far as necessary and as carefully as possible, in other words, to maintain the right proportion between the aim of security and the guarantee of individual freedom. The state is in a "dilemma of freedom,"[11] which both spurs it to action and restricts it. In this constellation it is plain that the state can be regarded neither solely as the born "friend and helper" (a German expression referring to the police) of the citizen, nor as the citizen's natural enemy. Neither premature moralizing and emotionalizing nor bogeyman images or idealizations are appropriate in a time of new challenges for internal and external security. They only obscure one's view of the necessary down-to-earth weighing of interests.

III. Transatlantic Perspectives

The attacks in New York, Madrid, and London, and the fact that the use of weapons of mass destruction by terrorists is conceivable, have markedly changed our view of the potential of possible dangers, which for decades was marked by the Cold War and East-West confrontation. Since September 11, 2001, the international dimension of the problem has entered the public consciousness. The war against terrorism, which was previously primarily understood as a duty of the nation states, is increasingly waged through heightened cooperation on a European and international level.

The challenge presented to the constitutional state and the international dimension of the problem are clearly shown by recent powers of intervention and reform proposals. The collection and exchange of highly sensitive data are being promoted. Examples include the communication of passenger data for passenger flights to or from the U.S. and the use of these data, the introduction, storage, and use of biometric data by multilateral treaties or the EU Directive, or the retention of data collected from telephone calls and the use of the internet. In this connection, the question as to whether and how other countries can directly access the stored data is not the only question that arises; there is also the question of how data privacy and the citizens' civil rights and liberties are guaranteed. Here it must also be taken into account that a large number of measures, such as data retention and stricter entry requirements, are also capable of hindering business dealings and the travel arrangements of business travelers.

In the war against international terrorism, Europe and the United States often take different directions. Depending on the commenter's viewpoint, there is either a lack of understanding of broad state powers on the one side or constitutional

10. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 15, 1977, 46 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 160, 164.

11. *See* Dr. Christian Calliess, *Sicherheit im freiheitlichen Rechtsstaat [Security in a Libertarian Constitutional State]*, 35 Zeitschrift für Rechtspolitik [ZRP] 1, 5 (2002).

restrictions of state action on the other side. In Germany, for example, discussions of the deliberate killing of terrorists, known as targeted killing, caused a particular stir. Under international law and under German law, the killing of civilians is prohibited; in war, only combatants are legitimate targets, and the Al-Qaeda terrorists are regarded by the German government as ordinary criminals. In the United States, terrorists are sometimes categorized as enemy or illegal combatants, and killing them regarded as permissible in exceptional cases.

Shooting down passenger planes is also treated differently. While the Federal Constitutional Court regards this as unconstitutional, in the U.S. and in other European countries the destruction of hijacked planes is permitted if they present a threat. A controversial issue is long-term detention in special prison camps such as Guantanamo and the question as to whether there may be special branches of jurisdiction for special risk situations. Human rights and civil rights are substantially restricted by extensive security measures.

There is often a lack of mutual understanding of the respective national measures and the diverging judicial decisions. On the one hand, the freedom and autonomy of the individual are moved into the center of attention and the danger of an Orwellian surveillance state is emphasized. On the other hand far-reaching measures to protect the citizen against terrorist and criminal risks and dangers are regarded as permissible and necessary. Transatlantic cooperation is made appreciably more difficult by reason of the differing concepts for the promotion of international security.

The different perspectives call for an intensive exchange of ideas, in order to discuss areas of common ground and contrasting approaches to dealing with the new challenges. A particular concern here is awakening a mutual understanding and establishing whether there are common foundations for arrangements more approximating each other. This presupposes that the participants in such a dialogue would be both those who are responsible for security and those who are responsible for observing human and civil rights.

Janet Napolitano[12]

Secretary, United States Department of Homeland Security

I was just thanking the Dean for that lovely introduction. I must warn you I haven't played the clarinet for quite some time and I won't play it here, but I am glad that we are having this discussion and that this program is being held entitled "Freedom and Security and the Transatlantic Dialogue."

I'm especially glad that my good friend Thomas de Maizière is here. We have had some good discussions over the last year and a very close and warm working relationship. So it's good to see you again, as indeed it's good to see many of you in the audience.

12. Secretary Napolitano's remarks can also be found at Janet Napolitano, U.S. Dep't of Homeland Security, Freedom and Security in Constitutional Democracies: A Transatlantic Dialogue (2010), *available at* http://www.law.georgetown.edu/news/documents/Napolitano.pdf.

I have been asked to help set the scene for this forum on Transatlantic Security and Security Cooperation and I thought to help set the scene, I would help us all recall a scene that you may have heard about. It is December 25th, somewhere above the skies of Detroit in a commercial airliner. There is a bombing attempt aboard the plane. The wouldbe bomber is a new recruit for Al-Qaeda in the Arabian Peninsula, AQAP. He has put nonmetallic explosives in his underwear, knowing that his best chance to sneak a weapon aboard a plane was to use this kind of material and put it in a place that was unlikely to be searched. This terrorist boarded a plane in Nigeria where he passed through screening. He then reboarded in Amsterdam at Schiphol Airport in order to take down the plane on its way to the United States. There were hardly any Americans aboard that plane. There were people from 17 other countries and, indeed, this is a scene that could occur anywhere in the world.

So to open this dialogue, I wish to offer the perspective of someone who is in the Executive Branch, a branch which does not necessarily interpret the law but is in charge of making sure the law is applied effectively on the ground, and as one who recognizes and wishes to communicate here, particularly to those within the Judicial Branch, that we are facing many threats akin to those on Christmas Day.

The threats are constantly evolving. They are fastmoving. They are diffuse. They are the challenges not just to one nation but to the community of nations. They require us to cooperate on every level, including a policy level, and they also require our differing legal traditions to respond in concert to ensure that our laws keep up with the nature of the threats that we face.

So while we work to meet an evolving threat, we also must protect our values, including the rights, liberties, and privacy of our peoples. After all, everything we do to combat violent extremism, to combat terrorism is rooted in the fundamental reason why we are in this struggle to begin with and that is to secure for future generations the value and way of life that our countries share.

Now a lot of people ask me how we go about balancing security with rights and I expect many of you here think of it in that way, and I don't know how the question is translated colloquially into German, but I will confess I don't like the word "balance" because I think we have to cast aside the notion that our liberty and our security are two opposing values that are on the opposite sides of a seesaw, that when one is up the other necessarily must be down.

The plain fact of the matter is that you cannot live free if you live in fear. So that security is a prerequisite if we wish to exercise the rights we cherish. So in a way, and in this way, our security and our liberty are not mutually exclusive. They are mutually reinforcing and the balance model, where you take the scale of justice and put each value on one side and wait for them to sort of even out, is not adapted to the threats we face today. We have to think within a new paradigm about how we will uphold rights and liberties.

Today, our threats and threats move too quickly for our legal systems to be sluggish in how they are addressed and as everyone in this room knows, we fight broad transnational threats that span legal systems, whether we are discussing aviation security, cyber security, or any other threat from international terrorism. That is one reality.

Another reality is that our countries have different frameworks for privacy and individual rights. Our guarantees work in different ways. But we need to remember that our values are more broadly similar than they are different. Our different systems are largely trying to achieve the same results: justice, security, protection of privacy.

So take privacy, an issue that is an integral part of my role as Secretary of Homeland Security. In Europe, there is an explicit though undefined guarantee of privacy. In the United States, we have a legal framework that is governed by the more specific guarantees in the 4th Amendment and the rest of the Bill of Rights. In Europe, judicial redress is required under law and it's required under law in the abstract. In the United States, there is not necessarily this requirement. Instead, administrative redress is an oftenused option. But these are mostly procedural differences when the values that underlie those systems are largely the same. After all, both sides of the Atlantic espouse the internationallyrecognized Fair Information Practice Principles as core tenets of any privacy rights.

So the differences are minor when what we want are similar outcomes and when we are talking about adapting in a world of fastmoving threats, we have to be outcomeoriented. We cannot let ourselves lose sight of this in favor of an attempt to merge two distinct legal traditions with two distinct histories and two ways of working. Instead, we need to more easily and more meaningful aim for the same goals.

The threats that we confront today require us to be innovative in the way that we address them. Even the lawyers have to think outside of the box and when you are confronting a fastmoving threat, we have to know our priorities when we are coming up with ways to help ensure our citizens' interests are protected in our joint security efforts.

In my perspective and from my perspective, our priorities should be substantive outcomes rather than specific procedural protections. Let me just state that again. From my perspective, our priorities must be substantive outcomes rather than specific procedural protections.

It is not important to try to duplicate the United States framework in Germany or the German framework in the United States and it probably isn't productive to do so either. Instead, we have to aim for a mutual understanding of each other's legal regimes when it comes to issues like privacy and while we share common privacy principles, we should not try to insist that other countries implement or oversee privacy protections exactly as we do.

We have strong foundations toward this kind of understanding. This is thanks to the work of the HighLevel Contact Group that was begun by the United States Government and our colleagues in the European Union. The goal of the High-Level Contact Group was to find common ground between the American and European approaches to privacy and to recommend a path forward for improving information sharing under a common privacy framework. That group concluded its work in October. Its final product is a series of principles of privacy protections that are common to both of our systems.

They also recommended that we negotiate a legallybinding agreement that makes these principles into standards. This effort has moved information sharing forward in a way that respects both of our legal systems and our legal cultures and this kind of approach is focused on goals. It engages issues of procedure to the extent that they affect the outcome of our different frameworks, but the approach also works in the fact that our values are more similar than they are different.

Ultimately, we are both constitutional democracies with cultures that strongly value liberty and privacy, but our goals will never be vastly divergent and we need to remember this. After all, it's precisely because we share these values that we are both targeted by the same types of terrorists.

Now let me describe some of the ways that the United States is working within its legal framework to ensure liberty and privacy, though not necessarily through the courts, and I will rely on the judges who are here to speak much more about the judicial aspect of our tradition.

But as I mentioned earlier, I do not like the word "balance" to describe how we treat rights and liberties. Let me add another reason why. The implication when we say the word "balance" is that our national values, such as privacy and individual liberties, are being mixed in later, once the Government has already come up with a policy that may come up short with these standards; in other words, that they are kind of afterthoughts. That model is not the best that we can do and it's certainly not the way that we work at the Department of Homeland Security.

Instead, privacy rights, civil rights, and civil liberties are values that we constantly pursue. They are an important part of how the United States ensures rights and liberties, in addition to the protections offered by the judicial system. So it is important to note that within the Department of Homeland Security in the United States, we have an Office for Civil Rights and Civil Liberties and an Office for the Protection of Privacy. We have named national leaders to head both of those offices. One is a former law clerk for a Supreme Court Justice, the other is a former leader of the Private Bar when it comes to privacy and privacy law.

These officers and their staffs are heavily involved in our policy discussions. Civil Rights, Civil Liberties, Protection of Privacy are firsttier considerations when we are designing new security measures in the first place. They are not things that we try to balance out after the fact, trying to shoehorn them into preexisting policies.

It's increasingly important to note that the Executive Branch has to operate in this way considering the threats we face and the speed with which they evolve, which is more times than not much more quickly than the speed of any judicial system.

Now, I think it is also important to note that in the United States, we have strong administrative redress with practical applications on enforcement. This is a good example of how mutual understanding of different legal systems can lead to the kind of joint outcomes to which we all aspire.

While access to the courts in Europe is guaranteed when someone does not like a government's data management policies, in the United States there is an equallybroad guarantee that applies to citizens and noncitizens alike, although various

United States laws allow both citizens and non citizens to seek redress, primarily through the administrative system, also through the judicial system.

In both the United States and Europe, citizens and noncitizens may not be able to access records about themselves when such release would harm national security or ongoing investigations. So judicial redress is not always the best answer because of how systems and outcomes are structured.

But in the United States, we are working to ensure efficient and effective administrative redress. People who feel their privacy or rights may have been violated may file a complaint with a division of the appropriate executive agency. A good example of this is within the Department of Homeland Security and its Traveler Redress Inquiry Program. Everything in DHS is an acronym, so the Traveler Redress Inquiry Program is known as TRIP and TRIP is a single point of contact for travelers who have inquiries or are seeking resolution about difficulties they have experienced in their travel screening. These include watch list issues or instances where travelers believe they have been unfairly delayed or denied boarding.

DHS TRIP is an effective recourse where there is not necessarily the ability, either by law or, by the way, financially, to access American courts and while the number of data corrections that have resulted is impressive, we are keenly focused on TRIP this year and to improve and to keep improving the redress process.

We have, in addition, strong Inspectors General across the Federal Government and in the security establishment. The Government Accountability Office affords the Legislative Branch oversight of executive activities and American Civil Society has a very robust contingent of lawyers dedicated to rights and liberties. So there is a lot of oversight not only within the legal system but within the administrative system itself.

These are some of the strengths of the United States system and as we work together on these issues, we have to acknowledge the strengths of each other's systems in order to pursue the same goals.

Now, it can sound very difficult to collaborate among nations that have different legal systems, cultural expectations, or political systems, but there are real success stories. One of these successes is the work of the HighLevel Contact Group I just mentioned. Another that is in process is the recent worldwide effort to improve aviation security in light of the attempted Christmas Day attack that I described at the beginning of my remarks.

Now this is not yet a finished success story. There is still work ahead, but in my travels around the world to meet with colleagues, like Minister de Maizière, I've been astounded by the extent of the international consensus that we have to improve the security for the global aviation system. This international response is the most important part of how we are going to secure air travel from violent extremism or terrorist acts in the future. After all, if an airport screener in Amsterdam is the person who can prevent a bombing over Detroit, that person needs to have access to enough information to do his or her job well, no matter where the information resides, a concept that is antiquated considering today's threats.

So, in particular, we have worked internationally toward consensus on three issues that we have identified: better information collection and sharing, stronger

cooperation on the development and deployment of technologies, like advanced airport screening devices, and three, modernized aviation security standards shared across the world.

Now all of these are prone to potential differences among the community of nations, but we are finding in the process of meeting, getting together consensus amongst all of them. This consensus is a strong antidote to people's pessimism and about the possibilities for security cooperation against the threat, like those of violent extremism, in a way that's respectful of civil rights and civil liberties.

So since the new year, myself, my leadership team have met with security ministers, aviation experts, elected officials, and airline executives not just from the United States and Europe but also the Middle East, Australia, the Caribbean, North, Central, and South America, and already these consultations have produced four historic joint declarations on aviation security cooperation, including a U.S./EU declaration issued on January 21st in Toledo, Spain.

As further evidence of growing international momentum, 10 nations, in addition to the United States, have announced increased aviation security budgets and accelerated testing and deployment of advanced technologies within their airports. So we have even found common ground on the issue of screening technology which many people consider to be an intractable area of international consensus.

I think an important thing to remember is that this kind of international collaboration not only allows us to share information about terrorists or other dangerous individuals but it also allows us to align our policies in a way that strengthens privacy protections. The work has to continue.

The United States and Germany, indeed all of the European Union, face the same threats and against these threats we must defend the same values. What we are embarked together upon is security collaboration that is at its core our joint attempt to defend our values, values like liberty, democracy, privacy, and justice, and that is the ultimate goal.

So when we talk about security cooperation, we are not just talking about technologies, procedures, investigations, and lists. We are talking about our joint national interests and our values. They are not a secondary part of the conversation. They are the fundamental part of the conversation.

So as we go about efforts like today's conference seeking to understand each other's frameworks and making sure that these frameworks are aimed at the same results as they are intended to do, this is the type of conversation that will help us make important progress and to help us secure the kind of values all of our peoples cherish.

Thank you very much. [Applause.]

Dr. Thomas de Maizière[13]

Federal Minister of the Interior, Berlin, Germany

Secretary Napolitano, Janet, President Vosskuhle, Madam Federal Prosecutor General Harms, Constitutional Justices, you in the U.S., with your splendid Constitution, know what freedom means and how precious it is. But we Germans also know what freedom means. For all too long, part of our country was not free.

Twenty years ago, people in East Germany took to the streets for the sake of freedom. And many people lost their lives on the internal German border for the sake of freedom. For all our happiness at what we have achieved, we should not forget this.

"Unity and law and freedom for the German fatherland" –these words are the beginning of our national anthem. Without the support of the United States, the people in East and West Germany would not be able to sing this anthem together in a united state. In the course of German unification, the partition of Europe was overcome. We Germans know this. We are very grateful for it. But this also gives us international responsibility. Many Germans would like to overlook that. And this knowledge has not yet been completely processed in Germany.

Today, we stand together, confronted by great challenges, different challenges from those of the Cold War. The attacks of September 11, 2001, and the attacks in Madrid and London, showed us that the security of our countries today is no longer a question of classic war or peace. New international security risks are coming to the fore: water shortages, religious fanaticism, the control of nuclear material, cyber war, global migration.

The threat from terrorism is difficult to grasp. Individual perpetrators may live in our countries quite inconspicuously and then use homemade bombs to cause catastrophic damage. They travel the world. They network on the Internet. They receive financing from all over the world.

We–and by this I mean Janet Napolitano and myself as representatives of our governments–we must nevertheless guarantee the security of our citizens through national and international efforts. For the state derives its legitimacy precisely from the fact that it has undertaken to guarantee security for all citizens. Instead of individuals having to be responsible for their own security, the government ensures public security, which is the prerequisite for exercising freedom without resorting to individual violence.

In the war against terrorism, our traditional police methods of fighting crime and preventing threats are still effective and indispensable. However, they depend on one thing: having the right information in the right place at the right time. The essential thing in counterterrorism is prevention, and this means sharing information. Criminal law is no deterrent to suicide bombers.

13. Dr. de Maizière's remarks can also be found in German at Dr. Thomas de Maizière, Remarks at the Freedom and Security in Constitutional Democracies: A Transatlantic Dialogue Conference (April 28, 2010), http://www.bmi.bund.de/SharedDocs/Reden/DE/2010/04/bm_washington.html?nn=109628.

Over the years, Germany and the United States have established excellent cooperation. Germany profits from this more than the U.S. The frustrated attacks of what we call the Sauerland group show how important this bilateral cooperation is. Some background for Americans in the audience: The German media named the group after the Sauerland region in Germany where the group was arrested.

The aim of this group, on the instructions of the Islamic Jihad Union, was to carry out bombings in Germany in 2007 with the maximum possible number of victims. The attacks were to be targeted at American citizens and American facilities in particular.

The attacks were planned to come shortly before the German Bundestag vote on extending the deployment of the German Bundeswehr in Afghanistan. At first, information from the U.S. revealed that there were contacts between the leadership of the Islamic Jihad Union and the members of the Sauerland group. In the course of the intelligence and later police investigation, the suspicion that attacks were being planned in Germany was confirmed. The members were arrested, convicted and given long prison sentences. They had ties to persons known as potential threats, who live in Germany today and give us cause for concern.

The attack plans made by this group showed not only how great the danger of Islamist groups is for Germany and for Americans living in Germany. They also clearly showed the enormous importance of our bilateral cooperation.

Our best weapon in the fight against the terrorist threat is information about planned attacks, communication structures and the whereabouts of persons.

Most recently, the attempted attack on a Delta Airlines passenger aircraft on December 25, 2009 showed how much we share a common area of danger. The later review of the Detroit case also showed that there are other central points of contact in the EU and its institutions. The airports in Frankfurt, Amsterdam, Paris and London are major transfer airports.

In the highly symbolic area of aviation security, which faces a special threat, responsibility is often no longer in the hands of the individual EU Member States. Multilateral cooperation in the cooperation between the EU and the U.S. will be part of our joint future.

The Treaty of Lisbon has led to striking changes in Europe: Before, we strictly distinguished between the European Community, the common foreign and security policy, and police and judicial cooperation. The Treaty of Lisbon now provides a uniform framework for the various policy areas.

Now the Council decides as a rule by majority voting. The European Parliament normally has a say through the co-decision procedure, and in this way it has a more direct responsibility for public security than before. The old division, whereby the Council was responsible for security while the Parliament called for freedom without responsibility, no longer holds.

This will also have a decisive effect on our bilateral treaties and how they come about. This is still very new. We have already had our first experience with the new role of the European Parliament. The Council and the Parliament and the U.S. administration have learned from this.

The American writer Erskine Caldwell once said, "gaining experience is like picking mushrooms: always one by one and always with a slightly unsettling feeling."

One thing is clear: The fact that the EU has become so much more important in our cooperation creates many opportunities.

It is also clear that reaching a joint position is often arduous. However, we Europeans must be conscious of the requirements the European Union and its institutions and bodies have to satisfy in cooperation with the U.S.

It would be wrong if cooperation with the EU hindered or blocked our cooperation:

Just as in a nation-state the state monopoly on the right to exercise force is justified by the fact that citizens can rely on the state's guarantee of security, on the level of the European Union, the increased competences for security must also be justified by the EU institutions doing their part in bearing responsibility for the security of our citizens.

Ladies and gentlemen, since the end of the 18th century, Europe and the United States of America have shared the heritage of the democratic values of the Enlightenment: freedom, security and justice. These are the coordinates of our actions. It is our shared goal to create a transatlantic area of freedom, security and justice.

And I say to our American friends: Europe may be old and slow, but it is always democratic, stable and reliable. For this reason we remain, in the long term, more reliable partners than others to the south or east of America.

The relationship between freedom and security is especially important for our actions in fighting terrorism. In discussions, at least in Germany, the impression is sometimes created that freedom and security are irreconcilable opposites. But freedom and security are not opposites; instead, they presuppose each other. Both are essential for the democratic body politic.

Karl Popper ends the first volume of his work "The Open Society and Its Enemies" with the remarkable sentence:

"We must go on into the unknown, the uncertain and insecure, using what reason we may have to plan as well as we can for both security and freedom."

Planning for security and freedom in an uncertain future is no easy task: In order to do equal justice to both security and freedom, it is necessary to find the correct balance.

What is the correct balance?

The answer to this question varies depending on tradition, and it must constantly be readjusted depending on the situation.

I have observed that in the United States and Europe we approach risks differently with regard to particular freedoms.

In Germany, for example, many people see autobahns without speed limits as a symbol of freedom. By permitting these, we accept more risks than most countries in the world, where there are speed limits to increase safety. In the U.S. the situation is presumably similar with regard to the right to bear arms.

Other differences can be seen in the case of data held by the state, for example in the law relating to registration. In Germany, residents are required to register their home address. This information is entered in a register of residents. From an American point of view, this would probably be seen as excessive intrusion by the state. No one in Germany disputes the registration requirement. Nor does anyone dispute the requirement for car owners to register their vehicles with the state under a number. Incidentally, both of these forms of registration are examples of data retention without suspicion of wrongdoing.

Another example: In Germany, all citizens must have a government-issued identification card and normally carry it with them. This too would be inconceivable in the "land of the free." On the other hand, in the U.S. one must always carry one's driver's license and must show it when going into a bar.

In the area of terrorism, we both agree that the risks of an attack should be kept as small as possible. Nevertheless, our cultural and constitutional differences mean that we deal differently with the remaining risk.

One difference, for example, is the different weight we give to data protection. Again and again, it is data protection issues that are problematic, and again and again these also relate to issues of individual legal redress.

Europeans and Americans approach data protection from different theoretical starting points. Some years ago, James Q. Whitman of the Yale Law School argued that privacy as a U.S. concept is based on the idea of freedom, whereas the European concept of data protection developed from ideas of dignity and honor.

Professor Kommers expressed this in more fundamental terms in his talk at the American Academy in Berlin last year, in which he contrasted Germany's Basic Law and the U.S. Constitution with each other as a "constitution of dignity" and a "constitution of freedom."

So perhaps a closer look at what each of us understands by "privacy" and "data protection" will also foster our shared understanding.

In Germany too, the experts associate the term "privacy" with an 1890 article by Warren and Brandeis. It was not until 1928 that the concept of privacy was derived from the U.S. Constitution, in particular from the Fourth Amendment, in a judgment of the U.S. Supreme Court—albeit in a dissenting opinion by Justice Brandeis.

According to this opinion, securing a house against arbitrary searches and seizure should not be seen in essence as protecting ownership of the home. Instead, it should protect the right to be let alone.

Today, the American concept of privacy still appears to cover many situations associated with invading the private sphere. This right to a private sphere is also protected in fundamental rights in Germany, for example, in the secrecy of telecommunications or in the inviolability of the home.

Our notion of data protection does not focus on this right to a private sphere. The Federal Constitutional Court has developed the fundamental right to determine the use of one's personal data, as we call it in Germany, from the fundamental right of human dignity and from the fundamental right to the free development of one's personality.

Underlying our provisions on data protection, therefore, is our idea that for the free development of personality, all people must be able to decide for themselves who stores what information about them. In a certain sense, therefore, we are protecting the right to freely decide for oneself.

This makes it difficult to classify certain situations—for example in Internet use—where there is no self-determined decision or where individuals present their private lives on the Internet in a way they would never do if not for the Internet. The question arises here as to whether the state must protect citizens against themselves and whether it is even permitted to do so.

I would like to mention one further point here which I personally regard as important: In the United States, the right to privacy is a civil right. But for us Germans, the fundamental right to determine the use of one's personal data is a human right which applies universally. It goes far beyond the rights which only German citizens have.

Perhaps such differences between our legal traditions are indeed partly responsible for the fact that our societies assess identical situations in quite different ways. That is certainly the case even within Europe.

Other legal and administrative traditions, for example concerning the actionability of state actions, but also the general relationship of the citizen to the state, may also have contributed to our differing assessments of some matters nowadays. Thus the (re)distributing social welfare state has access to its citizens' data—so far without being disputed—which the interventionist state would not be permitted to have or would not be permitted to use for the purpose of prevention.

Much may certainly yet be done to improve understanding on both sides. And it is all the more important that in the difficult field of data protection we made a start in the year 2007 and began a dialogue in which we wish to learn from each other.

What is the proper balance between freedom and security? Another approach to this fundamental question can also be seen if we speak of our joint responsibility to maintain the Internet as a free medium without regarding the Internet as a lawless parallel society.

The Internet is one of the most liberal media of all. In totalitarian states it is often the only way for dissidents to draw attention to oppression and censorship. However, the freedom of the Internet is not without limits. It is part of our everyday life and is subject to law and order like every other area of life.

Content which is clearly illegal, such as images of child pornography, is prohibited both in Germany and in the U.S. The First Amendment of the U.S. Constitution, freedom of speech, does not protect such illegal content any more than Germany's Basic Law does.

We have a broad consensus here as to what is illegal. We should use this consensus to work together to create a consensus to take firm action against such abhorrent criminal offenses on the Internet.

The same applies to the use of the Internet as a medium of communication between terrorists. For example, last year Germany was the target of a massive Islamist propaganda offensive on the Internet intended to influence the results of the Bundestag elections. The Internet is used for arranging crimes, it supplies

instructions on how to make bombs and offers the best possibility of acting internationally without having to reveal one's identity.

The number of Islamist websites is disturbingly large. Both the Sauerland group and the Detroit bomber seem to have been radicalized largely through the Internet.

> Free storage space from commercial providers which can be used anonymously encourages the massive dissemination of propaganda videos. Content suppliers and distributors still reject all responsibility for content. To prevent deletion, videos are posted to hundreds of different sites.
>
> We must not stand idly by while this happens. To the same degree as terrorists and other criminals make use of new technological possibilities, we must adapt the legal and technological possibilities of the security authorities, without unreasonably restricting the freedom of communication.
>
> A further important point for me is the fact that no one is born a terrorist. We should therefore do everything to understand how young people become radicalized—even in the midst of our societies.
>
> We will increasingly face the problem of homegrown terrorism.
>
> We must better understand the processes of radicalization, which often occur very rapidly, even within months. We must try to recognize and interrupt them early, and to bring back radicalized persons into our society and system of values. Deradicalization is not an easy task.

The concrete and urgent questions of our practical cooperation are now the area of counterterrorism in which we must find good solutions together:

- Continuing the U.S. program to track terrorist financing is in our joint interest. I am therefore sorry that the SWIFT interim agreement did not come about.

Both parties are now called upon to approach each other and also to learn their lessons from the failure of the interim agreement. The European negotiating mandate now stands—with German consent.

I will work to ensure that the negotiations on the final agreement are conducted constructively and intelligently.

- The issue of transferring passenger name data is less pressing. The transfer can continue on the existing legal basis of the 2007 PNR agreement, though only temporarily. Here too, questions of data protection law are being intensely discussed at European and national level. Another relevant question is how to reduce the quantity of data intelligently while linking it intelligently from a security perspective. Finding a needle in a haystack doesn't get any easier if you simply make the haystack bigger.
- A general data protection treaty between the U.S. and Germany might be beneficial for our cooperation. The preparatory work has been done.

> If (in the knowledge of the different cultural status of data protection) we achieve a consensus in a pragmatic and subject-oriented way, then we will no longer need to negotiate this matter anew on every topic.

Ladies and gentlemen,

In view of our differing legal and administrative traditions, both sides need to show respect, understanding and willingness to compromise.

One thing we must never forget in all our discussions:

We must rely on our common values in order to show our responsibility for the world.

Or as Fritz Stern wrote in his book "Five Germanys I Have Known":

> "German-American understanding is a dictate of history."

Andreas Vosskuhle

President of the Federal Constitutional Court of Germany

Have We Reached the Law's Limits in the Face of New Terrorist Threats?

Ladies and gentlemen, I am delighted that the Draeger Foundation and the Fritz Thyssen Foundation have once more succeeded in continuing the transatlantic dialogue on constitutional questions and in gathering eminent representatives of the judiciary, politics and academia here in Washington for a two-day conference on the topic of freedom and security.

Now that two experienced politicians have explored the practical problems of the subject, it is for me as a judge and academic to cast more light on the general theoretical and constitutional background. I will not examine any specific measures concerning security and freedom; this is a matter for the following panels.

I. Security and Freedom as Bases of State Legitimacy

From the perspective of political theory, the concepts of security and freedom and their relationship to each other are stepping stones to an understanding of how the modern state came into being. The beginning of this development is marked by the need to guarantee security.

1. Security as the Original Purpose of Modern Statehood

In the mid-17th century, the important political philosopher Thomas Hobbes, influenced by the historical background of the English Civil War as a virtually classic case of a state of emergency, developed the idea of a social contract between the people and the state. This meant that it was only the people who could give the state the monopoly of lawful exercise of power. In return, the state and sovereign (at that time an absolute and authoritarian monarch) promised peace at home and abroad. It was from this promise of security at home and abroad made *by* the state that it derived its (only) inner legitimacy. Only to the degree in which the state was able to give its citizens security and protection was the citizen obliged to show obedience. Consequently, a state unable to fulfill its promise of security would jeop-

ardize its own legitimacy. In this way, security becomes the state's central duty, an argument still relied on today in the case law of the Federal Constitutional Court.[14]

2. The Concept of Freedom as an Achievement of the Enlightenment

John Locke, the "great theorist of the normal condition under the rule of law,"[15] also recognized that the state, which has the monopoly on the right to exercise force, must ensure the security of its citizens and protect their lives, their freedom and their property. But at the same time he distrusted the state's unrestrained political power. In order to prevent the abuse of power by the absolute sovereign, he restricted the sovereign's power—fully in accordance with the Enlightenment call for personal freedom and not least on the basis of a more positive image of humanity—in favor of individual liberties of the citizens.

The guarantee *by* the state for Hobbes becomes for Locke at the same time a threat, with the result that the need for freedom is now also directed to security *against* the state. However, Locke's philosophy of freedom does not displace Hobbes' philosophy of security. Instead, it builds on it and develops it further by creating a new ground of legitimation of the state, the guarantee of personal freedom, on the basis of the existing ground of legitimation, the guarantee of security.

This association of security and freedom is the beginning of the shift from the absolutist authoritarian state to the constitutional state, or state under the rule of law. In a state under the rule of law it remains the case today that all state acts are subject to law both procedurally and substantively. In this way, the (precarious) relationship between freedom and security was unequivocally defined in terms of *individual freedom* as the rule and state encroachment as the exception: every restriction of liberty by the state was permissible only and insofar as it was necessary to protect this liberty against third-party encroachments, that is, to guarantee security.

3. Freedom and Security as Two Sides of the Same Coin

Even if the tasks of the democratic state under the rule of law have today increased, every form of state rule still requires legitimation. In principle, the concept of the legitimizing force of security and freedom is still valid. And yet it is plain that the relationship between freedom and security, as the fundamental conditions of the free constitutional state, is ambivalent and fraught with tension. For

14. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 15, 1977, 46 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 160, 164; 49 BVERFGE 24 (56-57) ("The security of the state as a constituted force for peace and order and the security of its people which it is to guarantee are constitutional values of equal rank with others and inalienable, because the state as an institution derives its actual and ultimate justification from them"). More recent case law is somewhat abbreviated—without a reference to the legitimacy of state action. *See* Bundesverwaltungsgericht [BVerfGE] [Federal Administrative Court] Apr. 4, 2006, BVerfGE 115, 320, 346, *available at* http://www.servat.unibe.ch/dfr/bv115320.html; Bundesverwaltungsgericht [BVerfGE] [Federal Administrative Court] Feb. 27, 2008, BVerfGE 120, 274, 305, *available at* http://www.servat.unibe.ch/dfr/bv120274.html.

15. *See* Stefan Huster & Karsten Rudolph, *Vom Rechtsstaat zum Präventionsstaat [From Constitutional State to Preventive State]*, *in* VOM RECHTSSTAAT ZUM PRÄVENTIONSSTAAT [FROM CONSTITUTIONAL STATE TO PREVENTIVE STATE] 9, 20 (Stefan Huster & Karsten Rudolph eds., 2008).

however much the two values relate to each other, they are certainly not in harmony from the outset. Freedom is a source of insecurity, and security can exercise a stranglehold on freedom.

However, a comparison of freedom and security also shows that these target values are not opposites or irreconcilable contradictions. A free constitutional state must never be interested in playing freedom off against security, or, conversely, playing security off against freedom. Freedom without security results in permanent fear. Security without freedom ends in permanent oppression.

The only way out of this dilemma is mutual optimization to create a balance that is appropriate in each individual case. In the democratic constitutional state with separation of powers, the legislative power with its underlying rationality shall be the first instance responsible to continually adjust the spheres of freedom and security.

II. The Change of Paradigm in National Security Law: from Warding Off Dangers to Preventing Risks

It is not only since the terrorist attack of September 11, 2001, and further following attacks and failed attempted attacks in a large number of other countries that the interrelationship of freedom and security, which has at all times been precarious and fragile, has been particularly put to the test.

1. Prevention in the Risk Society

If I claim that these changes began even before the current terrorist threats, the reason for this is that at the latest since the 1980s the concept of prevention has entered the law of security, as a key term in risk precaution. The precursors of this were environmental law, technology law, genetic engineering law, and pharmaceutical products law, that is, fields of law in which the use of new technologies, in particular nuclear, information, and genetic technology, but also the use of new chemical substances, creates risks which many times exceed the dangers of the first phase of industrialization. These are dangers which are often imperceptible, which cannot be anticipated by state of the art processes, or whose detrimental effects are experienced only after a delay, as a result of an accumulation of a large number of very small elements which are individually harmless, or at a physical distance from the place where they were caused.

It is true that prevention has always been one of the tasks of state security. However, as a result of the new dimension of potential damage scenarios—collectively referred to in terms of the (industrial) "risk society"[16] and through the precautionary principle of environmental law—state activity changed from a (rather static) preservation of the status quo to (more dynamic) forward planning. The aim of this new security strategy was (and is) not to wait until dangers are manifest to remove them but to prevent them in advance. The object of risk precaution is no longer the damage itself, but the mere risk of damage. However, because the num-

16. This term was decisively shaped by the German sociologist Ulrich Beck. *See* Ulrich Beck, Risikogesellschaft: Auf dem Weg in eine andere Moderne [A Society of Risks: Towards a Different Modernity] 10 (1986).

ber of potential sources of danger is always incomparably greater than the number of acute dangers, the state's interest in information has greatly increased.

2. New Types of Threat from Terrorism and Global Criminal Networks

In contrast to the industrial risk society, the threat to security associated with the new challenges originating in international terrorism does not arise from the vulnerability and hazardousness of complex technological systems. The new terrorist threat results from a global network of extremely flexible, decentralized, and professionally organized groups which attempt to undermine the state's promise of security by violent means.

But in view of its potentially hazardous nature, the new global terrorism shares many characteristics with large technological risks. It is an (asymmetrical) threat; it eludes precise identification either with regard to the persons involved or to its location; it attains previously unknown dimensions of damage, which may be confronted not only repressively but above all also preventively; and it has a diffuse, systemic character.

3. Expansion of Crime Prevention by Moving State Action Forward and Reducing State Barriers on Intervention

The diffuse dangers and the extraordinary damage potential of the new terrorism have given a further considerable impetus to the development of the modern state under the rule of law into a preventive state. They have led to a situation where the precautionary principle—conceived for risk situations that are in the broadest sense environmental—increasingly "spills over" into the law of internal security and thus also into the special branch of security law on fighting crime. Against this background, the state directs its endeavors to fighting security risks prospectively, recognizing them at an early date and nipping them in the bud. Leaving behind the balance between security and freedom found in traditional security law and tied to the constitutional contours of the principle of proportionality, there is an increasing extension of investigations into the period before there were any specific grounds for suspicion and thus into the even earlier period of risk.

Since prevention and risk precaution are primarily aimed at generating knowledge, the security services will attempt to discover as soon as possible when and where terrorist attacks are planned, or where there exists a social environment whose members might be inclined to such activities. The goal is to arrive at the scene of the crime even before the perpetrator, if possible. In this way, emphasis shifts to the search for grounds for suspicion and the detection and elimination of sources of danger. Against this background, knowledge comes to mean the preservation of security, the acquisition of knowledge and the development of suitable forms of knowledge management thus become the keys to prevention.

In addition, the acquisition and systematic processing of information are facilitated by the extremely rapid technological progress in the area of data acquisition and data processing. It is only digitalization that makes it possible for the state security services to develop an infrastructure that is "prone to surveillance," which

has substantially extended the intelligence potential of secret interception of communications even where the legal basis has effectively remained unchanged.[17]

4. Effects on the Architecture of Freedom and Security in the Constitutional State

In many cases it is advisable and necessary for the state to use new possibilities and also to react to new risk situations with new instruments. Nevertheless, the change of paradigm in security law outlined above is potentially explosive in the context of the constitutional state, for it changes the existing balance between freedom and security.

The free democratic state under the rule of law has an existential need to guarantee its citizens freedom of speech and free development of informed opinion. Its strength can especially be seen in the fact that it also in principle permits and tolerates all manner of views that are antagonistic to the rule of law. In contrast, preventive security policy—over and above operating an intelligence service—has the tendency to detect such antagonistic views of its citizens and to prevent their dissemination even before these views are realized in actions whose consequences for public security are unforeseeable.

Because the number of potential sources of danger is always incomparably greater than the number of acute dangers, there is the further consequence that prevention has a tendency to regard every citizen as a potential security risk and to make the citizen the object of state surveillance and monitoring. Every exercise of freedom may potentially become the basis for a state measure. As a result, it becomes harder and harder for the citizen to keep the state at a distance by outwardly lawful conduct. Regardless of any prior activity, anyone may at any time become the object of state observation, sometimes with highly detrimental consequences for his or her private surroundings and occupation or profession. Taken to its logical conclusion, this may result in a general shift of the burden of proof in the citizen-state relationship, where risk determines normality; the absence of danger becomes the exception, to be proven by the citizen.

III. The Constitutional Principle of Proportionality as an Instrument to Adjust Freedom and Security

How can the democratic constitutional state now succeed in creating security in such a way that freedom is not insidiously eroded as a result?

In my opinion, the fact that the concept of the (lawless) state of emergency and the careless assumption of a state of emergency carry a historical burden in Germany are not the only reasons not to regard the new terrorist threat as a situation similar to a state of emergency. I have already emphasized that in the democratic constitutional state security and freedom are certainly not opposites between which one could choose as alternatives in borderline cases or emergency situations. Freedom cannot be "sacrificed" in order to obtain more security, and conversely freedom is not conceivable without security.

17. *See also* Wolfgang Hoffmann-Riem, *Freiheit und Sicherheit im Angesicht terroristischer Anschläge [Freedom and Security in the Face of Terrorist Attacks]*, *in* Die Europäische Union im Kampf gegen den Terrorismus: Sicherheit vs. Freiheit? [The European Union in the Fight Against Terrorism: Security vs. Freedom?], 33, 35 (Erwin Müller & Patricia Schneider eds., 2006).

The classical instrument to reconcile conflicting constitutional values, which in essence is found in all constitutional systems, is the principle of careful balancing, that is, the principle of proportionality. By this principle, state encroachments upon the freedom of the citizens are permissible only if and insofar as they are suitable, necessary, and appropriate to ward off dangers. Against this background, blanket solutions such as giving priority in case of doubt to security or to freedom are out of the question. The appropriate balance between freedom and security depends both on assessments of the situation and evaluations of the means, and also on the weighting of the conflicting legal interests. In a democracy, it is primarily the representatives of politics who are responsible for answering these questions. If the government and parliament wish to restrict freedoms in the interests of security, they must also show that the encroachment upon freedom is balanced by a sufficient increase in security. By this I do not only mean acquiring just any level of security, but acquiring the security necessary for people in order to live in freedom.

It must also be taken into account that (too) diffuse authorizations of encroachment are often characterized by a considerable scatter range and scarcely manageable sequences of effects. The more precisely the aim of a security measure is defined and the more precisely and transparently politics establishes the weights on both sides of the scales of the constitutional legal interests involved, the more likely it will be that the measure will pass the constitutional proportionality test. Where it is not possible to adequately define the substantive criteria, procedural and organizational safeguards may compensate for the lack of substantive standards. Then, the information hunger of the preventively acting constitutional state, which is justified in principle, will not turn into limitless information greed, whose literal meaning already implies excess and thus unreasonableness.

I am very much looking forward to the discussions with you in the next two days in six panels, each dealing with concrete constitutional aspects of the tense relationship between security and freedom. The new challenges in connection with international terrorism have shown that—despite established constitutional traditions in every case—the United States, Europe, and Germany sometimes have different ideas on the permissibility of state action and on the protection of civil rights. It is true that divergences and differences of opinion—in particular from the point of view of scholars—may be stimulating and inspiring aspects of the partnership between Europe and the United States. With regard to freedom and security, however, we are exposed to great challenges which are usually also international challenges. Ultimately, a response to these manifold real challenges that is based on mutual trust requires that each side understand the criteria by which the other side acts and the criteria of joint action. Awakening and deepening this understanding should be the goal of our conference, which we should never lose sight of.

Thank you very much.

Dieter Grimm

Panel One

How Do We Deal with International Terrorism – Do We Need a New Paradigm?

Professor Luban (Georgetown) framed the question in a broader context, identifying the alternatives "war model or crime model." According to him, a hybrid model had developed in the U.S. as a result of the invention of the "enemy combatant," while the Supreme Court continued to closely follow the war model. He considered that the advantages of the hybrid model consisted in its doing more justice to modern terrorism as a new form of fighting. The disadvantage was that there were no clear legal criteria, and therefore the treatment of enemy combatants was a matter of convenience instead of principle.

Federal Constitutional Court Justice Udo Di Fabio contested the statement that the two aforementioned models were paradigms. In his view, a paradigm was a fundamental framework to explain phenomena, and it therefore logically preceded legal doctrine. In contrast, the models were concepts in legal doctrine. Neither of these two models completely applied to modern terrorism. But the hybrid model was inadequate, because it opened the floodgates to arbitrariness. There was a need for a new paradigm. Di Fabio elaborated on two ways to achieve this: on the one hand, a world constitution without internal and external regions, and on the other hand an internationalization of the resolution of conflicts. The U.S. followed one or the other alternative, depending on the nature of the interests involved. But a new paradigm could only consist of merging the two in the form of a "complementary dualism."

Professor Scheppele (Princeton), who emphasized in particular Resolution 1373 of the UN Security Council as a new element and the different reactions to it in the U.S. and Germany, believed that it was possible to see a certain merger of the war and crime models. But with regard to the criminalization of terrorism, this was done above all with the resulting functional advantages in mind (making it easier to exchange information and cooperation between police and secret service). In fact, the U.S. followed an emergency model, in which even internal political conflict was militarized and endangered the constitution. She saw the constitutionalization of the UN Security Council as a possible remedy.

Professor Möllers (Berlin) regarded the search for a new paradigm as dangerous. He said that the paradigm for the solution of the problem was the democratic constitutional state. In Europe, no regime of exception had come into existence in opposition to this state under the rule of law. Möllers referred to the criticism often expressed in the U.S. that in this approach Europe was taking the easy path and leaving the U.S. to confront the unavoidable harsh reactions, but the only way out he could see was in an internationalization of the resolution of the conflict, which, he said, had to be developed into an organized legal regime. In this process, it was indispensable for anti-terrorism measures to be monitored by the courts. According to Möllers, a self-monitoring of the executive branch was insufficient.

In the following discussion between the panelists, Professor Luban asked whether the war against terrorism did not lead to an endless state of emergency in which the civil institutions were gradually destroyed. Professor Scheppele noted that the harmonization of freedom and security was not easy. Even courts could correct only the large-scale violations of rights, but there were many small violations. Justice Di Fabio warned against a flight into a state of emergency, because this always puts the law under pressure. He said that the courts attempted to restore the acts of the executive to a legal state. He asked whether there was an alternative to the *Kadi* decision of the European Court of Justice (EJC), and in particular whether the juridification of the UN level was such an alternative. Professor Möllers indicated that he did not regard a world government as a solution. But where internationalization was underway, in any case, this should be given a legal framework. Internationalization should therefore not be equated with hybridization. Professor Luban interjected that this was not his intention; up to now, hybridization had tended to result in an accumulation of disadvantages for suspected terrorists. By contrast, Justice Di Fabio asked whether internationalization was not always hybridization. Professor Scheppele emphasized once more that she placed her hope in the national constitutional courts, which also reviewed acts which were carried out in compliance with international instructions. Justice Di Fabio repeated his view that a high degree of internationalization was possible even without renouncing sovereignty. It was not a question of breaking down the various monisms, but of connecting them. He regarded this as the new paradigm.

In the general discussion, a question was raised as to the legal responsibility of the states if they cooperated in defense against terrorism (Mrs. Cleveland). Professor Scheppele reacted to this with the request that states should not be put in a constitutionally difficult position. The constitutional commitments of the cooperation partners must be respected. Professor Möllers insisted that in view of the lack of democratic responsibility on the international level, judicial control was indispensable. Professor Luban added, however, that control by international courts was insufficient. There was also a question as to whether the cooperation of the intelligence services and the criminal prosecution authorities could be improved (Mr. Gray). Professor Scheppele replied that the secret services in Germany were organized differently than those in the U.S.. The distinction between secret services and criminal prosecution authorities still functioned in Germany. In addition, the secret services were governed by law, whereas the U.S. Federal Bureau of Investigation had no statutory basis. Justice Di Fabio added that the criminal prosecution authorities must always proceed strictly in accordance with law, whereas in the secret services adherence to law and effectiveness might come into conflict with each other. Judge von Danwitz spoke about the *Kadi* decision of the European Court of Justice and emphasized that the EU was not part of the UN and was therefore not bound by UN resolutions. The *Kadi* decision could not be equated with the *Solange* case law of the Federal Constitutional Court, since in the *Kadi* case the only issue had been the lack of any legal protection on the UN level. In contrast, Professor Möllers doubted that *Kadi* was the solution, because the danger existed that the states would be forced into breaking international law. Judicial protection on the UN level, however, was also difficult, because there was no community capable of supporting such a court.

Thomas von Danwitz

Panel Two

Secrecy, Disclosure, and the Role of Public Debate

Whereas Panel One discussed the question of the paradigmatic classification of international terrorism, the contributions of the panelists and the discussion in Panel Two attempted to treat concrete problem areas, strategies, and attempted solutions, on the basis of the statements of principle on the classification of different phenomena of international terrorism. The introductory remarks of Matthias J. Herdegen, Professor at Bonn University, made it clear that the transatlantic dialogue is characterized by a largely consistent approach to the various phenomena of international terrorism, but at the same time also by differences in each side's definition of its tasks, traditional perceptions of legal analysis and categorization and constitutional management and weighing of conflicting interests.

I.

The introductory contributions by Prof. Dr. Johannes Masing, Justice of the First Senate of the Federal Constitutional Court, by Stewart A. Baker, former Assistant Secretary at the Department of Homeland Security, by Professor Marc Rotenberg, President of the Electronic Privacy Information Center, and by Robert S. Litt, General Counsel at the Office of the Director of National Intelligence, illuminated the various aspects of the topic and in particular emphasized what practical difficulties need to be overcome in the war against terrorism. In addition, the current challenges found in the fields of confidentiality, disclosure of government information, and the necessity of public discussion in the democratic bodies politic were put into the context of the traditional discussion of these questions in American and European legal systems. It should also be noted that the conflicting interests mentioned in the discussion also offer a wide variety of illustrative material in other fields of case law and literature.

II.

The first portion of the discussion concerned the differing organizational and institutional approaches to the problems of obtaining and processing information and guaranteeing that these procedures are lawful. The American side started the discussion with the practical structural questions facing the intelligence community and emphasized the requirements for effective task fulfillment by the executive; it also presented forms of internal administrative procedure guaranteeing lawfulness and a review of lawfulness which for all intents and purposes is independent. In contrast, the views of the European side were more strongly oriented towards the traditional distinctions corresponding to the constitutional categories of the separation of powers. The European side emphasized the role of the different branches of jurisdiction in this regard, which was deemed natural. Thus, while the American side emphasized the requirements for effective task fulfillment, the European side stressed the constitutional requirements which call for effective judicial control of measures restricting citizens' constitutional freedom. Particular

attention was paid to the possibilities and requirements of a review of the actual reconnaissance findings.

With regard to the case law of the German Federal Constitutional Court, there was specific discussion of whether and how far the review of state measures of counterterrorism undertaken in recent years was indeed restricted to subjecting sovereign powers to narrower and more transparent requirements without depriving the security services of an instrument of intelligence. In contrast, the American side questioned in particular the admittedly problematic suitability of a review of lawfulness which was primarily, or possibly even completely, focused on judicial control. On this basis, questions were raised as to the constitutional suitability and independence of these procedures. The question remained open as to whether internal administrative review mechanisms have advantages over "classical" courts and what these advantages consist of; a variety of opinions were expressed on this topic.

The second portion of the discussion related to the arrangements for access to information which had been obtained or stored by the state, specifically the disclosure requirements in connection with state security measures and measures of prosecution. In the U.S., there has been an intensive legal development since the 1970s towards a broad recognition of freedom of information. This has only been adopted in Europe in recent years. On the European side, there has been a considerable call for discussion of the need for non-disclosure of reconnaissance results and findings of fact with regard to alleged offenses which justify security measures and deprivation of liberty. There was a discussion of the scope of the constitutionally guaranteed rights of defense and the possibility of safeguarding them while respecting their security interests that deserve protection. In the discussion, reference was made to concrete procedural forms (in camera proceedings).

Finally, in a third portion of the discussion, fundamental conceptual differences in the assessment of measures of collection of data and information were discussed, as well as their availability and evaluation. In this regard, it was particularly apparent that the public discussion on the tasks of the security services on one hand, and the necessary protection of civil liberties on the other, are discussed and evaluated differently on either side of the Atlantic. The transatlantic dispute about the SWIFT interim agreements and the precautions to guarantee civil liberties, which are to be anticipated in this regard, provided topical material for discussion. The legal standards which are developed in Europe from the constitutional principle of proportionality and in the U.S. from the requirements of reasonableness and rational basis were presented in detail: they protect civil liberties in different ways. A concluding question was raised as to whether these differences are ultimately, as it were, a natural result of the special responsibility of the U.S. as the leading power of the free world.

III.

In their entirety, the discussions held in Panel Two resulted in a sustained improvement of understanding of the peculiarities and differences which characterize state measures in the war against terrorism. The observations presented certainly

contributed to each side reviewing some of its opinions and to the development of a better understanding of other points of view.

Prof. Dr. Michael Eichberger

Panel Three

Investigating and Apprehending Suspected Terrorists

1. Panel Three, chaired by the Federal Constitutional Court justice Rudolf Mellinghoff, dealt with investigating and apprehending suspected terrorists.

On the podium were Michael Chertoff, former Secretary of the United States Department of Homeland Security, who is now managing principal of a security advice company; Jörg Ziercke, President of the Federal Criminal Police Office; Sir Konrad Schiemann, Judge at the Court of Justice of the European Communities; and Deborah N. Pearlstein, visiting Associate Professor of Law at Georgetown University.

2. Chertoff immediately gained the full attention of the audience at Georgetown University Law Center when he began by saying that on September 11, 2001, he himself was a criminal judge and so had, as it were, first-hand experience of the difficulties in investigating and prosecuting terrorists. He said that it was necessary to be aware that fighting terrorism was primarily a matter of prevention, and this depended very substantially on the success of the intelligence services. In Chertoff's opinion, this virtually reverses many priorities familiar from criminal prosecution. Whereas in the cold war methods such as satellite reconnaissance had been sufficient, now in the war against terrorism obtaining all relevant data and connecting them was most important. Only in this way, for example by storing passenger flight data, was it possible to successfully withstand international terrorism. This was confirmed, for example, by research recently carried out which established that fifteen of the terrorists active at that time could have been identified before September 11, 2001, if the information on passenger flight data that is possible today had been available then.

But terrorism was not only a police problem, but also a military problem. We had to be aware that the terrorists wanted to destroy our culture and our society. In this connection, a distinction should be made between the areas of conflict with regard to the methods to be used: whereas in Afghanistan bombs were used against terrorists, in Chicago, for instance, police methods had to be used. Altogether, new methods were necessary for effective counterterrorism.

Ziercke took up Chertoff's remarks and began by emphasizing, in agreement with Chertoff, the new quality of the challenges presented by terrorism in the twenty-first century for the security services. Traditional criminal prosecution, he said, had territorial and legal limits. Terrorism was active globally and networked in particular by means of modern information technologies. Findings of the police and the intelligence services must therefore be collated. In reaction to the newest dangers from terrorism, Germany had, among other things, introduced criminal offenses, for example in sections 129a and 129b of the Criminal Code, in which criminal liability is established long before any concrete injurious acts. Ziercke

stated that since January 1, 2009, the Federal Criminal Police Office, in keeping with the strict case law of the Federal Constitutional Court, has had the possibility of carrying out searches of computers online. Finally, the Federal Constitutional Court also regarded what is known as source telecommunications surveillance as constitutionally permissible; this was of central importance for the prosecution of terrorists.

However, Ziercke established with regret that in the present time the legislature's hesitant reaction to the decision of the Federal Constitutional Court on data retention had resulted in considerable security gaps. For example, in the field of investigation of criminal offenses which were committed with the use of telecommunications installations, the rate of successful investigation had dropped by sixty to seventy percent. In computer crime, in approximately eighty percent of cases it was at present not possible to continue investigations. The German legislature was therefore called upon to draw the necessary consequences from the decision of the Federal Constitutional Court on data retention as soon as possible.

Sir Konrad Schiemann's introductory words referred to the clearly different traditions and cultures of the individual states in dealing with their citizens' data, and in this connection he emphasized the general importance of the principle of proportionality. One day's imprisonment was one extreme—an extended term of imprisonment as preventive detention was the other; the intensity of the investigation of truth in relation to suspects could equally vary from one extreme to the other. In the *Kadi* case decided by the ECJ, too, the subject was the proportionality of the means and the possibility of legal protection in this connection. Where a person's accounts were frozen for many years without the possibility of legal protection, international law did not prevent this being measured against applicable human rights in the European Union. In a comparable case, *Hassan*, there was no decision of the ECJ because before this the Commission had created a new legal situation by issuing a regulation which took account of the ECJ's misgivings in the *Kadi* matter.

In her analysis of the fight against terrorism in the U.S., Pearlstein finally came to the conclusion that even after nine years of counterterrorism, there were a surprisingly large number of undecided legal points. She said that the legal situation in the U.S. lagged considerably behind that in the European Union in this respect. Only a few individual questions had as yet been resolved—for example the right of the Guantanamo prisoners to be brought before a judge—but in contrast not the question as to whether they also have a right to a fair trial. Altogether, it remained absolutely uncertain what law applied to international counterterrorism in the United States (the law of war, domestic police and criminal law, or a hybrid model).

3. In the first panel debate, following the introductory statements, Chertoff once more refined his starting position by referring again to the different national traditions of data protection: for example, the identity card requirement, which was customary in Germany but unknown in the U.S. The U.S. took the collection of passenger flight data for granted in the same way as a homeowner decoded who he would permit to enter his house. Admittedly, he too did not dispute that the principle of proportionality was useful and should be observed, above all in con-

nection with data collection. Thus, for example, the collection of data by government agencies was largely unproblematic; it was only when these data were used that legal protection was needed.

Ziercke took up Chertoff's comment on the different national traditions and pointed out that the requirement of separation between the police and the intelligence services was specific to Germany and applied to the collection of data but did not prevent the exchange of data between intelligence services and police. If the intelligence services determined through their investigations that a danger was recognizable and concrete, they had to pass on this information to the police. The Joint Counter-Terrorism Center in Berlin played an important role in this interaction between intelligence services and police. It was indispensable.

4. In the following discussion, which was open to the floor, Justice Masing of the Federal Constitutional Court first asked Chertoff whether shifting data collection upstream into the area of risk did not result in ethnic groups potentially being excluded as suspicious. If this were the case, it would be bound to have prejudicial effects on these citizens' perception of freedom. Chertoff countered this with the statement that in the U.S. there was no electronic profile searching oriented towards characteristics of race or ethnicity. The decisive factor, rather, was the existence of certain signs which gave rise to grounds for suspicion (e.g. taking flying lessons, downloading instructions on bomb-building etc.).

Mentioning the fact that on entry into the U.S. he had now within a short period of time had to give his fingerprints twice, ECJ Judge von Danwitz asked whether accumulating such unorganized quantities of data was in any way suitable for counterterrorism. He said that Ziercke himself had mentioned the problem of filtering data. The suspicion existed that the United States collected as many data as possible and stored them, and then later considered what could be done with them. Chertoff in turn countered this to the effect that where personal data were collected more than once on entry into the U.S., the first collection created master data and was compared against existing lists of suspects; the second and later collections on later entries were used to determine whether the entry papers were being used without authorization.

Ziercke added that in Germany the police did not make mass data collections. The police did not collect and retain data. In view of the increasing shift to internet telephony, however, source telecommunications surveillance would play an increasingly important role in the future. Here, however, a particular problem arose in view of the necessity of filtering out relevant contents from comprehensive streams of data, which also included, for example, videos and music files. In his opinion, it would only be possible in the future to solve the quantitative problems of surveillance in this area by imposing more obligations on the providers.

In a further round of questions, Professor Scheppele of Princeton University and William Webster, the Chairman of the Homeland Security Advisory Council, raised the question as to how reliable the data collected were and how suitable they were for detecting individual perpetrators (known as lone wolves); the panel (Chertoff, Ziercke, and Pearlstein) confirmed the importance of this aspect.

Dieter Wiefelspütz, a member of the German Bundestag and political spokesman of the SPD parliamentary group, contributed a general account in which he

referred to three points that he regarded as central in this connection: on the basis that the security cultures in the U.S. and Europe differ, he said that unlike Chertoff he did not always regard a conflict with terrorists as a state of war. It was true that fighting terrorism could be war, but in general it was a case of enforcing law against those who broke the law; this was an elementary distinction. The exchange of data, *inter alia* to fight crime, was indispensable and important. Nevertheless, it was clear that we lived in different cultures with regard to data protection. Both sides had to respect this, and, ideally, both sides should benefit from it. Finally, it should be taken into account that we lived in a time where communications were undergoing massive changes and were massively increasing. The constitutional state must adjust to this too. However, in his opinion, data retention was a form of data collection that had a new quality because it affected all citizens without their being under suspicion. The method must therefore be handled with appropriate caution.

Professor Kommers of the University of Notre Dame, Indiana, informed the audience of a specific incident that in his opinion, confirmed the misgivings expressed with reference to the counterterrorism practiced by the United States: he said that his university had sent an invitation to speak to a university professor from abroad who was known for his criticism of Israel and his support of the Palestinian position. He had been refused a visa. He, Kommers, and his university had attempted for months to discover the reasons for the refusal of the visa and to take legal action against this. But this had all been in vain. Chertoff asked the audience to understand that he could not say anything with reference to this concrete individual case, but he stressed that the issuing of the visa had naturally not been refused on account of this professor's ideological views; however, he was ultimately unable to persuade the audience of this.

5. In her closing remarks, Pearlstein first referred to the problem of identifying individual perpetrators outside terrorist networks, which was still unsolved.

Ziercke again affirmed that the increase and development of the possibilities of communication required corresponding amendments of law in the fight against terrorism and that a solution could be found only with the help of the providers. The state alone was not in a position to do this. In addition, in his forty years of police work he had never heard of the police collecting data on suspicion. He also regarded electronic profile searching to detect lone wolves as unsuitable, since there were far too many types of lone wolf.

Schiemann concluded by once more referring to the principle of proportionality. In his opinion, the handling of data was the least important part of counterterrorism. In some states, the other end of the spectrum was targeted killing and long-term imprisonment. It was undecided what should be done with persons under suspicion who had not yet committed a crime. The decision on the use of data should not be laid down in great detail in legislation but could be left to experienced judges.

Chertoff concluded by reaffirming his point of view that not every form of counterterrorism was war but that fighting international terrorism took place in a state of war. For him, data collection and data protection were not the central problems. Furthermore, the greatest collector of data was not the state but private persons.

Google, in particular, showed what powers existed in the private sphere to collect data.

6. Thanks to the disciplined way in which the panelists and the participants in the discussion followed the rules and the effectively targeted chairing, Panel Three enabled extremely lively and varied expression of opinions. The differing legal cultures on the two sides of the Atlantic were clearly displayed, especially with regard to collecting and dealing with personal data. In addition, it was shown how differently the measure of a state's own involvement in counterterrorism is regarded and how differently states deal with this. It was particularly striking to see, even over eight years after September 11, 2001, how much fundamental uncertainty still exists on the American side as to the legal standards and proper procedures for handling counterterrorism. At the same time it was directly palpable how much the panel discussions and the conference as a whole improved the foundations of mutual understanding in this problematic field and increased the readiness to engage in dialogue.

Gertrude Lübbe-Wolff

Panel Four

Detention, Trial, and Release

The moderator, Prof. Laura K. Donohue, Associate Professor of Law, Georgetown University Law Center, opened the discussion questioning the role of the courts in connection with the detention of terror suspects in view of the fact that these detentions have no statutory basis, but are rather based on somekind of common law of preventive detention.

Hon. John M. Walker, Judge, U.S. Court of Appeals for the Second Circuit, stressed that he did not advocate abandoning the rule of law in dealing with terror suspects, but that account must be taken of the specific law enforcement problems raised by terrorism, and that those who want terror suspects to be deterred and incapacitated by detention must be aware that in a legal framework, suspects cannot be detained without the necessary evidence of criminal activity.

Monika Harms, Federal Prosecutor General (Germany), commented that the German experience showed no need for preventive detention and detention without judicial control. Civil rights and liberties, and human rights in general, could best be protected without these instruments.

Hon. John M. Walker again emphasized that he was not in favor of acting without a statutory framework. However, preventive detention, as in the case of recedivist sex offenders, could be put on a statutory basis.

Hon. Neal Katyal, Principal Deputy Solicitor General, U.S. Department of Justice, referred to the difficulties of obtaining evidence if the evidence is overseas. Provisions for US citizens and foreigners ought to be symmetrical. In the case of controversial legislation which ought to be evaluated on the basis of experience, a sunset clause should be considered.

Prof. Laura K. Donohue followed up on her introductory question in enquiring whether the United States District Court for the District of Columbia was not at present acting as a legislator. She asked Prof. Stephen I. Vladeck , American University, Washington College of Law, what he thought of special national security courts. Vladeck said there were a variety of quite different ideas associated with this term. Where it referred to special courts to decide on the preventive detention of terrorist suspects, questions of organization must not be permitted to displace the question, which needs to be answered first, as to whether and in what conditions such preventive detention is to be permissible at all.

Deputy Assistant Attorney General Marty S. Lederman, referring to the distinction in the contribution of Hon. John M. Walker between a war paradigm and a law enforcement paradigm, stated that the debate as to which of these paradigms should govern dealing with terror suspects was not helpful as a debate on mutually exclusive alternatives. The government would use elements of both paradigms; the mix was decisive. It was necessary to understand the central significance of obtaining information. The essential question was how this fitted into one or the other paradigm. The current discussion was primarily concerned with the prisoners taken eight years earlier. However, the question as to how future prisoners should be dealt with ought not to be neglected.

Justice Stephen Breyer , U.S. Supreme Court, raised the question of the correct approach to cases in which the executive invokes the need for secrecy. What statutory rules, for example, should govern the case where the executive stated that it had information that Smith and Jones were planning an attack but could not reveal this information because it had obtained it from foreign secret services?

Federal Prosecutor General Monika Harms said that in Germany, too, difficulties arose when information had been received from intelligence services which were not prepared to accept that the information in question and its source be introduced in legal proceedings. Usually, this problem could be solved by using such information to obtain further admissible information.

Prof. Stephen I. Vladeck pointed to the possibility of providing for in camera proceedings, that is, for permitting disclosure solely to the judge.

Hon. Neal Katyal referred to the Classified Information Procedures Act. One might consider excluding the public. A time limitation to six months could also be considered. Where the main concern was to effectively prevent terrorists from carrying out attacks ("incapacitation"), it did not lead anywhere to refer to a few successful criminal proceedings as proof that criminal law worked well enough.

Sir Konrad Schiemann, Judge, Court of Justice of the European Union, mentioned the U.K. solution of giving competence to a special court with special defense lawyers whose discretion can be relied on, and spotted the decisive question which such a system raises: what information may the defense lawyer pass on to his or her client?

Prof. Deborah N. Pearlstein, Visiting Associate Professor at Georgetown University Law Center, said the only acceptable solution was to permit longer pre-trial detention and thus to allow more time for the collection of additional information.

The assumption that no such additional information might be obtainable was too unrealistic to justify more extensive preventive detentions.

Sarah H. Cleveland, Office of the Legal Adviser, U.S. Department of State. referred to the Authorization for Use of Military Force Against Terrorists as a legal basis.

Benjamin Wittes, Senior Fellow and Research Director in Public Law, The Brookings Institution, stated that the U.S., compared with Germany, had to deal with terrorists on a quite different scale. The U.S. was concerned with warding off off dangers in Afghanistan or in Yemen, whereas Germany, under the protection of the U.S., could restrict itself to dealing with individual perpetrators within Germany.

Prof. Matthew Waxman emphasized the importance of bridging the transatlantic differences concerning the management of terrorist dangers. This was necessary in the interest of effective cooperation in averting them.

Federal Prosecutor General Monika Harms asserted that Germany also assumed international responsibility. The question was how to treat terrorists and terror suspects in order to get them sentenced and convicted. Instruments such as preventive detention were inconceivable in Germany for historical reasons, but the authorities were able to live with the existing legal framework. The only problem was that of obtaining information on a level playing field; in this connection, the basic legal framework was unsatisfactory. It was to be hoped that the statutory provisions implementing the judgment of the Federal Constitutional Court on data retention would soon be provided.

Hon. John M. Walker recalled the events of September 11, 2001, which had felt like war, not like a criminal offense. The reaction in the U.S. had been commensurate with this. September 11, 2001, was experienced as a war scenario, but was ready and willing to integrate the necessary reactions into a legal framework.

Prof. Stephen I. Vladeck leveled criticism at the U.S. discussion concerning the law of fighting terrorism, and the same legal questions being discussed over and over again without much progress.

Rudolf Dolzer

Public Program of the Georgetown Conference

Summary of the Panelists' Contributions

In a public session, a panel discussion considered constitutional questions on the contents and limits of national security policy in the light of the principles of the separation of powers. On the podium were U.S. Supreme Court Justice Antonin Scalia, Professor Brun-Otto Bryde of the German Federal Constitutional Court, and Professor Donald Kommers, the paramount U.S. expert on German constitutional law, of Notre Dame University.

Professor Kommers turned to comparative law and discussed the foundations of the case law of the Supreme Court and the Federal Constitutional Court in the

respective texts of the constitutions and in the methodology of judicial decisions. In this connection, Kommers emphasized the importance of human dignity in Article 1 of the Basic Law, which marks the boundary of executive and legislative measures. A second focal point of his contribution was the analysis of the principle of proportionality, which in the practice of the Federal Constitutional Court is also understood as an essential barrier against measures to strengthen security. In conclusion, Professor Kommers showed that U.S. case law gives more latitude both to the executive and to the legislature in the field of security policy than the Federal Constitutional Court.

Professor Bryde concentrated in particular on the Federal Constitutional Court's most recent decision-making in the area of tension between security and freedom. It became clear in his account that although the Federal Constitutional Court repeatedly imposes requirements on the limits of the legislature's powers in restricting freedom, at the same time it does not in principle question the right to improve and tighten security measures. The Court repeatedly defines the limits: a measure or a bundle of measures is seen as constitutional insofar as it can be specifically proved to be necessary to fight a danger. According to this case law, limits of a general nature in the sense of general deterrence can normally not be constitutionally justified.

In his address, Justice Scalia focused on the case law of the Supreme Court on measures introduced in the context of the Second World War (*Korematsu v. United States, Johnson v. Eisentrager*) and in the context of counterterrorism since the year 2001. Here it became clear that Supreme Court decisions are often more likely than Federal Constitutional Court decisions to proceed on the basis that the legislature and the executive have more weight in the assessment of security requirements. In addition, the requirement of standing in the U.S. has the result that decisions are more likely to apply to the individual case; every plaintiff has to show that he or she is individually affected by the measure in question. The U.S. Supreme Court has always rejected the idea of the abstract review of statutes. This also means that questions as to the relationship between the powers of executive and legislature may remain open, as, for example, is currently the case with regard to war powers. Justice Scalia emphasized in general that in wartime the rights recognized in peace cannot apply in every respect, and the assessment of military questions may in principle lie with the President as the commander-in-chief, not with the Supreme Court.

In its entirety, and also in the accentuation given by each of the individual contributions, in particular by Justice Scalia, the panel discussion showed the peculiarities and differences in the attitudes of the Supreme Court and the Federal Constitutional Court more clearly than the other sections of the conference. This became most apparent when Justice Bryde presented the Federal Constitutional Court's unanimous decision on the unconstitutionality of shooting down planes hijacked by terrorists and containing civilian passengers, which the German Bundestag had approved; Justice Scalia was of the opinion that such a decision would be inconceivable in Washington, in particular with regard to the democratic legitimation of the legislature, which the court must respect. It was also clear from the contributions that the fundamental significance which the decisions of the Federal

Constitutional Court accord to the principle of proportionality of means as a barrier for executive and legislature is not recognized in the U.S. case law in this general way. The U.S. case law here instead prefers the principle of the separation of powers, with precedence given to the legislature and the executive.