

Cora Zeugmann

The Trade-Off between Civil Liberties and Security in the United States and Germany after 9/11/01

An Analysis



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Abstract

Der 11. September 2001 hat die Welt verändert. Sowohl in den USA als auch in Deutschland haben die Terroranschläge die Menschen nachhaltig in Angst versetzt. Anhand einer Untersuchung von Meinungsumfragen wird gezeigt, dass dies die Bereitschaft der Bevölkerung, Einschränkungen von bürgerlichen Freiheiten zugunsten gesteigerter Sicherheitsbedingungen hinzunehmen, verstärkt hat. Dabei fanden vor allem Maßnahmen, die sich kollektiv oder auf Individuen ungeliebter Gesellschaftsgruppen auswirken Zuspruch. Es wird gezeigt, dass die Fürsprecher stärkerer Sicherheitsbedingungen in beiden Ländern diese sich bietende Gelegenheit genutzt haben, um weitreichende Gesetzesänderungen wie den *USA PATRIOT ACT* und die deutschen *Antiterrorgesetze I* und *II* durchzusetzen. Diese Gesetze implementieren Maßnahmen, die zuvor jahrelang erfolgreich von Verfechtern bürgerlicher Freiheiten abgewehrt wurden. Anhand einer Untersuchung der Überwachungsgesetze beider Länder vor und nach dem 11. September wird belegt, dass Voraussetzungen für eine effektive staatliche Kontrolle, sowohl im geheimdienstlichen als auch Kriminalitätsbekämpfungssektor bereits vor 2001 vorhanden waren. Weiterhin wird dargestellt, dass die Anschläge dazu genutzt wurden, Befugnisse der Exekutive zu stärken und gleichzeitig, vor allem in den USA aber zunehmend auch in Deutschland einer gerichtlichen Kontrolle zu entziehen. Darüber hinaus werden die harschen Folgen für „ungewollte“ oder „verdächtige“ Ausländer nachgewiesen, indem die Behandlung Fremder vor dem 11. September mit dem Ausmaß der amerikanischen „Wegsperrtaktik“ und dem deutschen Ansatz der grundrechtsfeindlichen und nahezu absoluten Datenüberwachung nach den Terroranschlägen verglichen wird. Anhand immer weiter reichender Gesetzesvorschläge, wie der, der zur erfolgreich eingeführten Antiterrordatei in Deutschland und dem gescheiterten „*PATRIOT Act II*“ in den USA geführt hat, wird des Weiteren die Annahme untermauert, dass die Verschiebung des Gleichgewichtes zwischen bürgerlicher Freiheit und Sicherheit zugunsten der Sicherheit nur durch ein anhaltendes Klima der Angst weiter vorangetrieben wird. Im Gegensatz zu den USA hält sich in Deutschland ein derartiges Klima auf Grund wiederholter Anschlägen in Europa. Die Arbeit schließt mit der Einsicht, dass trotz unterschiedlich ausgestalteter Maßnahmen vor allem die Gewaltenkontrolle nach dem 11. September in Mitleidenschaft gezogen wurde und Verfechter stärkerer Sicherheitsmaßnahmen sich nie zufrieden geben, sondern anhaltend versuchen immer weiter reichende Maßnahmen durchzusetzen, die auch die „normale“ Bevölkerung betreffen, solange sich die Möglichkeit bietet.

Liberty is slow fruit. It is never cheap; it is made difficult because freedom is the accomplishment and perfectness of man.

Ralph Waldo Emerson, 1803 – 1882

[U]nd die Sicherheit betet man jetzt als die oberste Gottheit an. – Und nun! Entsetzen [...] Es wimmelt von gefährlichen Individuen! Und hinter ihnen die Gefahr der Gefahren – das Individuum!

Friedrich Nietzsche, 1881

Give me liberty or give me death.

Patrick Henry 1775

Thesis Structure

I. INTRODUCTION	7
II. REVIEWING OPINION POLLS – PEOPLES’ ATTITUDES CONCERNING 9/11/01	11
1. Abstract Value-Trade-Off.....	12
2. The Perception of Fear and Concrete Value-Trade-Off.....	22
a. Attitudes towards Surveillance Measures	23
b. Attitudes towards Non-citizens, Foreigners and Racial Profiling.....	27
III. U.S. AND GERMAN CIVIL LIBERTIES STANDARDS BEFORE 9/11/01	33
1. American Civil Liberties and German Basic Rights.....	33
2. U.S. Surveillance Laws vs. German Surveillance Laws.....	38
a. The U.S. Law Landscape	38
i. Title III of the Omnibus Crime Control and Safe Streets Act of 1968	39
ii. The “Church Committee” and the 1970s Intelligence Reforms.....	40
iii. The Foreign Intelligence Surveillance Act of 1978	41
iv. Anti-Terrorism and Effective Death Penalty Act of 1996	44
v. Non-citizens, Foreigners and their Rights.....	46
b. The German Law Landscape.....	47
i. A Basic Right to Security and “Rasterfahndung”	48
ii. The “Volkszählungsurteil” of 1983.....	49
iii. Criminal Telecommunications Surveillance	50
iv. The G-10 Law	52
v. Non-citizens, Foreigners and their Rights.....	54
c. U.S. and German Surveillance Laws in Comparison.....	54
IV. U.S. AND GERMAN CIVIL LIBERTIES STANDARDS AFTER 9/11/01	59
1. The Declaration of the “War on Terrorism“ and its Implications.....	59
2. U.S. Surveillance Laws vs. German Surveillance Laws.....	62
a. Legislation that Never Passed before 9/11 and other Legal Tendencies.....	62
b. U.S. Surveillance Laws	64
i. The USA PATRIOT Act.....	65
ii. Non-citizens, Foreigners and Interim Rule 2171-01	70
iii. The Limit of Limitations	72
c. German Surveillance Laws	75
i. The Antiterrorism Law I	76
ii. The Antiterrorism Law II	78
iii. The Antiterrorism Database	82
d. U.S. and German Surveillance Laws in Comparison.....	83
VI. CONCLUSION	87
REFERENCES	91

I. Introduction

It is a truth universally acknowledged that no democratic society can exist without granting certain liberties to its people and safeguarding them from potential harm. However, when either security or liberty is taken to their extremes they can have a rather disruptive effect on the stability of that democracy. Liberty, if granted without boundaries, can shatter a democracy to its very core and even be the cause of its downfall. The unlimited freedom of speech in the Weimar Republic can be seen, among other things, as one example of this. By abusing the liberty to speak out against the very nature of the Weimar political system and its constitutions, the NSDAP and followers of the old monarchy were able to gain power. Once in control they annulled the very liberties that are fundamental to a democratic society little by little and thus led the country into a dictatorship for 12 years. In a similar way the same is true for an overreaching extension of security. Confining liberties to a degree that virtually invalidates them for the sake of defending the society from perceived threats may result in harming the very social order that the security measures are supposed to guard. One example is the U.S. internment camps for Japanese during the Second World War. Over a hundred thousand U.S. citizens with Japanese origins were detained solely on the basis of their ethnic backgrounds in order to prevent possible agents from conducting espionage inside the United States.

Benjamin Franklin once said that, “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety” (Wisdom Quotes). There must be a balance between the two extremes. But what does the balance between these two values look like? From a historical perspective, there have been many democracies all over the world that have at times struggled with finding the right calibration for them. Though generally constitutions of democracies are dedicated to both security and liberty, the balance between those two often tends to be re-evaluated and shifted after crucial events have taken place.

One such event that has shocked people all over the world and had governments undertake sustainable value-trade-offs in favor for more security were the terrorist attacks on the United States on September 11, 2001¹. The effects of this catastrophe and its different impacts on the American and German legislation are the main focus of this paper. When sociotrophic fear is induced by a traumatic event, it opens a window of opportunity for more

¹ For convenience reasons of reading and writing the date September 11, 2001 will be abbreviated in the following with 9/11.

security. This in turn tempts governments to seize this moment to implement legal changes that restrict liberties in a way that was not socially acceptable before.

Throughout the three parts of the main body, it will be shown how the same event can lead to an altered outcome if the preconditions are different. Since it is, however, impossible to take a comprehensive view at *all* the aspects of the post-9/11 legislation, special issues will be at focus: For one, the people's attitudes toward the attacks and the resulting political setting will be scrutinized. Following that, legal changes that have come from these altered preconditions regarding criminal and intelligence surveillance and the treatment of foreigners, non-citizens and natives will be discussed.

Although both governments equally seized the opportunity to concentrate more than ever on prevention management rather than consequent management after 9/11, there have been differences in the actual implementations that have taken place to keep the risk of further attacks and potential losses of citizens minimal. Additionally, divergent legislative preconditions and attitudes from citizens had a major influence on the way the value-shift has been executed. In order to provide the reader with a comprehensive comparison of the initial circumstances and ensuing changes, each chapter will start off with an analysis of the situation in the United States. The conditions and transformations in Germany will be discussed in the following section. Once the reader has obtained a thorough understanding of the relevant settings of the respective nations; a comparison of the preceding issues will take place.

A successful political realignment and subsequent tilt in the balance between security and civil liberties is closely tied to the support of the citizenry. Chapter two will therefore contain an analysis of opinion polls taken in both the U.S. and Germany. Starting with a brief theoretical overview of how abstract and concrete value-trade-offs are manifested, the actual attitudes towards fear of terrorism in general and towards specific measures will subsequently be provided. In addition, the opinions of the general public regarding the treatment of non-citizens and foreigners will be an important focal point.

Chapter three will deal with the actual civil liberty standards and security legislations in the two countries prior to 9/11. In order to make clear which liberties are exactly in question, relevant amendments to the *U.S. Constitution* and the basic rights put down in the German *Basic Law* will be pointed out. Thereafter, criminal and intelligence surveillance laws and the treatment of foreigners and non-citizens preceding the attacks will be the center of attention.

The ramifications of 9/11 on the *U.S. Constitution* and the German *Basic Law* will be the content of chapter four. It will be shown how the value-trade-off has been initiated and how far it has gone. It will be revealed how laws that had been “shelved” for years prior the attacks have been passed as a result of the terrorist assaults and the consequently altered perceptions of security. These points will be illustrated by, among other things, the two most prominent laws in the U.S. and Germany, the *USA PATRIOT Act* and the *Antiterrorism Laws I and II*, respectively. The legal settings for criminal and intelligence surveillance will be evaluated in this regard. Additionally, a close look will be taken at the treatment of foreigners and non-citizens and the “special” attention they have been receiving. Finally, the development of legal tendencies over time in each country will be an issue.

The insights that have been gained in chapters two, three, and four will be joined together in chapter five. It will be shown how different legal preconditions have been affected in the same fashion by similar reactions of the people. The severity and effectiveness of the respective value shifts in each country will once again be briefly discussed. Following that, a comparison of the extremity of legal changes from before to after 9/11 in the U.S. and Germany will be provided. A contrast between the two nations of the persistence of the value-shifts in favor for more security over time will follow. In the final analysis, it will become clear that different preconditions and changing attitudes over a period of time have led to similar but divergent shifts in the value-systems. In conclusion, it will be apparent that the more traumatic an event is, the more prone it is to lead to a more biased shift toward security over civil liberties. Moreover, the assumption that in times of fear the acceptance of individual differences in a society is decreasing will be proven correct.

Although secondary literature concerning new legislation after 9/11 in the U.S. is abundant, the same is not true for Germany; while comparisons about the value-trade-off in the two countries are virtually inexistent. This disparity can at times lead to a more in depth analysis of the U.S. American situation than the German. The majority of articles written can be dated back to the two to three years after the terrorist attacks. A selection of those, together with texts of relevant laws, will be the basis of the chapters dealing with the legislation before and after 9/11. Primary literature like various opinion polls of large U.S. and German institutes such as Gallup, The Transatlantic Trends, EMNID or FORSA will also be the main basis for the evaluation of the perception of fear and the ensuing willingness to accept a value-trade-off in favor of security. Furthermore, newspaper articles and information from government and other websites will be cited to provide additional insight.

II. Reviewing Opinion Polls – Peoples’ Attitudes Concerning 9/11/01

A key finding repeatedly emphasized in the literature on mass beliefs is the fact that there are inconstancies or even contradictions when it comes to people’s attitudes towards a value-trade-off between security and civil liberties. In general, there is an obvious discrepancy between the willingness to accept liberty-constraints in the abstract or more specific ones. While an abstract trade-off usually conveys a negative connotation, precise measures tend to score considerably higher approval-rates (Lewis 2005, 24).

Knowing this, one could ask: What is the benefit of looking at opinion polls? The answer is simple: Public opinion matters regardless if it is stable or not. The governments of both the U.S. and Germany had security legislation “lying around” for a long time before 9/11 (Lewis 2005, 22; Kunz 2005, 18). But without a window of opportunity, politicians run the risk of being punished by the voter when putting through unpopular large-scale legislation. The importance of this fact and the significance of opinion polls have become particularly obvious after 9/11, when the governments of both the U.S. and Germany seized the shift in public opinion, which now favored the enhancement of security legislation, by passing severely restrictive antiterrorism laws. This suggests that the more interest the public expresses in a certain topic, the more its approval or disapproval will influence political actions. As a result of increased public interest, the number of polls covering this topic rose immensely following the terrorist attacks in the U.S. as well. As Huddy et al. (2002, 1) put it: “It is difficult to think of many others events to which Americans’ reactions have been assessed as thoroughly [as of 9/11]”. Although there have been polls about fear and fear of terrorism preceding the attacks, these have never been as explicit and in depth as the ones conducted after the attacks. For a scientific analysis, however, this bears certain complications. German polls, for example, concerning fear and, in particular, fear of terrorism have mostly been collected as part of a general inquiry about social concerns. Therefore, it is hard or even impossible to conduct an explicit comparison of feelings and attitudes from before and after the attacks. This is not only problematic in respect to Germany, but the challenge grows when it comes to contrasting the amount of fear from terrorism in the U.S. and Germany to each other.

Even when polls concerning terrorism from before 9/11 are available, the questions are mostly similar, not identical. Not a single polling institution has been sensible about

asking identical follow-up questions. Even larger discrepancies can be observed between the questions asked among different American and German institutions. This makes it not only hard to compare results, but also introduces a bias to the answers. It has been shown (Gallup Poll News Service 2007), for example, that respondents react more favorably to the request of giving up civil liberties for security if positive aspects of the trade-off are addressed. Likewise, reluctance grows when this is not the case. In addition, the reader should also be aware of the fact that opinion polls are always at risk of having errors due to random effects like sampling². These inconsistencies make it obvious that polls cannot be utilized as *precise* indicators for political action. However, public opinion can be understood as a trend barometer indicating “opportune moments” for legislative changes.

1. Abstract Value-Trade-Off

According to a study conducted in the immediate aftermath of 9/11 in the U.S. by Davis and Silver (2004, 35-43), the willingness to accept a value-trade-off between security and liberty is linked to the notion that the freedoms and liberties granted to the American people eased the preparations and execution of the terrorist assaults. Among other things, they established that sociotropic fear³ and trust in government are independent factors when it comes to accepting a value-trade-off between security and civil liberties. They discovered that a rising level of fear combined with a high level of trust in the government fosters the people’s acceptance for restrictions of civil liberties in general⁴. The main independent variable was, therefore, fear. Davis and Silver (2004) concluded that no matter how high the trust in the federal government was an increased sense of threat always led to an increased acceptance of liberty restrictions. Even people who prior to 9/11 were strong supporters of civil liberties were willing to compromise them in the aftermath. This was due to the threat they felt. Worries about too far fetched restrictions on civil liberties diminished even further the more the people additionally trusted in their federal government.

² Usually this error rate remains within a plus/minus of three percentage points.

³ Sociotropic fear is the individual perception of a person of unspecified threat and anxiety towards the country, society or region where they live. In contrast to that personal threat denotes the threat towards oneself or one’s family and friends (Davis and Silver 2004).

⁴ Of course there is a contingent effect of trust and fear on each other. While a high level of fear combined with a high level of trust always leads to the willingness to trade-off civil liberties for security, there are various combinations of fear and trust whose results cannot be as easily determined. One reason for that is that other factors like age, race, patriotism or political attitude are also playing a role in the explanation of how much and when a person is willing to accept a value trade-off. However, the overall trend is not fundamentally altered by these factors. Therefore, the specifics are not important to the focus of this chapter. For further reference see Davis and Silver (2004).

Similar findings to those of Davis and Silver (2004) were also made by Barbara Lübcke (2006, 4). Basing her results on recent opinion polls conducted by the Social Science Institute in Kiel, she found that people who support a value-shift for more security tend to perceive the chance for terrorist attacks in Germany as higher than those who oppose such shifts.

In the following, these findings will be the basis for the examination of fear in the U.S. and Germany. This will be followed by an analysis of trust and contentedness with government actions and, finally, the findings will be compared.

The events on 9/11 increased the world's awareness in respect to terrorism like nothing else ever before. According to the German Marshall Fund (2002, 1) no other incident has shaken the American public like this catastrophe in the last thirty years. This has led to a heightened sense of vulnerability. The only other comparable incident to 2001 in the amount of dread it caused in U.S. citizens toward terrorism is the Oklahoma City bombing in 1995, in which 169 people were killed and almost 1000 injured (Ball 2004, 11). When a poll was conducted only a few days after the bombing, 42% of the respondents admitted to being very or somewhat worried that they or a family member might become a victim of terrorist attacks (Carroll 2005, 2-3). Although nearly 9 in 10 of the people asked thought it was also very (47%) or somewhat (42%) likely that similar assaults might happen somewhere else in the U.S., about the same percentage (88%) had a great (58%) or moderate (30%) amount of confidence in federal law enforcement. At the same time, 46% did not trust the government to be able to prevent further attacks from happening and, 49% of the interviewees did not deem it necessary to sacrifice civil liberties in order to fight terrorism (Lewis 2005, 23). Even though sociotropic fear was high in the immediate aftermath of Oklahoma City, the Clinton administration failed to implement as far fetching legal changes as it had initially intended. The reason for that was a combination of a lack of trust in the abilities of the government and faith in the exiting legislation. During the year it took Congress to discuss and pass new security laws, public fear and support for legislative changes continuously diminished. Consequently, the window of opportunity for more severe changes had been missed. By May 1996, a month after the *Antiterrorism and Effective Death Penalty Act of 1996* was signed by Congress, the percentage of people who felt personally threatened by terrorist attacks had decreased to 35% while only 30% still deemed a value-trade-off as necessary (Carroll 2005, 2; Lewis 2005, 23). This trend was further continued throughout the 1990s. When in 1998 a poll was conducted that inquired about the two or three biggest problems the country was facing, terrorism was not on the list of responses (The German Marshall Fund 2002, 2).