Deliberative Democracy Versus the Rule of Law: *Rasterfahndung* and German Anti-terrorism Versus US Intel Approaches

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This paper examines the overlap between publicity or openness, plus different ideas about governance, discretion, and substantive standards, if one pursues judicial review. It draws on differing public law attitudes visible in German administrative (police), criminal procedure, and constitutional law, in something like the intel setting (anti-terrorism). By comparison, the American tradition includes on the law enforcement side a historical abhorrence of general warrants, but on the national security side recognizes minimal restraints on the executive given traditional views traced back to defense as one of the royal prerogatives. The practical problem is not that an exercise like effective judicial review by an FISA court looking at NSA activities is literally impossible. Rather, to make it effective, one arguably must first answer the question whether the problem is best approached in terms of reliance on a substantive rights standard like privacy, versus the balance between judicial review and executive discretion which may be understood differently in "law enforcement" versus "war-fighting" modes (and what exactly *is* the ultimate standard for national security?), versus the underlying governance problem of political versus legal responsibility.

The background is the following. *Rasterfahndung* or "pattern searches" through public databases to generate police leads as intelligence exercise were initially undertaken by German police in the 1970s as investigative response to repeated Rote Armee Fraktion attacks (the RAF or Baader-Meinhoff Gang). In the 1980s, *Rasterfahndung* originally undertaken under general police authority was regulated in detail by statute and subjected to judicial supervision (in line with traditional approaches to the *Rechtstaat*). Following 9/11, the German police employed *Rasterfahndung* as technique in an attempt to locate alleged al Qaida "sleeper" cells in anticipation of threatened revenge attacks within Europe, once the US undertook military action in Afghanistan in response. Recalling that several militants involved in the airplane attack on the World Trade Center had studied in Germany, overlapping nationwide database searches were carried out in Germany under judicial decrees in residency, university and similar registries focusing on criteria such as gender (male), age (20-40), study in Germany (as radicalization opportunity), religion (Muslim), place of birth (various Muslim majority countries), etc. This sifting process generated numerous leads in the form of lists of persons whom police subsequently investigated individually in various cities, but no such sleeper cells were ever found. In 2006, however, the German Constitutional Court declared the police's actions as in violation of a Moroccan university student complainant's constitutional right to *informationelle Selbstbestimmung* (most analogous to privacy) based upon the police actions having been undertaken without the existence of an imminent danger (understood as more specific indications of an attack to be carried out somewhere in Germany). But the Court's holding as such is less important than understanding its entire frame of reference and embedded (legal) assumptions. The Court's 6-2 opinion drew, somewhat unusually by German standards, a spirited dissent that the police's actions were clearly permissible under the German Constitution, and indeed upholding legislative decisions underpinning *Rasterfahndung* would have been more democratic. The implicit parallel is to intelligence gathering by technical means in the NSA context. So where and how do you draw the line(s)?

The US prototypically embraces transparent government in the tradition of freedom of information type laws to empower the media (effecting political control), while access to such information is much more restricted in the Continental tradition. But transparency itself is not necessarily "native" to the Anglo-American tradition when one considers the Official Secrets Act in the UK. Disregarding our problems with secret courts generally (Star Chamber phobia), if you are going to increase reliance on judicial review one needs to (a) reconceive the judicial function under separation of powers to eliminate any deference to the executive in limiting his discretion, and (b) acknowledge differences in what the "rule of law" means, to the extent you talk about adherence to legal rules without the political side of control. So we can have under the "rule of law" broadly understood a government that proceeds the way the US has most recently in classified national security matters, however, then you must make correspondingly broader changes in terms of judicial and executive roles at the constitutional level, assuming judicial review were to increase. This paper is a lawyer's comparative law exercise with the goal of eliciting particularly from non-legal colleagues insights into what (philosophical, political and ethical) ideas underlying differing Continental and Anglo-American traditions have to say about the rule of law versus the *Rechtstaat*, and the extent to which they are consistent with US attempts to (re-)formulate standards for the FISA court in the wake of recent revelations about NSA activities.