II. THE ROLE OF JUDICIAL REVIEW: HANS KELSEN AND JOHN MARSHALL

This session is an invitation to reflect on a great divide in current theory and practice which has its roots in the very different understandings of judicial review elaborated by John Marshall, on the one hand, and Hans Kelsen, on the other.

After an introductory statement of the contrast, we proceed to consider the differences in the realm of international relations, before concluding with cases involving human rights.

A. Marshall v. Kelsen

Alec Stone Sweet,
Governing with Judges: Constitutional Politics in Europe[*]

This chapter examines how constitutional politics are organized in France, Germany, Italy and Spain, focusing on how parliamentary systems of governance have accommodated constitutional adjudication. I begin by introducing the European model of constitutional review, contrasting it to the American model. I then provide an overview of the main structural features of 'the new constitutionalism.' I end with a discussion of the most important factors that determine the nature, scope, and intensity of constitutional [politics].

THE EUROPEAN MODEL OF CONSTITUTIONAL REVIEW

European constitutional courts comprise an institutional 'family' to the extent that they share important features that distinguish them from institutions that exercise constitutional review elsewhere. Contrasting the European and American 'models' of review is a common starting point.

The European Model v. the American Model

In American judicial review, 'any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional.' Although formulated broadly, the power is in practice conditioned by a number of doctrines designed to distinguish

[*] This excerpt is taken from Chapter 2 ("Constitutional Adjudication and Parliamentary Democracy") of ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000).

'the judicial function'—the settlement of legal disputes—from 'the political function'—legislating. Most important, judicial review powers are said to be exercised only to the extent that they are necessary to settle what the American constitution calls a 'case or controversy': a legal dispute involving two litigants who have an opposed interest in the outcome of the case. It can then be claimed that the power of judicial review is not desired, in and of itself, but at times must be exercised in order to resolve a conflict involving the constitutional law. American separation of powers notions—which rest on the formal equality of the executive, legislative, and judicial branches of government—both enable and restrict the exercise of judicial review. Courts are responsible for defending the constitution as higher law; advisory opinions on constitutionality are precluded, as potential usurpations of the legislative function; and judges may choose to curtail their review authority, deferring to the 'political' branches (e.g. by invoking doctrines such as act of state and political questions).

In contrast, the subordination of the work of the judiciary to that of the legislature is a foundational principle of civil law systems, and therefore of Continental constitutional law. As in the United States, the function of the European judiciary is to settle legal conflicts according to the applicable law. But European judges may not invalidate or refuse to apply a statute (legislation) as unconstitutional. From 1780 in Germanic states and from 1791 in France, for example, the prohibition of judicial review has been proclaimed in written constitutions, and the penal codes established penalties for any transgression. The paradigmatic statement of this prohibition is the French law of 16 August 1790, which remains in force today, and which has never been violated.

<u>Courts cannot interfere with the exercising of legislative powers or suspend the application of the laws.</u>

This constitutional orthodoxy spread across Europe during the 19th century. According to this orthodoxy, American-style judicial review, rather than corresponding to a separation of powers, actually establishes a permanent confusion of powers, because it enables the judiciary to participate in the legislative function. In European parlance, to the extent that courts interfere with the legislative function, a 'government of judges' emerges. The fear of creating a government of judges has been at the heart of European animosities to American judicial review since the French Revolution.

American judges are responsible for defending the integrity of a

hierarchy of legal norms, the apex of which is the constitution; and, because legislative norms are juridically inferior to constitutional norms, constitutional provisions must prevail in any legal conflict with statutory provisions. This is the logic of judicial review and the Supreme Court's famous opinion in *Marbury v. Madison*. European judges are also charged with defending a normative hierarchy, the apex of which is the statute: legislative norms (as in the United States) trump conflicting, inferior norms (regulations, decrees, local rules, and so on). But European judiciaries do not possess jurisdiction over the constitution. The constitutional law is formally detached from the hierarchy of laws which European judges are otherwise responsible for applying and defending.

A problem is posed: who will defend the constitution law, arguably the law most in need of protecting, if not the judiciary? The invention of a new institution, the constitutional court, provided the solution.

We can break down the European model of constitutional review into four constituent components. First, constitutional courts enjoy exclusive and final constitutional jurisdiction. Constitutional judges possess a monopoly on the exercise of constitutional review, while the judiciary remains precluded from engaging in review, and no appeal of a constitutional decision is possible. Second, terms of jurisdiction restrict constitutional courts to the settling of constitutional disputes. Unlike the US Supreme Court, constitutional courts do not preside over judicial disputes or litigation, which remain the function of judges sitting on the 'ordinary courts' (all courts with the exception of the constitutional court). Instead, constitutional judges answer constitutional questions referred to then. Third, constitutional courts have links with, but are formally detached from, the judiciary and legislature. They occupy their own 'constitutional' space, a space neither clearly 'judicial' nor 'political.' Fourth, some constitutional courts are empowered to review legislation before it has affected anyone negatively, as a means of eliminating unconstitutional legislation and practices before they can do harm. Thus, in the European model, the judges that staff the ordinary courts remain bound by the supremacy of statute while constitutional judges are charged with preserving the supremacy of the constitution.

The Kelsenian Constitutional Court

The European model of constitutional review has a seminal antecedent: the constitutional court of the Austrian Second Republic (1920-34). The Austrian court was the brainchild of Hans Kelsen, an

influential legal scholar who also drafted the constitution of 1920, founding the Second Republic. In 1928, he wrote a widely translated article elaborating and defending the European model of review. Kelsen argued that the integrity of the legal system, which he conceived as a kind of central nervous system for the state, would only be assured if the superior status of the constitution law, atop a hierarchically ordered system of legal norms, could be guaranteed by a 'jurisdiction,' or 'court-like' body. Because Kelsen foresaw nearly all of the variations on the model now in place, and because Kelsen's constitutional theory is the standard reference for debates about the legitimacy of European constitutional review even today, it is worth examining these arguments closely.

In his article, Kelsen provided an institutional template, or 'tool kit,' for constructing totems of constitutional justice in Europe. Kelsen faced two hostile camps: politicians suspicious of the judiciary and judicial power, and a pan-European movement of prominent legal scholars who favoured installing American judicial review on the Continent. Kelsen understood that the political elites would not accept the establishment of judicial review in Europe. Nevertheless, he believed that a constitutional court, if granted carefully prescribed powers, would not arouse their hostility. The trick would be to show that such a system could provide the benefits of constitutional review, without turning into a government of judges.

Kelsen engaged both fronts at once. First, he distinguished the work of legislators, which he characterized as 'creative' and 'positive,' from the work of constitutional judges, which he characterized as 'negative.' Legislators make law freely, limited only by procedural constitutional law (which distributes governing authority among institutions and levels of government and establishes the rules of the legislative process). Kelsen acknowledged that the authority to declare legislation unconstitutional is also a law-making, and therefore political, authority:

> To annul a law is to assert a general (legislative) norm, because the annulment of a law has the same character as its elaboration—only with a negative sign attached.... A tribunal which has the power to annul a law is, as a result, an organ of legislative power.
>
> But if constitutional judges make law, they do not do so freely, since the judges' decision-making is 'absolutely determined by the constitution.' A constitutional court is therefore only 'a negative legislator.'

Kelsen's distinction between the positive and negative legislator relies almost entirely on the absence, within the constitutional law, of a judicially enforceable charter of rights. Here, we encounter another feature of Kelsen's thought, a conception of the law and of the proper role of courts that goes under the label, 'legal positivism.' Grossly simplifying, for positivists, the law is the corpus of prescriptions that some person or group (a law-maker) has made, that are enforceable by courts and other state institutions, and that are meant to apply authoritatively to specific situations. Kelsen's conception of the unity of the legal system (a hierarchical system of interdependent rules) rested on the fundamental positive nature of the constitution. Positivism is often juxtaposed to 'natural law' theories, which generally assert that human will, however organized in any given society, is neither the only, nor the ultimate source of law. Instead, some foundational principles of law (such as human rights) transcend time and place, and therefore are (or ought to be) directly applicable in every legal system, even when they have not been explicitly proclaimed by a law-maker. In the positivist legal order, judges apply the law-maker's law; in the natural law legal order, judges seek to 'discover' and then apply principles that have an existence which is prior and independent of the law-maker's law. Kelsen believed that constitutions should not contain human rights, which he associated with natural law, because of their open-ended nature. Adjudicating rights claims would inevitably weaken positivism's hold on judges, thereby undermining the legitimacy of the judiciary itself, since judges would become the law-makers. Thus, he wrote

> Sometimes constitutions themselves may refer to [natural law] principles, which invoke the ideals of equity, justice, liberty, equality, morality, etc., without in the least defining [precisely] what are meant by these terms.... But with respect to constitutional justice, these principles can play an extremely dangerous role. A court could interpret these constitutional provisions, which invite the Legislator to honor the principles of justice, equity, equality ... as positive requirements for the contents of laws.

To the extent that constitutional judges would actually invoke natural law, Kelsen believed, they would become positive legislators, a government of judges would ensue, and a political backlash against constitutional review would be the likely outcome.

Second, Kelsen argued that the constitutional court should be able to

review the constitutionality of legislation before its enforcement in the public realm, thus preserving the sovereign character of statute within the legal system afterwards. Elected politicians, within parliaments, or in sub-national governments (within federal systems), would be able to initiate such review.

Third, Kelsen argued that constitutional courts should look as much as possible like other courts. He insisted that professional judges and law professors be recruited to the court, and emphasized that 'members of parliament or of the government' be excluded (on the other hand, he insisted that, because the court would play a legislative role, elected officials should appoint the court's members). He also proposed that the court might be given jurisdiction over constitutional controversies originating in the courts, as a means of securing the superiority of constitutional law, but also in order to link the court's work with formally judicial processes. Finally, individuals and/or a special constitutional ombudsmen might be given the authority to refer matters to the constitutional court.

With the exception of Austria, Kelsen's ideas about constitutional justice were ignored or dismissed during the interwar period. Traditionalists, like the German theoretician Carl Schmitt, argued that Kelsen's court would not function as a court at all but would instead become a kind of supralegislature. Proponents of American-style review regarded Kelsen's ideas as heresy, a brief for 'political' rather than 'judicial' review. Most important, across Europe the major political parties remained hostile to the establishment of review of any kind. Legislation must respect constitutional principles, the argument went, but only legislators should possess the authority to assure that respect. Last, the experience of American judicial review, which had decisively blocked social reform in the decades leading up to the New Deal, was widely discussed; many assumed that a move to establish constitutional review would engender a similar, European 'government of judges.'

The awesome destruction of World War II made possible the diffusion of the Kelsenian court. The bitter experience of fascism in Italy and Germany before the war, and the massive American presence in both countries after it, conspired to undermine fatally deeply entrenched ideologies that emphasized the state's omnipotent nature. Taming the state—constraining government in a system of democratic controls, recognizing the liberties of individuals, and embedding states in pan-European structures (like NATO and the emerging European Communities)—was suddenly at the very top of the European agenda. As democratic reconstruction proceeded, higher law constitutionalism

became the new orthodoxy. The precepts of this new constitutionalism can be simply listed: (1) state institutions are established by, and derive their authority exclusively from, a written constitution; (2) this constitution assigns ultimate power to the people by way of elections; (3) the use of public authority, including legislative authority, is lawful only insofar as it conforms with the constitutional law; (4) that law will include rights and a system of justice to defend those rights. As an overarching political ideology, or theory of the state, the new constitutionalism faces no serious rival today.

The European model of review proved popular because—unlike American judicial review—it could be easily attached to the parliamentary based architecture of the state. Nevertheless, Kelsen's institutional blueprint had to be modified in one crucial respect. Kelsen had argued that constitutional courts should be denied jurisdiction over constitutional rights, in order to ensure that judicial and legislative functions remain as separate as possible. Since World War II, Europe has experienced a rights revolution, a hugely important [effort] to codify human rights at both the national and supranational levels. The burden of protecting these rights has fallen on the modern Kelsenian court.

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B. United States Abrogation of Taiwan Defense Treaty

Before proceeding to the problem of human rights, we turn to consider a classic Kelsenian problem of the court as "negative legislator." This involves questions of the continuing legal validity of treaties under domestic law, given the "rule of recognition" established by the constitutional system.

Goldwater v. Carter
446 U.S. 996 (1979)
Supreme Court of the United States

[Statement of Facts from the opinion of the Court of Appeals:]

BACKGROUND

In the aftermath of the Chinese Revolution and the Korean War, the United States and the Republic of China (ROC) negotiated a Mutual Defense Treaty, primarily directed against the perceived threat from the People's Republic of China (PRC). The Treaty was signed by

representatives of both nations on December 2, 1954. It was approved by the Senate, and finally signed by the President on February 11, 1955. Article V of the Treaty provided that, in the event of an attack on Taiwan, the Pescadores, or United States territories in the western Pacific, each nation "would act to meet the common danger in accordance with its constitutional processes." Article X of the Treaty provided that it would remain in force "indefinitely," but said that "[e]ither Party may terminate it one year after notice has been given to the other Party."

At that time both the ROC and PRC claimed and still claim to be the sole legitimate government of China; both considered Taiwan a part of China. Since then over 100 nations, including all of our NATO allies and Japan, have officially recognized the PRC as the sole government of China, breaking off relations with Taiwan. In 1971 the United Nations admitted delegates from the PRC to the seats reserved for China in the General Assembly and Security Council, and expelled those from the ROC.

In the early 1970's the United States began to pursue a policy of closer relations with the PRC. The early stage of this effort culminated in President Nixon's visit to the mainland of China, during which the two nations released the "Shanghai Communique," declaring the goal of "normalization of relations between China and the United States." The PRC stipulated that full mutual diplomatic recognition was preconditioned on United States agreement to cease all diplomatic and other official relations with the ROC, to withdraw United States military units from Taiwan, and to terminate the Mutual Defense Treaty with the ROC.

In September 1978 Congress passed and the President signed the International Security Assistance Act of 1978, Pub.L.No.95-384, 92 Stat. 746. Section 26 of that Act, called the "Dole-Stone Amendment," provided:

> It is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954.

On December 15, 1978 President Carter announced that the United States would recognize the PRC as the sole government of China, effective January 1, 1979, and would simultaneously withdraw recognition from the ROC. In addition, the United States announced that the ROC would be notified that "the Mutual Defense Treaty is being terminated in accordance with the provisions of the Treaty." On December 23, 1978, the State

Department formally notified the ROC that the Treaty would terminate on January 1, 1980.

While severing all official ties with the ROC, the United States has sought to preserve "extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan." The Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14, signed into law on April 10, 1979, established the statutory framework for such relations.

DECISION BY THE SUPREME COURT (made without full briefing or oral argument)

ORDER

The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint.

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice STEVENS join, concurring in the judgment.

I am of the view that the basic question presented by the petitioners in this case is "political" and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President….

[T]he instant case is a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government. Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty.

In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties, the instant case in my view also "must surely be controlled by political standards."

I think that the justifications for concluding that the question here is political in nature are even more compelling than in [previous decisions] because it involves foreign relations—specifically a treaty commitment to

use military force in the defense of a foreign government if attacked. In *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936), this Court said:

> Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. . . . *Id.* at 315.

The present case differs in several important respects from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact. Here, by contrast, we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum. Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs." Finally, as already noted, the situation presented here is closely akin to that presented in *Coleman*, where the Constitution spoke only to the procedure for ratification of an amendment, not to its rejection.

Having decided that the question presented in this action is nonjusticiable, I believe that the appropriate disposition is for this Court to vacate the decision of the Court of Appeals and remand with instructions for the District Court to dismiss the complaint. This procedure derives support from our practice in disposing of moot actions in federal courts. For more than 30 years, we have instructed lower courts to vacate any decision on the merits of an action that has become moot prior to a resolution of the case in this Court. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The Court has required such decisions to be vacated in order to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41. It is even more imperative that this Court invoke this procedure to ensure that resolution of a "political question," which should not have been decided by a lower court, does not "spawn any legal consequences." An Art. III court's resolution of a question that is "political" in character can create far more disruption among the three

coequal branches of Government than the resolution of a question presented in a moot controversy. Since the political nature of the questions presented should have precluded the lower courts from considering or deciding the merits of the controversy, the prior proceedings in the federal courts must be vacated, and the complaint dismissed.

Mr. Justice POWELL, concurring.

Although I agree with the result reached by the Court, I would dismiss the complaint as not ripe for judicial review.

Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.

Mr. Justice MARSHALL concurs in the result.

Mr. Justice BLACKMUN, with whom Mr. Justice WHITE joins, dissenting in part.

In my view, the time factor and its importance are illusory; if the President does not have the power to terminate the treaty (a substantial issue that we should address only after briefing and oral argument), the notice of intention to terminate surely has no legal effect. It is also indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness. While I therefore join in the grant of the petition for certiorari, I would set the case for oral argument and give it the plenary consideration it so obviously deserves.

Mr. Justice BRENNAN, dissenting.

I respectfully dissent from the order directing the District Court to dismiss this case, and would affirm the judgment of the Court of Appeals insofar as it rests upon the President's well-established authority to

recognize, and withdraw recognition from, foreign governments.

In stating that this case presents a nonjusticiable "political question," Mr. Justice Rehnquist, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations. Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." But the doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power.

The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.

The constitutional question raised here is prudently answered in narrow terms. Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes. [Citing cases.] That mandate being clear, our judicial inquiry into the treaty rupture can go no further.

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Note: THE ABM TREATY ABROGATION

The problem of treaty abrogation returned in connection with the ABM Treaty between the United States and Russia.

Bruce Ackerman, "Treaties Don't Belong to Presidents Alone"
The New York Times
August 21, 2001

President Bush has told the Russians that he will withdraw from the Antiballistic Missile Treaty, which gives both countries the right to terminate on six months' notice. But does the president have the constitutional authority to exercise this power without first obtaining

Congressional consent?

Presidents don't have the power to enter into treaties unilaterally. This requires the consent of two-thirds of the Senate, and once a treaty enters into force, the Constitution makes it part of the "supreme law of the land" -- just like a statute. Presidents can't terminate statutes they don't like. They must persuade both houses of Congress to join in a repeal. Should the termination of treaties operate any differently?

The question first came up in 1798. As war intensified in Europe, America found itself in an entangling alliance with the French under treaties made during our own revolution. But President John Adams did not terminate these treaties unilaterally. He signed an act of Congress to "Declare the Treaties Heretofore Concluded with France No Longer Obligatory on the United States."

The next case was in 1846. As the country struggled to define its northern boundary with Canada, President James Polk specifically asked Congress for authority to withdraw from the Oregon Territory Treaty with Great Britain, and Congress obliged with a joint resolution. Cooperation of the legislative and executive branches remained the norm, despite some exceptions, during the next 125 years.

The big change occurred in 1978, when Jimmy Carter unilaterally terminated our mutual defense treaty with Taiwan. Senator Barry Goldwater responded with a lawsuit, asking the Supreme Court to maintain the traditional system of checks and balances. The court declined to make a decision on the merits of the case. In an opinion by Justice William Rehnquist, four justices called the issue a political question inappropriate for judicial resolution. Two others refused to go this far but joined the majority for other reasons. So by a vote of 6 to 3, the court dismissed the case.

Seven new justices have since joined the court, and there is no predicting how a new case would turn out. Only one thing is clear. In dismissing Senator Goldwater's complaint, the court did not endorse the doctrine of presidential unilateralism. Justice Rehnquist expressly left the matter for resolution "by the executive and legislative branches." The ball is now in Congress's court. How should it respond?

First and foremost, by recognizing the seriousness of this matter. If President Bush is allowed to terminate the ABM treaty, what is to stop

future presidents from unilaterally taking America out of NATO or the United Nations?

The question is not whether such steps are wise, but how democratically they should be taken. America does not enter into treaties lightly. They are solemn commitments made after wide-ranging democratic debate. Unilateral action by the president does not measure up to this standard.

Unilateralism might have seemed more plausible during the cold war. The popular imagination was full of apocalyptic scenarios under which the nation's fate hinged on emergency action by the president alone. These decisions did not typically involve the termination of treaties. But with the president's finger poised on the nuclear button, it might have seemed unrealistic for constitutional scholars to insist on a fundamental difference between the executive power to implement our foreign policy commitments and the power to terminate them.

The world now looks very different. America's adversaries may inveigh against its hegemony, but for America's friends, the crucial question is how this country will exercise its dominance. Will its power be wielded by a single man -- unchecked by the nation's international obligations or the control of Congress? Or will that power be exercised under the democratic rule of law?

Barry Goldwater's warning is even more relevant today than 20 years ago. The question is whether Republicans will heed his warning against "a dangerous precedent for executive usurpation of Congress's historically and constitutionally based powers." Several leading senators signed this statement that appeared in Senator Goldwater's brief -- including Orrin Hatch, Jesse Helms and Strom Thurmond, who are still serving. They should defend Congress's power today, as they did in the Carter era.

If they join with Democrats in raising the constitutional issue, they will help establish a precedent that will endure long after the ABM treaty is forgotten. Congress should proceed with a joint resolution declaring that Mr. Bush cannot terminate treaty obligations on his own. And if the president proceeds unilaterally, Congress should take further steps to defend its role in foreign policy.

We need not suppose that the president will respond by embarking

on a collision course with Congress. His father, for example, took a different approach to constitutionally sensitive issues. When members of Congress went to court to challenge the constitutionality of the Persian Gulf war, President George H. W. Bush did not proceed unilaterally. To his great credit, he requested and received support from both houses of Congress before making war against Saddam Hussein. This decision stands as one precedent for the democratic control of foreign policy in the post-cold war era. We are now in the process of creating another.

Note:

When members of Congress challenged President Bush's decision in federal district court, their case was dismissed on the authority of *Goldwater v. Carter*. There were no further appeals.

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C. German Military Intervention in Yugoslavia

International Military Operations (German Participation) Case

2 BvE 3/92, 5/93, 7/93 and 8/93 (1994)
Constitutional Court of Germany

SUMMARY: The facts: A number of constitutional petitions, raising similar issues, lodged mainly by the German Parliamentary Social Democrat Party, were joined by the Federal Constitutional Court. The cases mainly concerned the question of the right to participation of the Federal Parliament (Bundestag) in decisions on the deployment of German armed forces within the framework of operations undertaken by the North Atlantic Treaty Organization (NATO) and the Western European Union (WEU) for the implementation of United Nations Security Council Resolutions, and on the participation of German armed forces in peace-keeping forces established by the United Nations. The specific petitions were:

(i) No. 2 BvE 3/92, which concerned the participation of German armed forces in an operation carried out by NATO and WEU marine units, established to monitor an embargo imposed in the Adriatic Sea, by United Nations Security Council Resolutions Nos. 7134, 724 and 757, against the Federative Republic of Yugoslavia (Serbia and Montenegro), as well as the Federal Government's approval of resolutions of the NATO and WEU Councils implementing the embargo;

(ii) Nos. 2 BvE 5/93 and 7/93, which concerned the Federal Government's decision on the participation of German armed forces in the enforcement by NATO of the no-fly zone in the air space over Bosnia-Herzegovina, pursuant to United Nations Security Council Resolutions Nos. 781 and 816;

(iii) No: 2 BvE 8/93, which concerned the participation of German units in UNOSOM II, an armed force established by the UN Security Council for peace-keeping in Somalia.

The petitioners argued that the Government had violated the constitutional rights of the Bundestag by deciding to participate in these operations without first obtaining parliamentary approval.

Held: -- The constitutional petitions were partly well founded.

(A) (unanimously) Article 24(2) of the Basic Law (GG) provided a proper constitutional basis for the participation of German armed forces in:

(i) the NATO and WEU monitoring mission in the Adriatic Sea off Yugoslavia;

(ii) the enforcement by NATO of a no-fly zone over Bosnia-Herzegovina; and (iii) the UNOSOM II peace-keeping force in Somalia.

(B) Article 59(2) GG had not been infringed by the participation of German forces in the operations off Yugoslavia and over Bosnia-Herzegovina (by a tied vote of four to four) or in the peace-keeping force in Somalia (by seven votes to one).

(C) (unanimously) However, every deployment of German armed forces for military or peace-keeping purposes required the consent of the Federal Parliament (Bundestag) under the Basic Law. In principle, that consent should be obtained before German forces are [deployed].

B.

The constitutional petitions of the Social Democrat and Free Democrat parliamentary factions in the German Bundestag are, for the most part,

admissible. The petitions lodged by the individual members of the parliamentary parties are [inadmissible].

I. Article 24(2) of the Basic Law (GG)

1. Article 24(2) GG empowers the Federal Republic (Bund) to become part of a system of collective security in order to preserve peace. This authorization entitles the Federal Republic not only to join such a system and to agree to a resulting restriction of its sovereignty, but also forms the constitutional basis for the acceptance of duties typically resulting from membership in such a system and thus also for the deployment of the Federal Armed Forces for engagements within the framework and according to the rules of the [system].

III. Article 59(2)(1) GG

1. (a) The first alternative of Article 59(2)(1) GG preserves for the Legislature "the right to approve international treaties regulating Federal political relations." Deviating from the general principle of separation of powers, according to which foreign policy forms part of the Government's functions, this Article grants legislative bodies the right to participate in the field of Executive power. Within its scope of application, the provision gives Parliament the power to act by granting it a separate right to political participation, a function which it exercises as an act of government in the form of a Federal law. Thus Parliament has been given the power to act. This solution is intended to ensure that, without approval by the Bundestag, Germany cannot be bound by treaties such as those listed in Article 59(2)(1) GG. The requirement of prior consent is meant to protect Parliament's power of control from erosion by binding international treaties whose effects cannot be abolished by subsequent parliamentary disapproval. Seen in a historic context, this rule represents a tendency to increase the role of Parliament in the formulation of foreign policy objectives.

(b) At the same time, the parliamentary right to cooperate is limited by Article 59(2)(1) GG in procedural ways as well as in matters of substance.

(aa) The Federal Government alone is responsible for preliminary treaty discussions. It has the right to introduce any bill of accession in the sense of Article 59(2)(1) GG and to outline the scope of that treaty to Parliament, which can only approve or reject the treaty as a whole, unless it contains scope for discretion. Parliamentary approval merely

permits the Government to act. Subsequently, only the Government has the power to decide whether or not to ratify the treaty and, if necessary, to repeal or to extend it.

(bb) In principle, acts of foreign policy not covered by Article 59(2)(1) GG are matters to be [dealt with] solely by the Government. Treaties which fall outside the scope of the term "political treaty" do not require parliamentary consent, even where they have important effects on the Federal Republic's internal affairs. Nor is such consent required for all other acts of government which, outside of the framework of formal treaties, deal with Germany's relationship to foreign public international law subjects, even where these contacts encompass political relations.

Equally, it cannot be deduced from Article 59(2)(1) GG that whenever international actions of the Federal Government affect the Federal Republic's political relationships or touch upon matters falling within the legislative power of the Federation, the Government must choose the form of a treaty which is subject to legislative consent. An analogous or expanded application of Article 59(2)(1) GG is not possible.

(c) The right to legislative cooperation can therefore be infringed where the Executive, exercising its basic power to conduct foreign relations, creates by treaty new or extended legal obligations which fulfill the criteria of Article 59(2)(1) CG, but it fails to obtain prior legislative consent. The finding that the legislative right embodied in Article 59(2)(1) GG is violated cannot be countered by the argument that no bill of approval was laid before the Lower House (Bundestag) and that the Legislature cannot demand the introduction of such a bill. In such circumstances, the rights of Parliament have been infringed by default.

2. All treaties under public international law are agreements between two or more international bodies intended to change their existing legal relationships. Agreements to amend existing treaties also fall into this category. Their actual form and content are immaterial. As with any solemnly and formally concluded agreement, an exchange of notes, an administrative agreement or a verbal understanding can all represent contractual agreements. In particular, it is immaterial whether or not an accord was actually called a treaty. Even acts performed by the institutions of international treaty organizations, or concerted actions, can in fact amount to treaties which the Contracting Parties have concluded and which deal with the matter in hand, if these actions embody and demonstrate a corresponding intent. The decisive factor lies in the mutual

agreement of public international law bodies, reached by concurring declarations of intent to bring about specific international legal consequences.

The term "political treaties" in the sense of Article 59(2)(1) GG does not include all international agreements on public matters but only those affecting the "existence of the State, its territorial integrity, its independence and its standing and potential weight within the community of States." Primarily but not solely included are treaties aimed at "safeguarding, consolidating or extending a State's position of power in relation to others."

3. (a) Senate judges Klein, Grasshof, Kirchhof and Winter, on whose opinion this decision is based, are of the opinion that Article 59(2)(1) CG restricts the requirement of prior consent to treaties concluded under public international law. This Article does not, however, touch upon the emergence of international law from other sources, even where it affects the content of existing [treaties].

(cc) Changes affecting the contents of existing treaties only require legislative approval under Article 59(2)(1) GG, if they are introduced by amendment treaty, which requires that the Contracting Parties express their intention to amend the legal situation as laid down by the existing treaty. The contents of an international treaty can, however, also be altered from other sources of law. The emergence of new and specific customary law binding the Contracting Parties can modify the contents of treaties.

Within the framework of modern international law, treaties are often subjected to a dynamic form of interpretation which itself is a reaction to changing circumstances. Treaties which establish separate organizations whose bodies act independently within the framework of that treaty are particularly geared to dynamic processes. In treaties with a highly political character, this fact is usually reflected by loosely worded provisions outlining their aims and purposes which allow the Contracting Parties to adjust them to new international developments, especially where and in so far as they act by mutual accord. Under Article 31(1) and (2) of the Vienna Convention on the Law of Treaties, the object and purpose of a treaty as expressed in its text provide important guidelines for its interpretation. When approving an international treaty, the Legislature is fully aware of the significance which attaches to preambles and general aims and purposes. A further development of treaty law through so-called authentic interpretation and a treaty's practical implementation on the basis of such interpretation, both of which can lead to further legal developments, is therefore anchored in the

existing treaty and covered by the legislative consent required under Article 59(2)(1) GG. Only where the law, as in Article 24(1) GG, requires greater clarification and precision, is this process subject to greater restrictions.

(dd) In practice, international law is characterized by a fluid transition from treaty interpretation to treaty amendment. Within this borderline area, a change in the contents of an international treaty is occasionally brought about by interpretation of an existing international treaty rather than by an amendment of the treaty. The interpretation of an existing international treaty merely aimed at clarifying its actual contents, and certain concerted practices of the Contracting Parties in applying the treaty, provide legally valid guidelines for the interpretation of an existing treaty. They are not treaty amendments, since the Contracting Parties have no intention of changing the treaty, although in certain instances this practice can have the same effect on a treaty as a proper amendment. In these circumstances, there are insufficient indications to conclude that by their specific actions or statements the Parties intended to enter into new treaty obligations.

Where the Parties declare that they intend to create a new practice of applying the treaty and this practice in fact goes beyond the contents of the treaty, despite the Contracting Parties' express opinion, the Legislature has no power under Article 59(2)(1) GG to insist on the conclusion of an additional international treaty. By their declared intention to remain within the bounds of the existing treaty, the Parties have clearly stated that they do not wish to create new legal treaty obligations. And since the Parties have not declared that they intend to conclude an amendment treaty, no new treaty exists which requires consent under Article 59(2)(1) GG. In these circumstances, there is also no question of a tacitly agreed treaty merely lacking an explicit declaration of intent but covered by the Parties' will to enter into new treaty obligations. Such practice merely consists of a factual procedural process which itself forms part of the collaboration of all the Contracting Parties involved. If Article 59(2)(l) GG were to apply in respect of such processes, which in any event only lead to changes in the treaty contents in very hard-to-define cases, such application would blur the necessary clear delineation of powers between the Government responsible for foreign policy and the Legislature entitled to co-determination.

Thus it cannot be ruled out that the Government, by legally pertinent actions "within the framework of" existing treaties, creates for the Federal Republic of Germany new international rights and duties, either because the Government in concert with the governments of other Contracting Parties "authentically interprets" valid treaty law or because,

with its cooperation, a certain manner of applying the treaty becomes established which shows that all Contracting Parties interpret the treaty uniformly, a fact which gains significance for the treaty's content (see Article 31(3)(b) Vienna Convention on the Law of Treaties). If Article 59(2)(1) GG were to apply to these cases, the Federal Government would need the consent of the Legislature for every step which in the normal course of events could entail such a [result].

(ee) This does not mean, however, that Parliament has no influence upon the Government's foreign policy. Where the Federal Government has created new international obligations for the Federal Republic of Germany without prior approval by the Legislature under Article 59(2)(1) GG, the Federal Government's scope of action is limited to the fulfillment of these obligations by activities which are not subject to legislative reservation. Wherever the Basic Law demands express legislative powers, as for instance in the field of basic rights, the exercise of public authority or in respect of budgetary rights, the Government cannot act of its own volition, unless either inner-German legal applicability has been pronounced by a national act of accession or Parliament has otherwise created sufficient authorization. Moreover, if the Lower House (Bundestag) disapproves the Government's foreign policy or fears the emergence of undesirable international obligations, it can oppose the Government by the use of its many means of political control. Developments such as those which have given rise to the petitions before the Court in this case take place in full view of the public. Parliament is therefore able, at any time and at its own initiative, to influence Government and thereby to become part of the process of intention-forming and decision-making in force between States.

(b) The Federal Government's participation in the measures listed in petitions Nos. 2 BvE 3/92 and 2 BvE 7/93 has not violated the rights of the Bundestag.

(aa) As a reaction to the fundamental worldwide changes since 1989, especially in Europe, the European and Atlantic powers and the peace-keeping organizations to which they belong (i.e. CSCE, EU, NATO and WEU) have searched for a new "architecture of security" which has its basis in the discernment of new threats to peace in Europe. This development has led in particular to the admission of new Parties to these organizations, to new fields of operation, to cooperation with third parties ("partnership for peace"; "individual partnership programmes") and a new framework for the inter-relationship between these organizations and for their links with the United Nations. Apart from the European Union, which entered a new phase

of development through the Maastricht Treaty and has opened itself up to the accession of new members, Europe's future political structure has not yet found its definitive form. The ideas of the various parties involved on how best to deal with the situation have not yet reached a sufficient degree of maturity to allow them to be enshrined in a treaty and thus to be provided with a legally binding form both for the participating parties and in respect of third parties.

The envisaged new system of security is taking shape only gradually. This can best be demonstrated by the discussions and deliberations which have taken place within NATO and the WEU during recent years and which form the background for any evaluation of the decision to incorporate the structures of both alliances into the operations for the enforcement of the UN Security Council's resolutions in respect of the former Yugoslavia.

(bb) The declarations made by the Foreign and Defence Ministers of the WEU Member States on 19 June 1992 in Bonn (Petersberg) are an expression of political intentions and of plans for renewal. But they do not yet contain any definite or tacitly expressed statements on treaty relationships. The contents of later declarations made during meetings of the WEU Council of Ministers do not alter this position.

[Where] Ministers, politically in agreement, voice their willingness and firm determination to extend future WEU objectives and means of operation, this is only evidence of their joint endeavour to revitalize the alliance. Such political declarations provide no indications to support the assumption that the Parties' concepts are sufficiently advanced to provide the content of binding agreements.

The statement made in respect of the UN resolutions on the war in the former Yugoslavia must be seen in the same light. It was the urgent political wish of the European institutions and security systems, shared by the Western European States, no longer to refrain from effective cooperation in bringing about peace and ending the war which had caused large-scale human misery. As a response to this acute state of emergency, the WEU Member States had already decided to implement the spirit of the Alliance's intended revitalization. Given the current state of the war in Yugoslavia, the implementation of these measures could no longer be postponed. But it was not intended to extend the Treaty by including the enforcement of UN mandates in its legal [objectives].

(dd) All the declarations complained of are therefore political statements on the new European "architecture of security." They give expression to the firm intention to cooperate continuously in this process of new and extended collaboration. However, in the course of intermediate steps in political discussions and actual cooperation, they do not yet evince an intention to enter into new legal treaty obligations. The participating States and organizations reaffirm their current position in respect of plans and operations, albeit directed towards further developments, without regarding them as a conclusion to their efforts to bring about a conceptual renewal and without intending to give them the form of a binding treaty.

When the Federal Government participates in such planning and consultation procedures and, in agreement with the Alliance Partners, attributes no binding legal force, beyond the specific matter at issue, to the results of conferences or arrangements concerning actual cooperation, amendment of the NATO and WEU Treaties has obviously not taken place. Article 59(2)(1) GG is therefore not applicable.

This result saves the Federal Government from having to interrupt the process of careful coordination and joint planning by voicing a clarifying reservation not to be legally bound by it, because all participants are well aware of the non-binding nature of these discussions. The Federal Government is also spared from a duty, unilaterally to start a process of seeking legislative consent to a "treaty" which has no substance and for which a fictitious text would have to be written. Both such circumstances would appear strange to the participating States and organizations.

[Disssenting judges Limbach, Bockenforde, Kruis and Sommer did not support the decision of the majority and were of the opinion that the measures taken by the Federal Government directly infringed the rights of the Bundestag under Article 59(2)(1) GG. Accordingly they considered that, pursuant to Section 67 of the Act on the Federal Constitutional Court (BVerfGG), Article 59(2)(1) should be held to have been infringed.

In their view, by repeated joint political statements and participation in supervisory action in the Yugoslav conflict, the Federal Government had taken part in a dynamic extension of the original concepts of the NATO and Brussels (WEU) Treaties. Whilst not explicitly characterized as a treaty, this extension threatened to circumvent the rights of participation of the Bundestag.

Despite the fact that there had been no formal treaty amendment, by collaborating with its partners in this way the Federal Government had, as it were, "placed the NATO and WEU Treaties on wheels," thereby creating the danger of binding modifications being effected outside the traditional procedural framework and avoiding the requirement of parliamentary participation laid down by Article 59(2)(1) GG.

According to the minority opinion, by their own choice of words the Parties to the NATO and WEU Treaties could disguise actual amendments as the mere interpretation of existing provisions. This weakened the role of Parliament which, under Article 59(2)(1) GG, was given a clear mandate to participate in certain forms of international procedures with the potential to amend treaties. Article 59(2)(1) GG was to be interpreted as applying to such procedures and not as being restricted to formal treat amendments. The Court majority continued:]

IV. Parliamentary prerogative.

The Basic Law (GG) authorizes the Federation to establish armed forces for defence purposes and to join systems for collective self-defence and mutual collective security. This includes the power to deploy German forces as part of German participation in operations planned within the framework of these systems and carried out according to their rules. However, irrespective of this fact, any deployment of armed forces requires the prior constituent consent of the Bundestag.

Whilst the Constitution has largely attributed foreign policy matters to the Executive's sphere of action (see above, section III), as a matter of principle the constitutional provisions on military matters require an involvement of the Bundestag for the deployment of armed forces. According to their differing formulations, the rules in the Basic Law dealing with the armed forces seek to ensure that the Federal Army, instead of becoming a source of power solely for the use of the Executive, will be integrated as a "parliamentary army" into a democratic constitutional system governed by the rule of law, in other words to preserve for Parliament a legally relevant influence on the establishment and use of the armed forces.

[The Court then examined provisions originally contained in Article 59(a) GG but repealed in 1968 which dealt with matters of defence and parliamentary pronouncements that a "state of defence" (Verteidigungsfall)

existed. Despite constitutional amendments and the repeal of Article 59(a), parliamentary consent was still necessary for all troop deployments. The Court continued:]

Where currently, after German accession to the United Nations and in view of the changed international political circumstances, German forces are to be deployed, parliamentary consent is no longer explicitly mentioned in the Basic Law as a constitutional prerogative. However, Parliament never intended to dispense with this requirement.

2. The requirement of constituent parliamentary consent to any military deployment of troops is to be derived from the Basic Law.

[2(a)-(b) (bb): The Court then examined the position under the Weimar Constitution and constitutional amendments introduced in 1956 concerning limitations to parliamentary involvement in declarations of war or state of defence. The Court elaborated on the purpose behind the introduction of Article 59(a) GG (German rearmament) and the need to involve the German people, through its parliamentary representatives, in political decisions on war and peace. Any deployment of German forces was to be linked to prior parliamentary consent and the term "declaration of war" was to be replaced by the concept of "defensive emergency" in order to demonstrate that Germany was no longer a power bent on the use of war for her own purposes. In particular, Articles 45(a), 45(b) and 87(a)(I)(2) GG testified to this new concept. Having analysed these provisions, the Court continued:]

(b) (cc) As regards the armed forces, the Basic Law not only retains for Parliament the power to supervise and fundamentally control future planning and development activities, but also grants Parliament the right specifically to decide on their deployment.

(1) It is true that any declaration of a "state of defence" under Article 115(a)(l) GG merely effects a transition from the provisions contained in the normally applicable Constitution to those of the so-called Emergency Constitution (Notstandsverfassung), thereby adapting the law on the organization of the German State to the requirements following an armed attack on German territory from outside (ausserer Notstand). But such a declaration is not a precondition for every deployment of Federal armed forces for defence purposes. The Basic Law states that any declaration of a state of defence has legal repercussions for Germany's emergency legislation, the constitutional structure of the armed forces and

the area of foreign policy (see Art. 115(a)(V), 115(b), 115(1)A GG; Art. 87(a)(III)). More than anything else, it is the transfer of the power of command from the Federal Minister of Defence to the Chancellor under Article 115(b) GG which highlights the fact that a parliamentary declaration of a state of defence under Article 115(a) GG simultaneously authorizes the military deployment of troops. The transformation of the Chancellor's previous powers, restricted to the issue of decrees, into a position of overall command as brought about by the parliamentary decision on the state of emergency, concentrates military and foreign powers in the hands of the Chancellor who now bears full parliamentary responsibility for his actions.

The provisions of Article 80(a)(III) GG dealing with alliances (Büdnisklausel) equally prohibit the deployment of armed forces solely by Executive authorization. This Article deals with a "partial mobilization of the civilian population" through the NATO alarm system, and not with the deployment of troops in case of a threat to the Alliance.

[2. The Court considered the constitutional provisions governing the deployment of troops for civil defence purposes during states of emergency or defence, for which prior parliamentary consent was also necessary. The Court continued:]

(c) In the light of Germany's constitutional tradition since 1918, the decision in favour of total parliamentary control of the armed forces, established by the provisions of the Basic Law, highlights the principle, underlying the constitutional structure of the armed forces, according to which the deployment of armed forces is subject to the constituent and, in principle, prior consent of the Bundestag.

3. Notwithstanding exceptional cases specifically regulated by the Basic Law, this principle of constituent parliamentary involvement in the deployment of armed forces has the following consequences:

(a) Parliamentary involvement is needed to deploy armed forces. Where an Alliance Partner is attacked, Parliament has already approved the obligation to assist by approving the act required under Article 59(2) GG and thus in principle has consented to the deployment of German troops where the Alliance is threatened. But even in such cases, Parliament must give its (in principle prior, see below under b) consent to an actual deployment, carried out in compliance with obligations under the Alliance.

However, where both Houses of Parliament (Bundestag and

Bundesrat) have already determined under Article 115(a) GG that a state of defence exists, such decision includes parliamentary consent to the deployment of armed forces.

When armed forces are deployed within the framework of Security Council resolutions, the prior consent of the Bundestag is necessary irrespective of whether or not those forces are given coercive powers under Chapter VII of the UN Charter and of how the command structure is to operate. A differentiation between the various forms of deployment of peace-keeping forces is inappropriate, since in reality the borderline between traditional blue-helmet operations and those including the power to engage in armed security measures has become blurred. "Self-defence," which is permitted for straightforward peace-keeping forces, has already been defined in a more active sense as including resistance to forcible attempts to prevent the troops from carrying out their objectives.

The deployment of armed forces personnel for relief services, and foreign aid does not require the consent of the Bundestag, as long as the soldiers are not engaged in armed operations.

(b) The constitutionally required participation of the Bundestag in specific decisions on the deployment of armed forces must not interfere with Germany's military capability and her ability to fulfill her obligations within the Alliance. In cases of emergency, the Federal Government is therefore permitted to make provisional decisions on the deployment of armed forces without prior specific parliamentary consent, to participate in the relevant decisions either of the Alliance or of international organizations, and to give provisional effect to those decisions. But in every case the Federal Government must immediately put the question of such deployment before Parliament. Armed forces must be recalled if Parliament so decides. The Legislature is empowered to impose preconditions governing such cases of emergency and the procedure to be followed (see below, under 4).

(c) Decisions of the Bundestag on the deployment of armed forces are to be reached in accordance with the provisions of Article 42(2) GG.

(d) The prerogative of parliamentary consent to the deployment of armed forces does not give the Bundestag a power of initiative. Parliament can only either refuse to endorse the Government's plans to deploy armed forces or put an end to their continued deployment where, under exceptional circumstances, deployment has already started (see above, under b). But the

Bundestag has no power to force the Federal Government to deploy armed forces. The Government's own sphere of Executive power and responsibility, as provided for by the Basic Law, is unaffected by any parliamentary prerogative. This is particularly the case for decisions on the method, scope and duration of deployments and for necessary coordination within international organizations and with their institutions.

[4. (a) The Court pointed out the current lack of legislative provisions concerning the procedure for obtaining parliamentary consent. Legislative intervention was required to determine the form and extent of parliamentary participation in decisions of the type at issue in this case. In particular it was necessary to differentiate between the various forms of international obligations which could entail the deployment of troops and to lay down the time scale for and intensity of parliamentary control. The Court continued:]

Irrespective of the Government's freedom to choose their form, any legislative rules must sufficiently accentuate the principle of formal parliamentary participation. On the other hand, such legislation must pay attention to the Government's constitutionally guaranteed exclusive sphere of Executive power and responsibility in respect of foreign policy (see above, sections 3(b) and (d)).

(b) The condition of constitutionally required parliamentary consent already applies directly by virtue of the Basic Law, irrespective of any further and more detailed legislative arrangements. Until a law has been enacted which makes provision for more formal parliamentary participation in decisions on the deployment of German troops, the Federal Government and Bundestag must proceed according to the requirements set out above in section 3.

5. By its decisions of 15 July 1992, 2 April 1993 and 21 April 1993 to deploy armed forces, the Government has failed in its duty, as outlined above, to obtain prior constituent consent from the German Bundestag.

[The Court summarized the extent to which its judgment was unanimous and set out the dissenting opinion of judges Böckenförde and Kruis on certain procedural points.]

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D. Passive Virtues (?) in the United States: *Padilla v. Hanft*

The Facts[*]

The government seized … Jose Padilla when he arrived at Chicago's O'Hare International Airport. In proudly announcing his detention as an "enemy combatant," Attorney General John Ashcroft did not claim that Padilla, like Hamdi, had fought on a traditional battlefield. He justified the seizure by claiming that it had "disrupt[ed] an unfolding terrorist plot to attack the United States by exploding a radioactive dirty bomb." Despite the gravity of this charge, Ashcroft refused to give Padilla a chance to defend himself before a jury of his peers, asserting that the commander-in-chief had the unilateral authority to detain anybody he designated as an "enemy combatant." Lest this claim of arbitrary power seem too raw for public consumption, he assured a national television audience that the administration had plenty of evidence to back up its decision: "We know from multiple, independent and corroborating sources that [Padilla] was closely associated with al Qaeda and that, as an al Qaeda operative, he was involved in planning future terrorist attacks on innocent American civilians in the United States." Within days, alas, the Administration was running away from its apocalyptic charges, and it was soon conceding serious problems with its evidence as well. As the months turned into years, the president's charges against Padilla would continue to shift, and in surprising ways.

Yet none of this slipping and sliding would alter President Bush's determination to hold Padilla in a military brig without justifying his decision to any judicial authority…. All we really know about Padilla is that he converted to Islam (as was his constitutional right), and that he later traveled to a variety of Islamic countries for extended periods (not a crime). Americans change their religions every day, and millions more fly back and forth from foreign lands. If this is enough to send Padilla into endless detention in a military brig, no citizen is safe. Although the president claims to have more incriminating information on Padilla, we can only guess whether the government has a ghost of a chance of persuading a jury of his guilt—in a process in which his counsel could confront and cross-examine witnesses and require the prosecution to overcome the presumption of innocence. We know only that the president thinks that these are dispensable luxuries in the "war on terror."

[*] Excerpted from Chapter 1 ("This Is Not a War") of BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006).

It can't happen here, we tell ourselves, and ordinarily we would be right. The writ of habeas corpus has for centuries been the great guarantee against arbitrary arrest and detention in the English-speaking world. Padilla's case is a legal no-brainer: his lawyer had every reason to expect any federal judge—conservative or liberal—to require the government either to charge Padilla with a crime or to release him immediately from military prison.

Yet a first-rate federal judge refused to order Padilla's release, succumbing to the misbegotten notion that he could be treated as a foot soldier in a "war on terror." This man, a citizen of the United States of America, remained in solitary confinement for two years as his case proceeded up the judicial hierarchy to the Supreme Court. When his moment of truth finally came, he failed to get relief. Instead of delivering a ringing reassertion of American freedom, the 5–4 majority decided that the issue was too hot to handle. Seizing upon a jurisdictional pretext, it refused to reach any decision on the merits—sending Padilla's lawyers back to the lower federal courts for more litigation before they could return to hear the high court's judgment on the merits. This pause speaks volumes. It is a dark day in our history when an American citizen remains in solitary confinement for *three or four years* before the Court deigns to consider his plea for due process of law.

Upon return to the lower courts, the government developed a new story. It had always claimed that Padilla was "closely associated with Al Qaeda" and had spent time in Afghanistan planning "acts of international terrorism," before successfully escaping to Pakistan after September 11. But now the government added a new fact that it claimed was crucial: Padilla "was armed with an assault rifle" as he beat his retreat into Pakistan. It did not allege, however, that Padilla actually fought for the Taliban government in its war with America and its local allies. With its new allegations about the gun, the government could portray Padilla as bearing weapons in the "war on terror" even if he wasn't engaged in battlefield operations.

On its first trial run, this clever bit of lawyering went nowhere. The district judge who heard Padilla's case was far more impressed with the fact that Padilla arrived at O'Hare Airport in civilian clothes without any weapons, and that it was his on-going threat to the United States, not his activities in Afghanistan, that made him a high-priority target for detention. He refused to expand *Hamdi* and vigorously protected Padilla's fundamental rights as a citizen--rejecting his designation as an "enemy

combatant" and requiring the government to charge him with a crime and prove its charges, beyond a reasonable doubt, to a jury of Padilla's peers.

But the president's lawyers were luckier when their case came before the court of appeals. This three-judge appellate panel glossed over the government's failure to allege that Padilla was actually fighting for the Taliban government on the battlefield. It was enough for them that the president claimed that he was "armed and present in a combat zone."

At this point, the case took another remarkable turn. Since the court of appeals had handed the President a great victory, his lawyers moved at once to protect it from reversal by the Supreme Court. After more than three years of intransigence, they suddenly announced that the President was no longer interested in holding Padilla as an enemy combatant. Instead, he would graciously choose to respect the Bill of Rights by charging Padilla with a crime, and grant him all his traditional rights at a jury trial.

The point of this gambit was painfully obvious. President Bush is far more interested in preserving his prerogatives than he is in holding any particular American citizen. Once he discharged Padilla from military detention, he hoped that the Court would decide that the case was no longer worth the trouble of plenary review. But in a remarkable rebuke, the Court of Appeals rejected this maneuver. It kept Padilla in military custody, leaving it up to the Supreme Court to pass judgment on the president's claims.

The government's new criminal indictment suggests the extent to which it has retreated from Ashcroft's earlier charges. It has dropped any mention of a plot to blow up American cities. Padilla is now alleged to be part of a small-time conspiracy assisting terrorists to launch attacks overseas: "As the government must surely understand," the court of appeals added, the radical shift has "left the impression that Padilla may have been held for these years…by mistake."

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Padilla v. Hanft
126 S. Ct. 1649 (2006)
Supreme Court of the United States

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The petition for a writ of certiorari is denied. Justice

SOUTER and Justice BREYER would grant the petition for a writ of certiorari.

Justice KENNEDY, with whom THE CHIEF JUSTICE and Justice STEVENS join, concurring in the denial of certiorari.

The Court's decision to deny the petition for writ of certiorari is, in my view, a proper exercise of its discretion in light of the circumstances of the case. The history of petitioner Jose Padilla's detention, however, does require this brief explanatory statement.

Padilla is a United States citizen. Acting pursuant to a material witness warrant issued by the United States District Court for the Southern District of New York, federal agents apprehended Padilla at Chicago's O'Hare International Airport on May 8, 2002. He was transported to New York, and on May 22 he moved to vacate the warrant. On June 9, while that motion was pending, the President issued an order to the Secretary of Defense designating Padilla an enemy combatant and ordering his military detention. The District Court, notified of this action by the Government's *ex parte* motion, vacated the material witness warrant.

Padilla was taken to the Consolidated Naval Brig in Charleston, South Carolina. On June 11, Padilla's counsel filed a habeas corpus petition in the Southern District of New York challenging the military detention. The District Court denied the petition, but the Court of Appeals for the Second Circuit reversed and ordered the issuance of a writ directing Padilla's release. This Court granted certiorari and ordered dismissal of the habeas corpus petition without prejudice, holding that the District Court for the Southern District of New York was not the appropriate court to consider it. See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

The present case arises from Padilla's subsequent habeas corpus petition, filed in the United States District Court for the District of South Carolina on July 2, 2004. Padilla requested that he be released immediately or else charged with a crime. The District Court granted the petition on February 28, 2005, but the Court of Appeals for the Fourth Circuit reversed that judgment on September 9, 2005. Padilla then filed the instant petition for writ of certiorari.

After Padilla sought certiorari in this Court, the Government obtained an indictment charging him with various federal crimes. The President ordered that Padilla be released from military custody and

transferred to the control of the Attorney General to face criminal charges. The Government filed a motion for approval of Padilla's transfer in the Court of Appeals for the Fourth Circuit. The Court of Appeals denied the motion, but this Court granted the Government's subsequent application respecting the transfer. *Hanft v. Padilla,* 126 S.Ct. 978 (2006). The Government also filed a brief in opposition to certiorari, arguing, among other things, that Padilla's petition should be denied as moot.

The Government's mootness argument is based on the premise that Padilla, now having been charged with crimes and released from military custody, has received the principal relief he sought. Padilla responds that his case was not mooted by the Government's voluntary actions because there remains a possibility that he will be redesignated and redetained as an enemy combatant.

Whatever the ultimate merits of the parties' mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court's certiorari power. Even if the Court were to rule in Padilla's favor, his present custody status would be unaffected. Padilla is scheduled to be tried on criminal charges. Any consideration of what rights he might be able to assert if he were returned to military custody would be hypothetical, and to no effect, at this stage of the proceedings.

In light of the previous changes in his custody status and the fact that nearly four years have passed since he first was detained, Padilla, it must be acknowledged, has a continuing concern that his status might be altered again. That concern, however, can be addressed if the necessity arises. Padilla is now being held pursuant to the control and supervision of the United States District Court for the Southern District of Florida, pending trial of the criminal case. In the course of its supervision over Padilla's custody and trial the District Court will be obliged to afford him the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants. *See, e.g.*, U.S. Const., Amdt. 6; 18 U.S.C. § 3161. Were the Government to seek to change the status or conditions of Padilla's custody, that court would be in a position to rule quickly on any responsive filings submitted by Padilla. In such an event, the District Court, as well as other courts of competent jurisdiction, should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised. Padilla, moreover, retains the option of seeking a writ of habeas corpus in this Court. *See* this Court's Rule 20; 28 U.S.C. §§ 1651(a), 2241.

That Padilla's claims raise fundamental issues respecting the

separation of powers, including consideration of the role and function of the courts, also counsels against addressing those claims when the course of legal proceedings has made them, at least for now, hypothetical. This is especially true given that Padilla's current custody is part of the relief he sought, and that its lawfulness is uncontested.

These are the reasons for my vote to deny certiorari.

Justice GINSBURG, dissenting from the denial of certiorari.

This case, here for the second time, raises a question "of profound importance to the Nation," *Rumsfeld v. Padilla*, 542 U.S. 426, 455 (2004) (STEVENS, J., dissenting): Does the President have authority to imprison indefinitely a United States citizen arrested on United States soil distant from a zone of combat, based on an Executive declaration that the citizen was, at the time of his arrest, an "enemy combatant"? It is a question the Court heard, and should have decided, two years ago. Nothing the Government has yet done purports to retract the assertion of Executive power Padilla protests.

Although the Government has recently lodged charges against Padilla in a civilian court, nothing prevents the Executive from returning to the road it earlier constructed and defended. A party's voluntary cessation does not make a case less capable of repetition or less evasive of review. See *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968) (party whose actions threaten to moot a case must make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur").

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E. Abstract Review in Rights Cases

Alec Stone Sweet
Governing with Judges: Constitutional Politics in Europe[*]

Legislating

Legislative processes are sites of constitutional politics to the extent that they organise interactions between legislators and constitutional judges. As these interactions have grown over time, law-making and the construction of the constitutional law have tended to bind together, each process becoming at least partly constitutive of the other. This chapter explores this growing interdependence in France, Germany, Italy, and Spain.

I proceed from the view that constitutional courts ought to be conceptualized as specialized legislative organs, and constitutional review ought to be understood as one stage in the elaboration of statutes. Adopting this perspective facilitates observing and evaluating the complex relationship between constitutional adjudication and law-making. After examining how often, and with what techniques, constitutional courts intervene in legislative processes, I turn to the judicialization of parliamentary governance, focusing on the capacity of constitutional rule-making to structure ongoing legislative behaviour. Case studies illustrate my main [points].

CONSTITUTIONAL COURTS AS SPECIALIZED LEGISLATIVE CHAMBERS

One simple way of focusing attention on the policy impact of constitutional adjudication is to conceptualize the constitutional court as one kind of law-making body which interacts with other kinds of law-making bodies, within legislative processes. The legislative authority of constitutional judges is specialized, in that it is restricted to judging the constitutionality of statutes previously adopted by parliament. In European parliamentary systems, most of the nitty-gritty, technical legislative work is done by specialized committee. Normally, the budget committee is far more sensitive to the fiscal consequences of proposed legislation than is the legislature as a whole; and the agricultural committee will be more

[*] This excerpt is taken from Chapters 2 ("Legislating") and 5 ("The Politics of Judging") of ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000).

competent to evaluate the likely consequences of certain proposals on farming and farmers than will the legislature as a whole. If the constitutional court were simply a specialized committee of the legislature, composed of regular members of the lower house of parliament (rather than having its own peculiar institutional separation from the legislature), it would be far more sensitive to issues of constitutionality than the chamber as a whole. But the constitutional court has powers that are independent of those of the other two houses of parliament. When it exercises abstract review authority it operates as a separate, but specialized, legislative chamber. The opposition's referral triggers a final, constitutional 'reading' of the statute to parliamentary procedures. And constitutional rule-making can provoke, or require, new legislative processes, as when parliament must act in order to comply with the dictates of case law.

Accepting the 'constitutional court as legislative chamber' formulation does not entail ignoring obvious institutional distinctions between parliaments and constitutional courts. Two such distinctions deserve emphasis at this point, because we can expect them to condition behaviours relevant to policy-making. First, government ministers and parliamentarians are relatively self-activating law-makers, in that they are capable of deciding when and how to legislate, on their own, within limits imposed by the constitution. Until a case law relevant to a given legal domain has developed, constitutional judges act in a context that has been constructed by others (e.g. elected politicians and ordinary judges). Second, constitutional judges must, by law, give legal reasons for their decisions in writing. Elected politicians, in contrast, can take decisions on the basis of their own partisan interest, or ideology, without going further. They presume, after all, that they were elected to do so.

One purpose of this chapter is to demonstrate the extent to which the judicialization of the legislative process can blur these distinctions, even to the point of irrelevance. As constitutional rule-making proceeds in any given policy domain, governments and parliaments may find themselves operating in contexts that have been meaningfully constructed by constitutional judges. Elected officials may find that giving constitutional reasons for their behaviour cannot be avoided, and that surviving policy interests can only be effectively pursued in the language of the constitutional law. Judicialization produces constitutional constraints on law-makers. But, as important, it engenders new modes of legislative discourse and practice.

The legislative impact of constitutional courts will be assessed on

two dimensions: (1) the immediate, direct, or formal effects of particular decisions on specific policy outcomes; and (2) the pedagogical, indirect, or feedback effects of constitutional rule-making on subsequent legislative processes and outcomes. We begin with first dimension effects.

The Formal Impact of Constitutional Decisions on Legislative Outcomes

Once petitioned to control the constitutionality of a statute, the constitutional court must take a decision and, in taking such decisions, it engages in behaviour whose effects are partly legislative. In annulling a legislative provision, for example, constitutional judges exercise their veto authority, an authority that inheres in constitutional review. When they announce legally binding interpretations of statutory provisions, they rewrite or amend legislation, to the extent that the court's interpretation meaningfully differs from that of the government and parliament.

Statistical summaries of the activities of constitutional courts provide some indication of the presence of constitutional courts in law-making processes, and their impact on outcomes. In France, the 1971 decision incorporating a bill of rights and the 1974 amendment authorizing parliamentarians to petition the Council combined to expand radically the system's capacity to generate review. After 1974, all budget bills and nearly every important piece of legislation has been the subject of referral by the parliamentary opposition. The number of referrals grew dramatically again after 1981, and has since stabilized. In the 1974-80 period, the Giscard d'Estaing presidency, 46 laws were referred to the Council, 6.6 laws per year; in the 1981-7 period, the first Mitterrand presidency, 92 laws were referred, or 13.1 laws per year. The average number of laws referred has remained above 10 per year since 1987. Expressed in different terms, since 1981, about 1/3 of all legislation adopted has been referred, an extraordinary ratio given the fact that most legislation passed is politically uncontroversial. The figures also indicate why referrals are so popular with the opposition, and why the government and its parliamentary majority must take seriously the opposition's threats to go to the Council. Since 1981, more than half (54 per cent) of all referrals ended in some form of annulment by the Council. In France, where abstract review is the only type of review possible, the Council's intervention in the policymaking process can be characterized as systematic.

Compared with the French case, the importance of abstract review to German policy-making appears, at lead at first glance, to be more limited. Through 1994, the Federal Constitutional Court (GFCC) has received 119

referrals, or about 3 per year. Through 1991, these referrals led to definitive decisions on 43 laws, 23 (or 53 per cent) of which were declared to be at least partly unconstitutional. These numbers underestimate the actual impact of abstract review, and in two crucial ways. First, to be discussed below, the very threat of referral-whether or not such referrals are eventually made--can profoundly alter outcomes. Second, the German policy-making process is relatively veto-ridden. The demands of coalition government (in practice, the Free Democrats have effectively reoriented reform-minded governments of both the Left and Right to the pragmatic centre), cooperative federalism (the necessity of co-ordinating national and member state policies), and the existence of a strong second chamber (the Bundesrat) possessed of substantial veto authority, combine to encourage intragovernmental and interparty compromises, and to filter out controversial legislative initiatives. In France, the Council is the only policy-making institution which can impose its will on the government and its majority, accounting for its popularity with the opposition. In Germany, the GFCC has spent most of its first four decades processing concrete review referrals (more than 3,000) and individual complaints (more than 85,000). Taking its constitutional review activities as a whole, the GFCC (through 1991) has invalidated some 200 laws, and another 223 administrative and other legal rules. Expressed in percentage terms, the Court has reviewed 20 per cent of all federal laws adopted, annulling 4.6 per cent of them. Individual complaints have a success rate of slightly less than 3 per cent (Rivers 1994).

In Spain, instances of abstract review exceed those of concrete review. During its first decade in operation, 1981-90, the Spanish Constitutional Tribunal (SCT) received 143 abstract review referrals, leading to the review of 101 laws. Of these, 53 were declared in whole or in part unconstitutional, a success rate for petitioners of 52 per cent. Since 1986, the rhythm of such referrals has quickened, surpassing French levels. Of the 143 referrals received during the SCT's first decade, 103 (or 72 per cent) were made during the 1986-90 period, leading to 63 decisions and 37 rulings of unconstitutionality (70 per cent of all such invalidations). Spanish--like German--abstract review implicates the constitutional court not only in partisan disputes over national Legislation, but also in the ongoing construction of what must now be considered a federal state. Of the 143 abstract review referrals to the SCE, 33 (23 per cent) were made by parliamentary oppositions; 44 (31 per cent) by the federal government, usually against legislation passed by the autonomous regions; 60 (42 per cent) by the autonomous regions attacking national legislation; and 6 (4 per cent) by the Ombudsman. During the 1981-90 period, the SCT has also

received 83 concrete review referrals--resulting in 32 invalidations of statutes for unconstitutionality--and 1,300 individual [complaints].

Annulments

Decisions that invalidate entire law as unconstitutional, or 'total annulments,' are rare but politically explosive. In 1975, the Court (GFCC 1975) annulled an attempt on the part of the Social-Liberal (SPD-FDP) coalition to decriminalize abortion, declaring that the fetus possessed constitutional rights, including the 'right to life' mentioned in article 2 of the German constitution. A 1985 attempt to decriminalize abortion in Spain by the Socialist-Worker's government met with a similar fate. In France, the Constitutional Council annulled the 1982 nationalization law, on the grounds that the law did not provide for adequate compensation to stockholders of companies to be nationalized. In these cases, constitutional courts not only invalidated these reforms, but went on to tell legislatures exactly how legislators could 'correct' the censored texts to make them constitutional.

France: Nationalizing the Economy (1981-2)

In January 1982, the French Council rendered what is arguably its most important decision ever, a ruling on the very centrepiece of the new Socialist government's legislative programme: a bill to nationalize the five largest industrial conglomerates in France, every major bank (36 of them), and the two dominant financial investment companies. The bill was adopted after three months of tortuous constitutional debate in parliament. On three occasions, the Senate (then controlled by opposition parties of the Right) rejected the bill as unconstitutional, a violation of the 'sacred right of property.' The government and its large majority in the National Assembly refused to compromise, overrode the Senate's vetoes, and finally passed the bill without amending it in any important way.

The bill had nevertheless been scrutinized in minute constitutional detail well before parliamentary deliberations had begun. The government had commissioned two widely respected law professors (one former and one future member of the constitutional court) to examine the bill, and they produced a long brief in favour of the bill's constitutionality. The brief was made public, and widely debated in the press. Opponents of the bill had commissioned three other law professors, who arrived at the opposite conclusion. Last, the government's official legal adviser, the Council of State, had examined the bill, and had successfully pressed for an important

change in the way that stockholders to be expropriated would be compensated, substantially raising the costs of nationalizing.

The fate of the legislation was tied to the resolution of the central controversy of French constitutional law, the nature of the relationship between three seemingly contradictory texts: article 34 of the 1958 constitution, the 1789 Declaration of the Rights of Man, and the 1946 social and economic principles. Article 34 grants to parliament the authority to legislate in certain enumerated subject matters, a grant that includes the power to nationalize companies and to privatize them. In French legislative discourse, appeals to the sanctity of article 34 are appeals to majority rule and parliamentary sovereignty. The 1789 declaration, however, lists constraints on law-making, article 17 declaring that 'property being inviolable and sacred, no one can be deprived of it in the absence of public necessity, legally declared, obviously warranted, and without just and prior compensation.' Finally, line 9 of the 1946 principles, originally intended to supersede the 1789 text, proclaims an obligation to nationalize in certain circumstances: 'Every asset, every enterprise, whose exploitation is or has acquired the character of a national public service or of de facto monopoly, must become the property of the collective.' In the absence of constitutional review and of an enforceable preamble, these contradictions, like so many others in French constitutional history, would have remained purely academic. Article 34 would simply have triumphed without a fight, and nationalizations would have gone ahead as the Socialists saw fit.

The Council ruled that nationalizations were constitutional in principle, under article 34, but that the authority to nationalize could only be exercised in accordance with 'principles and rules possessed of constitutional status,' that is, those dwelling within the charter of rights that the Council had begun incorporating into the constitution in 1971. The judges nevertheless vetoed the legislation on the grounds, among others, that the compensation formula did not meet constitutional requirements derivable from article 17 (1789); they all but ignored line 9 (1946), except to limit its application. The Council then went on to state in precise detail how the Socialists should have handled payment in the first place, in effect, elaborating a new compensation formula. Deciding against escalating to constitutional crisis, the government drafted a second bill, writing into the new draft the Council's preferred compensation policy. This 'corrected' bill, which raised the costs of nationalization by a full 25 per cent, was approved by the Council, after the opposition had referred the matter a second time.

The decision deserves to be evaluated in terms of its impact on legislative process and outcomes, and in terms of its impact on the development of the constitutional law. The Council's decision generated a second legislative process that served, among other things, to pay stockholders more money. 'Instead of stating the law, the Council has stated the price,' Michele Rocard complained. In this case, to determine the law is to fix the price. Once the Council had held article 17 (1789) to be controlling, and line 9 (1946) to be irrelevant, it had to move on to evaluate constitutionality in terms of standards for compensation contained in the former. Second, as a matter of constitutional rule-making, the decision harmonized the discordant terms of the rights texts at play. The Council ruled that the 1946 principles could never contradict or limit the enjoyment of a right contained in the 1789 declaration, now and in the future, thereby constructing a hierarchical relationship among the respective norms that comprise France's charter of rights. Thus, the annulment constituted rule-making that operates at different levels of generality and prospectivity at once.

Spain: Liberalizing Abortion (1983-5)

During the 1982 parliamentary elections in Spain, the Socialist Worker's party promised that, if it were to take power, it would move to decriminalize abortion. On winning a majority of seats in the Cortes, the party proceeded to make good on its promise, despite resistance from several fronts. The new rightwing opposition, supported by the Catholic Church and by forces nostalgic for the 'moral order' allegedly maintained by the fascist regime of General Franco, pledged all-out opposition.

For most of the 20th century, the Spanish penal code has defined voluntary termination of pregnancy to be a crime, punishable by imprisonment. In the years preceding the reform, it was estimated that, each year, more than 300,000 Spanish women traveled to neighbouring countries to obtain abortions. Of course, many poorer women could not afford this luxury, and either sought dangerous and illegal abortions, or took their pregnancies to term. In 1983, the highest appellate jurisdiction of the ordinary judiciary, the Spanish Supreme Court, upheld a judicial decision sentencing a woman to a month and a day in prison for having obtained an abortion in Britain. The Supreme Court reasoned, in effect, that the fetus constituted a life form covered by article 15 of the constitution, which proclaims that 'all possess the right to life'; and it asserted jurisdiction on the basis of a provision of the 'Organic Law establishing Judicial Authority' that grants to the courts the authority to punish crimes committed by one

Spaniard (in this case, the pregnant woman) against another (the embryo) while abroad. Having lost her case, the woman filed a constitutional complaint (an *amparo*) with the constitutional court. The SCT annulled the Supreme Court's verdict. The Tribunal declared that because the codes do not specifically prohibit women from obtaining abortions outside of Spain, punishing them for doing so abridges rights, contained in article 25.1 of the constitution, which provides that 'no one can be ... punished for an act ... which, at the time it occurred, did not constitute a crime.' The constitutional judges, however, did not address the issue of whether, and how much, article 15 protected the fetus.

While this abortion dispute was being decided by judges, parliament was heatedly debating the government's proposed reform of articles 411-417 of the penal code. The Socialists agreed with the opposition that the constitution required the protection of embryonic life, but disagreed that article 15 therefore absolutely prohibited abortions. Instead, the government claimed to have balanced the right to life provision with a woman's freedom to control her reproductive life. This freedom was derived from constitutional rights to 'personal dignity' (article 10), the 'free development of personality' (article 10), and 'personal and familial honour and privacy' (article 18).

The government sought to decriminalize abortion in three contexts: (1) when 'it is necessary to avoid serious danger to the life and health of the pregnant woman'; (2) when 'the pregnancy is the result of a rape'; and (3) when 'it is probable that the fetus will be born with serious physical or mental defects.' The Socialists had proceeded cautiously, deciding not to include a fourth--in fact, the most common--context in which abortions are sought: when having a baby might cause 'social hardship, including financial, to a woman and her family.' Despite the modesty of the proposal, the opposition objected, and threatened to refer it to the Constitutional Tribunal. In December 1983, immediately after parliament had adopted the bill, the reform was sent to the Constitutional Tribunal.

Deeply divided internally, the SGT took eighteen months to produce its decision (ignoring rules requiring a decision within one month). Like the French Council's decision in the nationalization case, the SCT's judgment took the form of an annulment with draft legislation attached. Although the Tribunal agreed that a balance must be struck between the rights of the fetus and those of pregnant women, it annulled the bill on the grounds that article 15 required enhanced protection of the fetus, which it called 'a constitutionally protected legal good.' The judgment detailed how the

legislature would have to protect this good if it wished to save the reform. Court-mandated changes included the following: that the agreement of a second doctor is necessary before an abortion can be performed in the first and third situations; that all medical consultations must take place in public health centres (or private centres licensed by the state); and that, in the case of rape, the woman must have filed a complaint on the offence before the abortion could be performed. Six of the twelve judges dissented, in five different opinions. Dissenters accused the court of exceeding its powers, and of behaving more like a 'chamber of parliament' than a constitutional court, prescribing legislative outcomes (the positive legislator) rather than determining limits on what could be done (the negative legislator).

The decision was celebrated by the opposition as an important victory, and virulently criticized by the Socialists. The majority seriously considered adding a fourth, 'social abortion' exception in the corrected bill; in the end, however, the government chose to redraft the bill in strict conformity with the SCT's ruling, and to leave out the social hardship exception, probably to avoid more controversy and a second round of review.

Partial Annulments

The great majority of all invalidations are 'partial annulments,' that is, the constitutional court 'deletes' from the referred law those provisions judged to be unconstitutional, and allows the provisions that have escaped censure to enter into force. Partial annulments are a relatively more flexible means of controlling legislative outcomes. They allow the judges to, in American parlance, 'prune' bad branches, rather than chop down the whole tree. European legal scholars commonly use a medical analogy: judges 'amputate' those provisions judged to be 'contaminated' by unconstitutionality, thus saving the law. Partial annulments split the difference between the parties, allowing governments and their legislative majorities to claim at least some absolution. Some partial annulments have nevertheless had spectacular policy effects, obstructing central legislative priorities (see the French media pluralism cases below).

Most partial annulments are less dramatic but can, over time, add up to the virtual 'constitutionalization' of rules binding law-makers in any given sector. Probably the best cross-national example of this phenomenon is the constitutionalization of the penal law, the codes specifying crimes and the penalties for committing them, and the codes governing judicial procedures. In Italy, since the adoption of a new code of criminal procedure

in 1989, the ICC [Italian Constitutional Court] has rendered more than 200 annulments, forcing the legislature to revise the code on dozens of occasions. In all four countries, constitutional judges have generated detailed rules meant to govern how these codes must, or must not be, revised in the future. In consequence, law-makers must now be sure to maintain, and sometimes even extend, standards of due process, habeas corpus, non-retroactivity, proportionality, equality before the law, and so on. These standards have been constructed by constitutional judges, from constitutional rights texts, in interaction with legislators and judges.

Binding Interpretations and Constitutional Surveillance

Constitutional courts have also developed a wealth of techniques designed to control the constitutionality of a law without invalidating it. Most place legislators, ordinary judges, and other public officials under some mode of constitutional surveillance: public authorities must behave in a certain way, with respect to a particular set of legislative norms, or suffer constitutional censure. As Landfried has noted with respect to the German case, these techniques give constitutional judges 'pre-eminence' over policy outcomes, not by 'invalidating' rules but by 'prescribing' them.

One set of such techniques places legislators under surveillance. In Germany, the GFCC may rule that a law is 'not compatible' with the constitution (as opposed to strictly unconstitutional), a decision that permits the law to remain in force but only for a specified period of time, pending the law's revision by the legislature. Such decisions, of which there have been 151 through 1991, constitute constitutional commands, issued by the GFCC to the government and parliament, to (re-)legislate in a given area. The Italian court employs a similar technique when it declares that a legislative provision will be struck down as unconstitutional in a future case, if the legislature does not alter it beforehand.

A second set of techniques enables constitutional judges to control how laws are to be applied by other public authorities. All four constitutional courts regularly issue, if in a variety of different forms, decisions that contain what I will simply call 'binding interpretations.' Such rulings are formal, legally binding declarations stating that a legislative provision is to be considered constitutional if and only if that provision is interpreted exactly as the constitutional court does. Put differently, the judges rule that only one interpretation of a given legislative text, the one announced by the court, saves that text from being judged unconstitutional. Constitutional courts have produced a rising tide of such declarations. In

France, for example, the percentage of decisions containing binding interpretations has risen from 11 per cent (1959-74), to 14.5 per cent (1974-81), to 19.5 per cent (1981-5); in 1986, 56 per cent (9/16) of the decisions the Council rendered contained them. In Italy, the same percentage rose from 15 per cent during the 1980s, to 25 per cent since 1990. Perhaps revelatory of the ICC's new, more policy-relevant role, more than 2/3 of the decisions rendered by the ICC on legal texts promulgated during the 1987-90 period announced binding interpretations.

Such decisions authoritatively rewrite the legislative provisions in question, thus amending them, in that they authoritatively state exactly what the law means, and how it must be applied by judges, regardless of how legislators intended it to be applied. Binding interpretations place judicial authorities under surveillance: judicial failure to comply with such interpretations can be grounds for judicial appeals and concrete review petitions (Germany, Italy, Spain), as well as grounds for individual complaints (Germany, Spain).

LAW-MAKERS AS CONSTITUTIONAL JUDGES

The authority to veto legislation as unconstitutional is only one dimension-*immediate*, *direct*, and *negative*—of the policy impact of constitutional courts. We must also account for a second dimension—*prospective*, *indirect*, and *creative*. When government ministers and parliamentarians write, revise, and repeat statutes in order to: (1) comply with relevant case law; or (2) anticipate the direction of future constitutional decision-making, legislators ratify the pedagogical authority of constitutional rule-making over their own activities. In France, Germany, and Spain, the emergence and consolidation of this authority has been accompanied by the institutionalization of a new form of legislative politics. In these politics, legislators engage in structured deliberations of the constitutionality of legislative proposals. These debates can alter legislative outcomes, sometimes profoundly. In Italy, a recognizable form of such politics exists, although it has developed more slowly, due to the absence of abstract [review].

CONSTITUTIONAL POLITICS AND LEGITIMACY

Opinion Styles and Dissents

Two models of opinion-writing styles coexist in Europe. The first, represented by France and Italy, is the more traditional. The French and

Italian constitutional courts follow conventions established by the high administrative and civil courts. Decisions are relative short and declaratory of the law; they invoke the precedential authority of prior case law through the use of linguistic formulas that are pointedly repeated. The second model, developed first in Germany but quickly adopted in Spain, more resembles American practice. Constitutional decisions are longer, more wideranging, even literary. Each important point of law raised by each litigant may be argued through to its conclusion, in the light of existing case law and alternative (but ultimately rejected) lines of argument. The German and Spanish courts commonly cite the work of legal scholars and even other courts, like the US Supreme Court. Although a decision written in the style given by the first model could never be confused for one written in the style of the second, French and Italian constitutional rulings have, over time, become much longer, more openly argumentative, and less terse and syllogistic. I interpret this change as a predictable response to the increased politicization of constitutional justice. As constitutional judges know, the politicization of their offices by litigants can only be effectively countered with more and better normative arguments.

In Germany and Spain, votes are published and dissenting opinions allowed; in France and Italy, dissents are prohibited. Those who favour the practice argue that dissents enhance the court's legitimacy by showing 'that the arguments of the losing side were taken seriously by the court.' Opponents invoke the legitimizing power of public unanimity. A small handful of studies on voting patterns in the German and Spanish courts exists, which show that groups of judges do tend to vote together, and that judges appointed by the same parties tend to belong to the same groups. These tendencies, which are quite weak, are often overwhelmed by disagreements about the law and constitutional doctrine.

In Italy, but not France, there exists a vigorous debate over whether to allow dissenting opinions. In any case, the style of opinion-writing in Germany and Spain more easily accommodates dissents. If France or Italy did move to permit the publication of minority opinions, it is likely that a more literary, discursive model of opinion-writing (such as that found in the US, Germany, and Spain) would gradually emerge.

The Precedential Authority of Case Law

It is commonplace in comparative law to note, first, the formal absence of the doctrine of stare decisis in Continental legal systems and then to assert that this absence constitutes a crucial difference between legal

systems. However, the best systematic research has shown, in Summers and Taruffo's summation, 'that there are no great differences in the use [of precedent] between the so-called common law and civil law systems.' Courts, and especially higher courts, constantly invoke the authority of prior decisions. In Spain, scholars now openly debate whether or not the principle of stare decisis has in fact already emerged. In Germany, lawyers can be fined for failing to invoke relevant precedents in their pleadings. The notion that judicial decisions could not create binding precedent inhered in traditional separation of powers doctrines, since to admit otherwise would have required recognizing that judges participated in the legislative function. Today, with legislative sovereignty in full retreat, judges more openly exploit the legitimizing resources that asserting precedent provides. In contemporary Europe, virtually all of the constitutional law that matters is case law.

Decisions rendered by constitutional courts are recognized as formal sources of binding law in all four countries. In France, Germany, and Spain, how courts arrive at their decisions—the judges' reasoning—is also binding; in Italy, the doctrine of the 'living law' gives the Supreme Court (Cassazione) some latitude to interpret constitutional case law in light of its own, judicially constructed, doctrine and cannons of statutory interpretation. Finally, in Germany and Spain, failure on the part of any public official to abide by the terms of constitutional case law constitutes grounds for individual complaints. In France, some judicial authorities continue to resist the authority of the Council's reasoning.

Doctrinal Activity

Legal scholars work to construct the law as a coherent body of rules, by elucidating the content and meaning of specific norms, and by defining the relationship of any given norm to the greater normative system. Constitutional case law grounds the scholar's work, conditioning while not entirely determining it. One function performed by the legal scholar is to explain the constitutional court's jurisprudence, and to integrate the court's rule-making into the law; still the constitutional law, as curated by the legal scholar, remains analytically distinct from case law. As a form of normative discourse, doctrinal activity is—relative to litigating—maximally opaque: it self-consciously ignores the world external to the law itself. Put differently, doctrinal activity reconstructs the law as a radically autonomous discursive structure, cut off from the greater socio-political environment to which the law, and the judges of the law, would otherwise belong.

In Europe, the social power of public law scholars has depended critically on their capacity to insulate the law from the social world, and especially from 'politics': the world of political parties, ideologies, interests, and 'non-legal' values. This way of doing things—the maintenance of the law/politics distinction as an article of disciplinary faith—has reproduced itself over many generations. That Continental legal scholarship is highly formalist, relatively immune to critical perspectives on the law, largely disinterested in questions of legal interpretation, but none the less committed to enhancing the prestige and legitimacy of doctrinal and judicial power are tendencies that have been widely commented upon. For our purposes, what is important to emphasize is that legal scholars, in pursuing their own corporate interests, operate to legitimize the court and its case law.

They do so in several ways. Constitutional scholarship, first, refrains from being too critical of any decision. Confronted with an aspect of a decision that appears inconsistent with prior case law, or with established understandings of the constitution, for example, doctrinal authorities will typically downplay the mistake, narrowing its relevance to the specific case at hand, and reasserting the full scope of the prior version of the law in all other relevant cases. Scholars have thus invited the constitutional court to correct itself in the future, and shown the court how to do so without having to admit that an 'error' had ever been made.

Second, scholars extract from the case law those purely normative elements that can be incorporated into the rule system they are building, all but ignoring other elements. They do so almost instinctively, so normal has the reflex become. Thus, most standard texts on constitutional law in Germany, Italy, and Spain, make little or no mention of who litigates and why, what kinds of legal arguments were made and rejected, or even how the constitutional court reasoned through rules. (In fact, most students of constitutional law in German, Italian, or Spanish universities do not read any case law for their courses, but rather a treatise--a 'synthesis' of the law written by a constitutional scholar.) In France, scholars have even produced a Code Constitutionnel that combines exegesis of the constitution, provision by provision, with discussion of how relevant decisions have clarified the meaning of the constitutional text. In constructing a 'pure system of constitutional law,' scholars enhance the court's authority, to the extent that constitutional rule-making is portrayed as the by-product of purely normative reasoning.

Bernard Schlink, one of a very small number of constitutionalists

who have written reflectively on their discipline, is quite critical of this result, which he characterizes as a kind of 'constitutional court positivism,' wherein constitutional scholars seek to 'canonize the constitutional court's case law,' by 'harmoniz[ing] these decisions into a coherent doctrinal corpus.' If the legal scholar appears to treat the constitutional court as if it were 'the mouth' of the constitution, the scholar appears to be 'the mouth' of the constitutional court. What is clear is that the relationship between constitutional adjudication and doctrinal activity is pervasively symbiotic. Scholars need an authoritative, 'judicial' interpreter of the constitutional law, to structure, but also to give salience and urgency, to their own activities; and constitutional courts rely heavily on legal scholars to disseminate and explain their decisions to politicians, judges, the interested public, and, often enough, even to the constitutional judges themselves.

Although my argument is that the scholarly impulse towards systematizing the constitutional law helps to legitimize that law, I do not mean to imply that scholars are blind to the politics of constitutional review. On the contrary, legal scholars actively participate in these politics other than through their doctrinal production. For obvious reasons, the more authoritative a legal scholar is within the academy, the more likely that scholar will be solicited by potential litigants, such as governments and political parties, for advice and for drafting referrals. Further, in all four of the countries under consideration here, eminent public law scholars have not only been named to, but have dominated, constitutional courts. I argue, instead, that the drive towards systematizing the law constitutes a deeply ingrained response to the fact that constitutional law only develops in reaction to politicization. The constitutional law is, inherently and by definition, political law, but legal scholars rightly insist on that law's normative qualities. In doing so, they help to constitute and perpetuate their own authority.