

**THE U.S. MILITARY GOVERNMENT AND THE
ESTABLISHMENT OF DEMOCRATIC REFORM,
FEDERALISM, AND CONSTITUTIONALISM DURING
THE OCCUPATION OF BAVARIA, 1945-47**

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I. Introduction

In the spring of 1945, the United States Army established a military government in Bavaria, a German state (*Land*) caught in a maelstrom of defeat and near-anarchy. Its public works, courts, and school systems had broken down completely. Cities and towns lay in waste. Allied air attacks destroyed 80 percent of Munich, Bavaria's once proud capital, and its population had fallen from 830,000 to 475,000.² The Americans who captured the city described it as a place of desolation and despair: "People came out of their roofless, windowless apartments or cold cellars and, as if by reflex,

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I would like to express my gratitude to my thesis committee, Lieutenant Colonel (LTC) Marvin L. Meek, Major Andrew S. Harvey, and Dr. Samuel J. Lewis. I further appreciate the insights into German society and culture I gained while taking Dr. Lewis's elective on German military history while a student at Command and General Staff College. In addition, I am grateful that during my nearly two years spent in Germany as the Deputy Staff Judge Advocate, 1st Armored Division, my superiors, in particular LTC Mark S. Martins, Colonel (COL) William H. McCoy, Jr., and COL Jackson L. Flake, III, allowed me opportunities to study and travel in Germany, further increasing my understanding of its history, culture, and language. I am also indebted to the librarians and archivists at the Hoover Institute at Stanford University, the archival assistants at the National Archives in College Park, Maryland, and the librarians, archivists, and assistants at the Combined Arms Research Library (CARL) at Fort Leavenworth, Kansas, as well as my parents, COL (Ret.) and Mrs. William A. Hudson, for their encouragement and support. I dedicate this article to the memory of Walter J. Muller (1895-1967), Major General, United States Army, and Director, Office of Military Government for Bavaria (OMGB), October 1945-November, 1947.

2. U.S. MILITARY POLICE SCHOOL, CASE STUDIES ON FIELD OPERATIONS OF MILITARY GOVERNMENT UNITS 77 (1950) [hereinafter *CASE STUDIES*]. An American postwar observer described Germany as "a country without cities. The countryside is practically untouched and in many spots as picturesque as ever. But in a physical and to a large degree psychological sense, the cities no longer exist." JULIAN BACH, *AMERICA'S GERMANY: AN ACCOUNT OF THE OCCUPATION* 17 (1946).

began to move along the streets. From force of habit, some lined in front of food stores that did not open. . . . They were all dazed, scarcely moving to avoid the American tanks and artillery that rumbled past.”³

In many ways, Bavaria had been the region of Germany most resilient to National Socialism.⁴ Yet it was also the wellspring of the Nazi movement.⁵ Hitler wrote *Mein Kampf* in Landsberg Prison after leading the unsuccessful 1923 Munich *Putsch*. He held huge Nazi Party rallies in the northern Bavarian city of Nuremberg. His retreat house was in the mountain resort of Berchtesgaden, near the Austrian border. Despite Bavaria’s separatism and Catholicism, Nazi ideology had nonetheless made inroads into Bavarian life, from schoolbooks and youth groups to professional organizations.⁶ In the midst of all this, the U.S. Army, as the military government from 1945 to 1947, was to rebuild Bavaria physically and, perhaps even more dauntingly, reform it politically.⁷

A. Setting the Stage

When the Allies defeated and occupied Germany in the spring of 1945, the major powers agreed that there was to be no repeat of 1918.⁸ Germany was never again to emerge as a belligerent, dictatorial state. Germany was not simply to be defeated; it was to become a wholly new nation. But what that new nation would be was not at first certain. Under the influence of Secretary of Treasury Henry Morgenthau, there were proposals put forth within President Franklin D. Roosevelt’s administration to “pastoralize” Germany.⁹ It was also uncertain what kind of government Germany

3. BACH, *supra* note 2, at 17.

4. Until 1806, Bavaria consisted of Upper and Lower Bavaria and the Upper Palatinate, areas that were completely Catholic. In 1806, Bavaria formed an alliance with Napoleon and as a result acquired Franconia to the north and Swabia (Schwaben) to the east, predominately Catholic areas. After the Bismarck Constitution of 1871, Bavaria became part of the German nation, but retained special rights and preserved its monarchy. Bismarck’s *Kulturkampf* (the conflict between the German government under Bismarck and the Roman Catholic Church) occurred in the 1870s when he attempted to attack Catholic institutions throughout Germany. His attempts backfired and Catholicism emerged more powerful than before. GEOFFREY PRIDHAM, *HITLER’S RISE TO POWER: THE NAZI MOVEMENT IN BAVARIA, 1923-1933*, 1-11 (1973); D. R. DORONODO, *BAVARIA AND GERMAN FEDERALISM* 1-4 (1992). It should be noted that Bavaria did not feel the weight of the *Kulturkampf* as strongly as did other German regions, notably Prussia. ALLAN MITCHELL, *REVOLUTION IN BAVARIA, 1918-1919: THE EISNER REGIME AND THE SOVIET REPUBLIC* 12 (1965).

would have. Indeed, at the Allied war conferences at Quebec and Yalta, democratization of Germany was not a high priority.¹⁰

As the defeat of Germany became evident, however, democratization moved to the center of America's occupation policy. Set forth in *United States Joint Chiefs of Staff Directive (JCS) 1067*, democratization later became official policy that the major Allied powers at the Potsdam Conference in the summer of 1945 ratified and clarified.¹¹ Taken together, JCS 1067 and the Potsdam Declarations indicated that political life would

5. Following Germany's surrender in November 1918, a short-lived radical Socialist and Marxist regime succeeded the toppled Bavarian monarchy (House of Wittelsbach). It was initially led by Kurt Eisner (assassinated in February 1919 by an archconservative) and then followed, in April 1919, by a Soviet style regime. Bavarian and other German paramilitary units suppressed it in May 1919. The impact of the Soviet style government had an immense impact on Bavarian political consciousness:

It would be hard to exaggerate the impact on political consciousness in Bavaria of the events between November 1918 and May 1919, and quite especially of the *Räterepublik* [the Soviet style government briefly established in April 1919]. At its very mildest, it was experienced in Munich itself as a time of curtailed freedom, severe food shortages, press censorship, general strike, sequestration of foodstuffs, coal, and items of clothing, and general disorder and chaos. But of more lasting significance, it went down in popular memory as a "rule of horror" (*Schrenksherrschaft*) imposed by foreign elements in the service of Soviet communism.

IAN KERSHAW, HITLER, 1889-1938: HUBRIS 114 (1998). The Eisner regime and the short-lived Bavarian Soviet also fanned the fires of anti-Semitism and xenophobia, Eisner and prominent figures in the Soviet regime being "non-Bavarian" Jews. ROBERT S. GARNETT, LION, EAGLE, AND SWASTIKA: BAVARIAN MONARCHISM IN WEIMAR GERMANY, 1918-1933, 41 (1991). See also MITCHELL, *supra* note 4, *passim*. The subsequent 1919 constitution of the Weimar Republic took most of the remaining vestiges of Bavarian autonomy away, tying Bavaria to the more leftwing central government in Berlin. Throughout the 1920's, a strong right-wing backlash took hold in Bavaria, with many Bavarians believing Bavaria should be a "cell of order" against the liberal and Marxist north. PRIDHAM, *supra* note 4, at 7; KERSHAW, *supra*, at 169, 171; GARNETT, *supra*, at 51-64. Despite the rightwing reaction, throughout the 1920s, most Bavarians rejected Nazism. Instead, the rightwing, populist Catholic Bavarian People's Party (BVP), formed in 1918, and emerged as the dominant political force. PRIDHAM, *supra* note 4, at 322. Voting patterns indicated that support for Nazism was weak or lukewarm in Bavaria throughout the decade, more so in the more Catholic south. There was a gradual, steady nine year increase of the Nazi vote from 1924 to 1933. *Id.* Although Bavaria averaged a far higher percentage of the vote at the beginning of Nazism in 1924 (16% to 6.5% for Germany overall), in the March, 1933 elections, Bavaria's percentage of the electorate voting for Nazism was actually slightly *less* than the overall German electorate (43.1% to 43.9% for Germany overall). *Id.* The Nazis finally broke the BVP hold in old Bavaria when it consolidated its national power in 1933. *Id.* at 4.

resume in Germany, an autonomous government would at some point be restored, and the form of government would be democratic.¹²

Restoring a democratic government to Germany was a formidable challenge that many thought would take a generation.¹³ For twelve years, the Nazi government strove to achieve a society based on the principle of *Gleichschaltung*, forced synchronization, in which all aspects of life—familial, communal, professional, religious, and governmental—fell under a centralized, pyramidal governmental system of control and coercion. The Nazi regime sought submission to the *Führerprinzip*—absolute loyalty to Hitler: youths were taught to honor Hitler before their parents, the Reich co-opted religious clergy, and professional organizations turned into adjuncts of the Nazi Party.¹⁴

The victorious Allies thus reckoned that military defeat was not sufficient. Political changes had to occur to help ensure Germany would never again fall under the totalitarian spell. One particularly American

6. While the BVP emerged as the dominant political force in Bavaria in the 1920s, the Nazi party nevertheless made significant inroads in Bavaria during that decade. Though BVP Bavarian Minister-President Eugen von Knilling stated in May 1923 that, “The enemy stands left, but the danger [stands] on the right,” Bavaria had become a postwar haven for rightwing extremists throughout Germany. KERSHAW, *supra* note 5, at 197. Nazism, with its fiercely anti-communist, anti-liberal, and anti-Semitic rhetoric, appealed to many Bavarians, despite the fact that some Nazi propaganda, such as that by Julius Streicher, was as anti-Catholic as it was anti-Semitic. PRIDHAM, *supra* note 4, at 24. Those Bavarians whose autonomous Bavarian, Catholic identities were not as pronounced generally were less likely to join the BVP and more likely to vote for the Nazi party. *Id.* at 321. After Hitler took power in 1933, however, many in the BVP—and some in the Bavarian Catholic hierarchy—found common cause with some Nazism, in particular approving its destruction of the despised Weimar Republic, which many Bavarians considered weak, ineffectual, and Marxist-leaning. KERSHAW, *supra* note 5, at 488.

7. The American zone included the German states (*Länder*) of Hesse, Wuerttemberg-Baden, Bavaria, the north German cities of Bremen and Bremerhaven, and one sector of Berlin. The British occupied Hamburg, Lower Saxony, North Rhine-Westphalia, and Schwlesig-Holstein; the French occupied Baden, Rhineland-Palatinate, and Wuerttemberg-Hohenzollern; and the Soviet Union occupied Brandenburg, Mecklenberg, Saxony, Saxony-Anhalt, and Thuringia. The military government of Germany consisted of American, French, British, and Russian headquarters and organizations. Military government representatives of each nation formed the Allied Control Council (ACC), which promulgated joint policy and plans, which were subsequently executed in each nation’s respective zone. See EARL F. ZIEMKE, *THE U.S. ARMY IN THE OCCUPATION OF GERMANY passim* (1975).

8. A review of any of the major conferences reveal the Allies intentions in this regard. See UNITED STATES DEPARTMENT OF STATE, *FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCES AT YALTA AND MALTA passim* (1955) [hereinafter *CONFERENCES AT YALTA AND MALTA*].

solution to the totalitarian problem was to restore German government along decentralized, federalist lines. A federalist-type government, in which the *Länder* (the German provinces, separately called *Land*) and local governments possessed substantial powers themselves, would create structural impediments to totalitarian centralism.¹⁵ Federalism would allow local cultures within each *Land* to revive and act as buffers and mediators against an encroaching, centralized state.¹⁶ A federalist-style government of divided local and state governments also was something within the realm of German experience. Prior to 1871, Germany had been a loosely knit confederation of states, and even during the Weimar Republic years, *Länder* had retained some autonomous powers.¹⁷

The Allied occupiers would not be bound by legal restraints in their occupation mission and thus swept aside any possible restraints in international law, embodied in the Hague Conventions. Article 43 of the 1907

9. The fullest exposition of the Morgenthau Plan is found in a Treasury Department briefing book dated 9 September 1944, dramatically entitled "Program to Prevent Germany from Starting a World War III." The Morgenthau Plan for restructuring German government stressed a permanent dissolution of the modern German state, restructuring it as a loose confederation along pre-1871 lines:

The military administration in Germany in the initial period should be carried out with a view toward the eventual partitioning of Germany. To facilitate partitioning and to assure its permanence, the military authorities should be guided by the following principles: (a) Dismiss all policy-making officials of the Reich government and deal primarily with local governments. (b) Encourage the reestablishment of state governments in each of the states (*Länder*) corresponding to 18 states into which Germany is presently divided and in addition make the Prussian provinces separate states. (c) Upon the partition of Germany, the various state governments should be encouraged to organize a new federal government for each of the newly partitioned areas. Such new governments should be in the form of a confederation of states, with emphasis on states' rights and a large degree of local autonomy.

"Program to Prevent Germany from Starting a World War III"/Briefing Book Prepared in the Treasury Department, September 9, 1944 in UNITED STATES DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCE AT QUEBEC, 1944, 129-30 (1972) [hereinafter Conference at Quebec].

10. HAROLD ZINK, *AMERICAN MILITARY GOVERNMENT IN GERMANY* 167 (1947). A review of the published papers from Yalta and Quebec reveal that the term "democratization" is never specifically referred to in any of the documents dealing with the future occupation of Germany. CONFERENCE AT QUEBEC, *supra* note 9 *passim*; UNITED STATES DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCES AT MALTA AND YALTA, *supra* note 8, *passim*.

Hague Conventions required that occupants “restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”¹⁸ But the Allies had no

11. After several drafts, the final version of JCS 1067 that became occupation policy was approved on 12 May 1945. This version is entitled “Directive to the Commander in Chief of the United States Forces of Occupation Regarding the Military Government of Germany, May 10, 1945.” *Directive to the Commander in Chief of the United States Forces of Occupation Regarding the Military Government of Germany, May 10, 1945*, in UNITED STATES DEPARTMENT OF STATE, DOCUMENTS ON GERMANY, 1944-1985, 15-32 (1985). The final version of JCS 1067 listed among its “basic objectives”:

B. Germany will not be occupied for the purpose of liberation but as a defeated enemy nation. . . . In the conduct of your occupation and administration you should be just but firm and aloof. You will strongly discourage fraternization with the German officials and population. C. The principal Allied objective is to prevent Germany from ever again becoming a threat to the peace of the world. Essential steps in the accomplishment of this objective are the elimination of Nazism and militarism in all their forms, the immediate apprehension of war criminals for punishment, the industrial disarmament and demilitarization of Germany, with continuing control over Germany’s capacity to make war, and the preparation for an eventual reconstruction of German political life on a democratic basis.

Id. at 16.

12. ZINK, *supra* note 10, at 167; JOHN GIMBEL, THE AMERICAN OCCUPATION OF GERMANY 15 (1968). According to Herbert Feis, the political programs that President Truman proposed at Potsdam were little different from those in JCS 1067 that Eisenhower and Lucius Clay used to guide them during the occupation. HERBERT FEIS, BETWEEN WAR AND PEACE: THE POTSDAM CONFERENCE 241 (1960). The ten features of Truman’s proposal were: (1) Germans had to unconditionally submit to orders of the Allied Control Council (ACC) and the zone commanders; (2) Germany would be completely disarmed and military forces forbidden forever; (3) National Socialism would be extinguished as a government, party, and ideal, meaning that all Nazis would be removed from private and public office; (4) all Nazi laws and decrees that were discriminatory on grounds of race, creed, political opinion were nullified; (5) individuals accused of war crimes would go before a jointly formed tribunal; (6) the formation of a central German government was indefinitely postponed, but the ACC might use governmental administrative machinery for national economic policies; (7) the German political structure would be decentralized and local responsibility developed; (8) all political parties except those of a Nazi character would be allowed to function freely; (9) education in Germany would be controlled and directed in ways to further democratic ideas and forms of government and society, and eventual peaceful cooperation with other nations; and (10) and steps would be taken to assure freedom of speech, press, religion, and trade-union organizations subordinate to the Allied Control Council for security reasons. *Id.* at 242.

13. No one more so than Henry Morgenthau. See MICHAEL BESCHLOSS, THE CONQUERORS 70-81 (2002).

intention of abiding by the totalitarian Nazi laws, or restoring the laws of the Weimar Republic--the state that crumbled weakly under Hitler's grip. Instead, based on the concept of *debellatio* or subjugation, the Allies held that Germany did not fall under the Conventions because, totally subjugated, with its institutions

14. RICHARD MERRITT, *DEMOCRACY IMPOSED: U.S. OCCUPATION POLICY AND THE GERMAN PUBLIC, 1945-1949* 393 (1995). IAN KERSHAW, *THE NAZI DICTATORSHIP: PROBLEMS IN PERSPECTIVES OF INTERPRETATION* 161-217 (4th ed. 2000). Note, however, that Kershaw contends that the Nazi social revolution never in fact occurred. *Id.* at 178-79.

15. As stated in a special report to the U.S. Military Governor, U.S. Zone 2:

“Centralization” and “decentralization” are reverse aspects of the single process of distributing the powers and functions of government. In democratic political theory, the source of all power and therefore of all functions is the people. Democratically established centralized and decentralized structures differ not in the basic source of their powers, therefore, but in the levels to which that power is assigned. On the other hand, U.S. policy holds that, however democratically conceived, the powers exercised by a centralized government are deprived of their democratic vitality directly as they are removed from their popular source and thus enable minority groups to seize and exploit the instrumentalities of government for warlike purposes. Conversely, powers exercised close to those from whom they have been obtained are less apt to confuse means for end, more apt to preserve a sense of responsibility to the people.

OFFICE OF MILITARY GOVERNMENT FOR GERMANY (UNITED STATES) (OMGUS), *CENTRAL GERMAN AGENCIES: SPECIAL REPORT TO THE MILITARY GOVERNOR, U.S. ZONE 2* (1946) (on file at the Combined Arms Research Library (CARL), Fort Leavenworth, KS) [hereinafter *CENTRAL GERMAN AGENCIES*].

16. According to the Interdivisional Group on German Governmental Structures, composed of political science academics, and established under OMGUS to examine how the German government had traditionally been organized and to propose new governmental models, the German government would be considered decentralized when the following conditions were met: (1) All power would be recognized as originating from the people; (2) such power would be granted by people primarily to the *Länder* governments and only in specifically enumerated and approved instances to a federal government; (3) a substantial number of functions would be delegated by the *Länder* to the *Kreise* (roughly comparable to American counties) and *Gemeinden* (small towns and villages); and (4) all residual powers would remain in the *Länder* or would be reserved to the people. *Id.*

17. As described by D. R. Doronodo, “The individual states were rather well represented in the *Bundesrat*, the designated organ of imperial collective sovereignty. Indeed, its members were more ambassadors of the states than legislators.” DORONODO, *supra* note 4, at 1.

18. Hague Convention No. IV, Respecting the Laws and Customs of War on Land, art. 43, October 18, 1907, 36 Stat. 2277.

destroyed, Germany no longer legally existed as a nation-state at all.¹⁹

Despite such legal justification, however, unrestrained attempts to create a new German society and culture did not occur within the American zone. The Morgenthau Plan reforms were not significantly implemented.²⁰ Rhetorical claims to the contrary, American occupiers primarily sought to change German government, not to transform German culture. While there were programs in reeducation along democratic lines and efforts at social reorientation, they were remarkably modest in the American zone.²¹ Furthermore, while the United States would set up a military government in its zone, and while the American military would set about establishing democratic government, it did so, for the most part, without dictating which political parties should prevail. The military gov-

19. Eyal Benevisti points out that a fundamental distinction between the German and Japanese surrenders was that Japanese sovereignty still existed, whereas the German government had totally disintegrated. EYAL BENEVISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 92 (1993). As defined by Morris Greenspan, subjugation (*debellatio*) “embraces not merely the occupation of the territory of the state, but its actual annexation, so that the legal title passes to the conqueror.” MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 601 (1959). *Debellatio* indicates a final and irretrievable defeat, with no standing army in the field attempting to restore the country to its former “owner.” Furthermore, *debellatio* derives “purely from the act of conquest itself” and does not require any consent from the defeated belligerent. *Id.* at 601-02. Greenspan points out, however, that: “Calling an occupation a subjugation [*debellatio*] will not avail the occupant as a means of evading the obligations of an occupant imposed by international law.” *Id.* at 215. Benevisti contends that the concept of *debellatio* is outdated, in light of modern concepts of human rights, and a corresponding diminished concept of governmental entities as the legal bodies recognized under international law: “This doctrine has no place in contemporary international law, which has come to recognize the principle that sovereignty lies in a people, not in a political elite.” BENEVISTI, *supra*, at 95. Others, however, still hold that international law does give military authorities the power to amend or repeal a wide variety of laws “prejudicial to the welfare and safety of their forces.” Brigadier General Uri Shoham, *The Principle of Legality and the Israeli Government in the Territories*, 153 *MIL. L. REV.* 245, 263 (1996).

20. Secretary of War Henry Stimson vigorously resisted the Morgenthau Plan, and President Roosevelt vacillated on promulgating it as policy. Lucius Clay, deputy director of the office of War Mobilization and Reconversion (1944), deputy chief of the U.S. military government in Germany (1945—47), commander of U.S. troops in Europe (1947), and director of operations in the Berlin blockade as U.S. military governor (1947—49), purportedly never actually read the proposed plan. JEAN EDWARD SMITH, LUCIUS D. CLAY, *AN AMERICAN LIFE* 220 (1990).

21. MERRITT, *supra* note 14, at 387. While there were attempts at reforming certain aspects of German culture, such as the educational system in Bavaria, they were relatively modest. These modest attempts ultimately failed due to Bavarian resistance and also because of lack of American desire to push for complete reform. See JAMES F. TENT, *MIS-SION ON THE RHINE* 110-163 (1982).

ernment did not affiliate with particular political parties or movements within Germany, and did not choose sides.²² In the American zone, the U.S. military government set conditions for democracy and set limits on how far the Germans could go in restoring it, but to a great degree, allowed Germans to achieve democratic government themselves.²³

22. This is the view of one principal postwar German occupation historian, Earl F. Ziemke. See ZIEMKE, *supra* note 7, at 360. The scholar Richard Merritt concludes that the United States had a mission to “limit the spread of socialism in western Germany” and therefore did “play favorites.” MERRITT, *supra* note 14, at 264. It should be noted, however, that the U.S. government also recognized that part of mission success was creating an appearance of impartiality as much as possible. For example, Brigadier General Walter J. Muller, the Office of Military Government for Bavaria (OMGB) Director, required that Wilhelm Hoegner, Bavaria’s second U.S. appointed Minister-President, place Communist party members in his cabinet. While Hoegner placed only one to a significant post, it was one of the most public and important, the so-called “Minister without Portfolio” who was charged with overseeing denazification. See EDWARD N. PETERSON, *THE AMERICAN OCCUPATION OF GERMANY: RETREAT TO VICTORY* 227 (1977). Additionally, a communication from Clay to the War Department is evidence that he refused to provide “all out assistance” to the majority “mainstream” parties:

There is a group of officials of military government here who believe strongly that military government should grant much greater support to the [Christian Democratic Union] CDU and [Social Democratic Party] SPD parties in Berlin against the Socialist Unity Party. . . . I do not agree with this group that we should provide all out assistance to the CDU and SPD parties. If we did this, military government would have clearly violated its announced principles of complete political neutrality and such action would be misunderstood in Germany and would prove a step backward in teaching democracy. Moreover, it would weaken the strength of our protests against corresponding Soviet action and we are not in a position to compete on equal terms in Berlin.

LUCIUS D. CLAY, *Lucius D. Clay for War Department, CC 2135 (Secret) U.S. Aid for CDU and SPD* (August 20, 1946), in 1 *THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949*, at 256-57 (Jean Edward Smith, ed. 1974).

23. This is not to say that the American military government abdicated ultimate authority. In Nuremberg, for example, Colonel Charles Andrews, the military government detachment commander, authorized the Nuremberg governmental authorities to promulgate legislation with the following restrictions: all such legislation had to be examined by military government officials and were subject to U.S. approval; the American military government had the authority to nullify any laws; and no German legislation could contain anything that would suggest it was issued at the behest of, or approved by, the military government. Boyd L. Dastrup, *U.S. Military Occupation of Nuremberg, Germany, 1945-1949*, 143-144 (1980) (Ph.D. dissertation, Kansas State University) (on file with Kansas State University), *later published as* *CRUSADE IN NUREMBERG: MILITARY OCCUPATION, 1945-1949* (1985).

The ultimate goal was the unification of all the German *Länder* in the zones into a new German nation.²⁴ But what the Americans sought to establish in their own zone, and hoped would become the model for all Germany, was a decentralized, federalist constitutional democracy. This plan partially succeeded. The Soviet zone did not unify with the western zones. Instead it formed its own centralized Communist government. The *Länder* in the three western zones unified, however, in 1949, and the governmental model they adopted, in many significant ways, was federalist.²⁵

Bavaria had a vital role to play in this process. It was the largest and most populated *Land* in the U.S. zone.²⁶ It also had a strong tradition of independence, and had, prior to the Nazi ascendance in 1933, political parties that sought to maximize Bavarian governmental autonomy.²⁷ Of all the German provinces, it appeared to be a natural place for federalism and decentralization to take root in postwar Germany.²⁸ Bavaria, however, also had a tradition of separatism, and as perhaps the most conservative region of Germany, still had monarchist, antidemocratic elements. The American military government thus had a unique challenge. It sought to encourage federalism and constitutionalism in Bavaria without interfering directly in Bavarian politics, and yet at the same time it sought to steer Bavaria away from reactionary separatism.²⁹

From 1945 to 1947, perhaps the primary architect of democratic reform in the U.S. zone was Lieutenant General Lucius D. Clay, who served as Deputy Military Governor of Germany but was, for all intents

24. There were, in fact, significant differences in governmental administration in each zone. In the British zone, for example, the tendency was not to assimilate into the normal local government agencies many special services. National field offices instead performed such services. Furthermore, the British gave almost no economic powers to the *Länder* in their zone, and also kept control of transportation, health services, and education functions. In the French zone, levels below the *Länder* level of government had virtually no governmental administrative bodies. In the Soviet zone, the military government kept complete control over all aspects of government. CENTRAL GERMAN AGENCIES, *supra* note 15, at 5.

25. A U.S. military government document described federalism as follows: "In order for a federal organization to work, it is essential that the state boundaries provide firm economic and sociological areas which can sustain the states as strong units in a federal system." OFFICE OF MILITARY GOVERNMENT FOR GERMANY (UNITED STATES), THE CIVIL ADMINISTRATION OF U.S. ZONE, GERMANY (1946) (on file at the CARL, Fort Leavenworth, KS). The main tenets of German federalism are found in Articles 30 and 31 of the German "Basic Law" adopted in 1949. Article 30 states that "The exercise of *Land* governmental powers and the discharge of governmental functions shall be incumbent on the *Länder* insofar as this Basic Law does not otherwise prescribe or permit." Article 31 begins by stating that "Federal law shall override Basic law." GRUDGESETZ (GG) arts. 30, 31.

and purposes, the American viceroy there. Clay, however, received little instruction from Washington policy makers on how to accomplish this. Indeed, he was to admit years after his service in Germany that he received no guidance from any executive agency on how to achieve German gov-

26. Unlike many of the other *Länder* following the surrender, Bavaria kept most of its area and population. The *Land* was administratively subdivided into five separate districts known as *Regierungsbezirke*: (1) Mainfranken (also known as Unterfranken) in the northwest; (2) Ober and Mittelfranken running from northeast to southwest (along with Mainfranken comprising the more Protestant Franconia); (3) Oberpfalz and Niederbayern in the east; (4) Oberbayern in the south, along the Austrian border; and (5) Schwaben in the southwest, along the border of Wuerttemberg-Baden. Those five *Regierungsbezirke* were further divided into either *Landkreise*, in predominantly rural areas (roughly approximate to an American county), or *Stadtkreise*, cities usually with a population of 20,000 or more not under *Landkreis* control. A *Landkreis* further subdivided into smaller communities called *Gemeinden*, villages or rural areas with a few thousand people. Each of these subdivisions of the Bavarian *Land* had a form of government, headed by either chief executives or community councils. During the Third Reich, however, governmental functions had become almost entirely administrative, and the appointed governmental entities simply implemented directives from Berlin. For a U.S. military government understanding of German community structure, see OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, CIVIL ADMINISTRATION DIVISION, CIVIL ADMINISTRATION QUESTION AND ANSWER BOOK 3 (1947) (from the papers of Walter J. Muller, Box 13, Vol. 2, on file with the Hoover Archives, Stanford University). Bavaria lost its Rhineland Palatinate (*Pfalz*) region. It became incorporated into the French zone. The old Bavarian Rhineland Palatinate region differed significantly from other parts of the French zone, not the least of which were its Catholic, conservative tendencies, as opposed to those of the "Protestant and Socialist majority" in other parts of the zone. F. ROY WILLIS, *THE FRENCH IN GERMANY, 1945-1949* 100 (1962).

27. The Weimar BVP was the most powerful party in Bavaria at the time, and advocated greater rights for individual *Länder*. PRIDHAM, *supra* note 4, at 67-9. Hitler had criticized the BVP in *Mein Kampf* for its attempts "to preserve special rights for the Bavarian State out of small-hearted, particularistic motives." ADOLF HITLER, *MEIN KAMPF* 574 (Ralph Manheim, trans., Houghton Mifflin 1971) (1926). He devoted a chapter of *Mein Kampf* to attacking federalism and concluded the chapter with these words:

National Socialism as a matter of principle must lay claim to the right to force its principles on the whole German nation without consideration for previous federated state boundaries, and to educate it in its ideas and conceptions. Just as the churches do not feel bound and limited by political boundaries, no more does the National Socialist idea feel limited by the individual state territories of our fatherland.

The National Socialist doctrine is not the servant of individual federated states, but shall some day become the master of the German nation. It must determine and reorder the life of a people, and must, therefore, imperiously claim the right to pass over boundaries drawn by a development we have rejected. The more complete the victory of its ideas will be, the greater may be the particular liberties it offers internally.

Id. at 577-78.

ernmental decentralization.³⁰ Mainly drawing on *JCS 1067* and the Potsdam Declarations, Clay and his military government staff prepared plans for democratic restoration. In a letter written in 1946 to Lieutenant General O. P. Nichols, the director of the War Department's Civil Affairs Division, Clay set forth his interpretation of U.S. policy for German government reconstruction:

The United States believes in a decentralized German government in accordance with the Potsdam Agreement. It proposes therefore the establishment of a Germany composed of a small number of states, each of which would have a substantial responsibility for self-government. These states would be permitted to form a confederation or federal type of government, which, however, would be given the requisite powers to achieve true economic unity. The United States recognizes the right of the German people to participate in the determination of their governmental structure which, however, must come within the general provision for decentralization agreed at Potsdam.³¹

In order to achieve this vision of a federalized Germany, Clay further stated it would be necessary for the several *Länder* to draft and for their citizens to approve democratic constitutions and to "provide for some delegation of governmental responsibility to county and community levels."³²

Such a process in the midst of an impoverished, devastated Germany might reasonably be thought of as the job of one or more generations. Fur-

28. The OMGB came to these conclusions in its own study of Catholicism in Bavaria. Bavaria remained an essentially agrarian *Land*, with a great deal of its population dispersed in the countryside, and not concentrated in heavy industries, which were natural targets for socialist and Communist politicians. Furthermore, its strong Catholicism formed a natural bulwark against Communist-style centralization of any sort. Office of Military Government for Bavaria, Intelligence Division, Analysis Branch, *The Catholic Church in Bavaria in TREND: A MONTHLY REPORT OF INTELLIGENCE ANALYSIS AND PUBLIC OPINION*, Nos. 13-14. (1946) (National Archives Record Group No. 260.71, on file at the National Archives, College Park, MD).

29. *See supra* note 5.

30. SMITH, *supra* note 20, at 244. John Gimbel contends that major discrepancies existed between policy and practice for most of the 1945-47 occupation period. Only after the revocation of *JCS 1067* and its replacement with another policy document, *JCS 1779*, were policy and practice consistent. GIMBEL, *supra* note 12, at 1-2.

31. Letter from Lucius D. Clay to O.P. Echols (July 19, 1946), in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 240.

32. *Id.* at 241.

thermore, Clay had on his own military government staff many officials who were leading exponents for radical societal reconstruction. Clay, however, came to the conclusion that many of the ambitious plans of the social reformers were unworkable. He called the more ambitious reformers “zealots for reforms that go far beyond anything that’s ever been done in [the United States].”³³ Rather, against the advice of many reformers, Clay determined to begin democratic reform—which meant giving German political autonomy—as soon as possible.³⁴

Within weeks of the surrender, basic governmental functions in the U.S. zone *Länder* had been reestablished and the appointed officials empowered to act according to their positions.³⁵ In several speeches to the

33. In an interview conducted by Jean Edward Smith, Clay stated:

One of the real problems in running an occupation is your own people. They want to be Czars. They resent very bitterly when they suggest to the Germans that certain things be done and the Germans don’t do them. This is one of the hardest things you have to face in an occupation situation: your own staff are zealots, and they’re often zealots for reforms that go far beyond anything that’s ever been done in your own country.

SMITH, *supra* note 20, at 244.

34. Letter from Lucius D. Clay to John McCloy, (September 16, 1945), in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY 1945-1949, *supra* note 22, at 77.

35. Dr. James R. Newman, Military Governor and later Land Commissioner for Hesse, described the general procedure by which military government officials restored local governments:

Mayors (*Buergermeisters*) and county presidents (*Landraete*) were selected from previously furnished lists. Generally, the Military Government officer called in the town or county priest or minister, the local school-teacher, and a few local citizens and asked them to suggest a *Buergermeister* or *Landrat*. After several conferences, as much investigation as possible, and clearance of political questionnaire, a provisional administrative chief was selected, and he in turn appointed other provisional leaders, such as police and fire chiefs, food office head, local clerk, motor vehicle supervisor, and other needed officials. Through these appointed officials, the local Military Government Officers began to bring order out of complete chaos, restore circulation, remove hazards to life, such as partially destroyed buildings, start cleaning up rubble, and feed the starving population.

JAMES R. NEWMAN, THE STORY OF RECONSTRUCTION AND REORIENTATION AT THE GRASS ROOTS LEVEL OF CIVIL AFFAIRS AND MILITARY GOVERNMENT (1949), *quoted in* J. F. J. GILLEN, U.S. MILITARY GOVERNMENT IN GERMANY: AMERICAN INFLUENCE ON THE DEVELOPMENT OF POLITICAL INSTITUTIONS 4 (1950) (on file at the CARL, Fort Leavenworth, KS).

Council of Minister-Presidents of the U.S. zone *Länder* (called the *Länderrat*), Clay stated that the *Land* Minister-Presidents, though U.S. appointed, should make their own decisions as much as possible and not turn to the American military government for answers.³⁶ Within months, political parties were legalized. In January 1946, just eight months after the Third Reich had ceased to exist, U.S.-zone Germans voted in local elections. By December of that year, they voted in their respective *Land* legislatures (*Landtag*) and approved their *Land* constitutions.³⁷

Clay and his subordinate military governor directors refined the policies of democratic reform in the fall of 1945. Minister-Presidents were appointed for each U.S.-occupied *Land* (Wuerttemberg and Baden were consolidated as one *Land*) and, in September, each *Land* Minister-President was explicitly authorized to approve and promulgate state legislation that did not conflict with military government policy.³⁸ In August, Clay ordered that the administration of the U.S. zone “should be directed toward the decentralization of the political structure and the development of local responsibility,” with an ultimate goal of an independent democratic Germany.³⁹ To achieve this, self-government at the regional, city, and *Land* level using “representative and elective principles” would return “as rapidly as [was] consistent with military security and the purposes of military occupation.”⁴⁰ In September, Clay directed that the primary American military government relationships would be among the three autonomous *Land* governments and American military government at that level. All instructions passed from Clay to his military government directors and from them to the Minister-Presidents, who would then implement them.⁴¹

36. John Elliott, *Democratization in Germany 1* (February 4, 1948) (National Archives Record Group No. 260.71, on file at the National Archives, College Park, MD). Elliott points out that “[I]n his speeches to the *Länderrat* at Stuttgart, General Clay has encouraged the German minister-presidents to take decisions for themselves instead of referring everything to Military Government in Berlin for settlement.” *Id.*

37. OMGUS, *CONSTITUTIONS OF BAVARIA, HESSE AND WUERTEMBERG-BADEN 2* (1947) (from the papers of Walter J. Muller, Box 13, Item 73 on file at the Hoover Archives, Stanford University, Palo Alto, CA).

38. Military Government Proclamation No. 2, dated 19 September 1945, stated that each *Land* was to have eventual complete legislative, judicial, and executive powers, but that, while democratic institutions were developing, the *Land* Minister-Presidents could approve and promulgate legislation, and that lower executive officials in local governments had similar authority. U.S. MILITARY GOVERNMENT IN GERMANY PROCLAMATION NO. 2 (September 19, 1945).

39. H. H. Newman, *Administration of Military Government in U.S. Zone in Germany* (Aug. 27, 1945) (from the papers of Walter J. Muller, Box 15, Item 90, on file at the Hoover Archives, Stanford University, Palo Alto, CA.).

40. *Id.*

Clay also directed that the Minister-Presidents and their subordinate ministers would have the right to appoint all *Land* officials subject to prior military government approval for political reliability.⁴² Likewise, in September, the Office of Military Government for Bavaria (OMGB) directed that higher authorities in the Bavarian government would issue administrative instructions related to military government laws and directives directly to lower civilian echelons. They would not have to receive formal authorization for the instructions, but only had to ensure that Bavarian government officials submitted information copies to the supervising OMGB authority.⁴³

At the same time, however, Clay's Office of Military Government for Germany (OMGUS) and the OMGB initiated systems and processes to create conditions for federalism.⁴⁴ As the following accounts reveal, the U.S. military government kept overwatch and intervened as necessary to resolve complex questions of federalism and constitutionalism.

B. Bavaria, the *Länderrat*, and Bizonal Fusion

On 6 September 1946, U.S. Secretary of State James Byrnes gave an important speech in Stuttgart to the assembled Minister-Presidents of the U.S. zone and others. The speech, almost verbatim, adopted many of Clay's ideas about German democracy almost verbatim.⁴⁵ It included a

41. H. H. Newman, Administration of Military Government in U.S. Zone in Germany (Sept. 20, 1945) (from the papers of Walter J. Muller, Box 15, Item 90, on file at the Hoover Archives, Stanford University, Palo Alto, CA).

42. *Id.*

43. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, NO. 19 (1945). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

44. This article focuses on the establishment of governmental processes at the highest *Land* level. Other areas in which the U.S. military government was essential included setting rules for the establishment of political parties, to include granting approval for the existence of parties, establishing the right to vote, and supervising elections at the *Gemeinde*, *Landkreis*, and *Stadtkreis* levels. See, e.g., Walter J. Muller, Duties and Responsibilities of *Regierungsbezirk* after 15 December 1945 and Duties and Responsibilities of *Landkreis* and *Stadtkreis* after 15 December 1945 (1945) (from the papers of Walter J. Muller, Box 15, Item 92 at the Hoover Archives, Stanford University, Palo Alto, CA).

45. When asked by his biographer whether he had written Byrnes' address, Clay stated: "It was very close to the messages that I had sent to Washington. But to say that I wrote the speech would not be correct. To say that Mr. Byrnes listened to and accepted many of my ideas and suggestions would be much closer to the truth." SMITH, *supra* note 20, at 387.

near-total endorsement of Clay's policy, to include his policies of establishing an autonomous, elected German government.⁴⁶ Bavarians especially welcomed the central theme of the speech—that Germans should and would govern themselves—along with its lack of animosity.⁴⁷ Some Bavarians also apparently took the speech as a call to arms against Soviet Communism, a sure indication that “the German people are once again called upon to free the world of bolshevism.”⁴⁸ Bavarians polled about Byrnes' speech took it as meaning that Germany's government would be built from the “bottom up.”⁴⁹

Despite these assurances, the American military government did not entirely release control over Bavaria. The *Länderrat*, a governmental organization set up by Clay in the summer of 1945, was composed of the American appointed Minister-Presidents from each of the American zone *Länder*.⁵⁰ The *Länderrat* had been meeting monthly for over a year, primarily to coordinate economic policies, when Byrnes made his Stuttgart speech.⁵¹ The organization, however, seemed contrary in many ways to federalist ideas. According to John Gimbel, the *Länderrat* revealed that the American military government's interest in economic problems

46. “It is the view of the American Government that the German people throughout Germany, under proper safeguards, should now be given the primary responsibility for the running of their own affairs.” James F. Byrnes, Secretary of State, Address at Stuttgart Germany on United States Policy Regarding Germany (Sep. 6, 1946), in UNITED STATES DEPARTMENT OF STATE, DOCUMENTS ON GERMANY, 1944-1985 (1985).

47. According to a poll of 266 Bavarians taken by the OMGB Information Control Division after Byrnes' speech, 86% of those surveyed responded very favorably (40%) or favorably (46%) to the address. Only 6% reacted unfavorably, and 8% had no opinion. OMGB, Intelligence Division, Analysis Branch, *Reactions to Byrnes' Speech*, in TREND: A WEEKLY REPORT OF POLITICAL AFFAIRS, No. 15 3, 6 (Sept. 17, 1946) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD) [hereinafter *Reaction to Byrnes' Speech*].

48. According to an OMGB intelligence analyst,

Common people still imbued with Nazi propaganda and lacking a political sense . . . conclude that Byrnes' words were directed in the first place against Russia, that a war between the United States and the Soviet Union is imminent and that the German people are again called upon to free the world of Bolshevism.

Id. at 4.

49. Perhaps for that reason they were somewhat less enthusiastic of another of Byrnes' proposals, a *Nationalrat* of Minister-Presidents that would meet together on certain issues. Bavarians viewed this proposal skeptically, unless it was checked by a democratically elected parliament. *Id.* at 5.

50. See GILLEN, *supra* note 35, at 91.

“assumed precedence over the grass-roots interest expressed by Germans and Americans alike.”⁵² Bavarians also expressed their concerns over the *Länderrat*'s power, both actual and potential. In January 1946, reports indicated that many saw it as a *de facto* zonal government bent on recentralizing German government and taking away Bavarian autonomy.⁵³

The *Länderrat* could be seen as a measure that might, in the short term, run contrary to federalist principles. Despite this short-term perception, however, American military government policymakers deemed the *Länderrat* necessary for long-term democratic success. As E.H. Litchfield, a prominent member of OMGUS's civil affairs division, stated

In the final analysis, the triumph or failure of the attempt to democratize Germany will be determined by whether American military government can succeed in making western Germany economically prosperous. For democracy is a plant that thrives only in prosperous countries. So long as the German people are on the verge of starvation and economic collapse, democracy can never hope to get a firm foothold in the country.⁵⁴

51. The first meeting of the *Länderrat* took place on 17 October 1945 in Stuttgart, Germany. At this meeting, Clay stated that he did not want to create a “South German state,” but rather believed that administrative coordination among the *Länder* was needed to meet the ultimate goal of establishing Germany as a functioning, autonomous economic unit. See GILLEN, *supra* note 35, at 91. In its charter, the *Länderrat* called for a General Secretariat, who with the help of experts, would deal with matters of common concern in the U.S. zone *Länder*. *Id.* at 92.

52. According to John Gimbel, the official history of the *Länderrat* overstates its contribution to the “establishment of the federal principle in postwar German politics.” GIMBEL, *supra* note 12, at 44. Gimbel instead asserts that, “The case is effectively presented, but it rests mainly on theory and structural considerations, and on selected evidence that minimizes the extent to which the Americans intervened to make the *Länderrat*, and therefore the *Länder*, conform to the larger objectives of the United States in Germany.” *Id.* at 44-45. Gimbel's argument that the *Länderrat* cannot be considered a deliberate “capstone” to a “political program of German self-government starting from the grass roots in the *Gemeinde* and rising to the *Kreise*, to the *Länder*, and then to the entire zone” is correct in the sense that, as he points out, the *Länderrat* came into being months before the *Gemeinde* elections in January 1946. *Id.* at 50-51.

53. According to Gimbel, “Bavarians thought that it assumed too much authority, that it operated as a zonal government, that it required *Land* officials to devote excessive time to meetings and committees, that it was expensive, and that Erich] Rossman [the appointed General Secretariat of the *Länderrat*] was building up a permanent staff.” *Id.* at 40.

54. E.H. LITCHFIELD, DEMOCRATIZATION IN GERMANY 11 (Feb. 4, 1948) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

Indeed, over the course of 1945-46, the *Länderrat* had been the instrument deemed necessary for the maintenance of those services that crossed *Länder* lines, such as the railroads, postal service, and telephone and telegraph services.⁵⁵ It had also been the organization that drafted the Law for the Liberation from National Socialism and Militarism, the first piece of German legislation that dealt with denazification. Because the new denazification policy had to be consistent throughout the U.S. zone, the *Länder-rat* had been the best means to gather *Länder* officials to develop a unified, workable law.⁵⁶

On closer examination, the *Länderrat* could also be seen as an institution that promoted federalism as much as it hindered it. Clay established it to coordinate the U.S. zone *Länder* and eliminate duplication of efforts on matters of immediate concern such as coal shortages. Each Minister-President or his representative had an equal vote among the *Länder*. All agreements had to be unanimous.⁵⁷ As D. R. Doronodo states,

With the *Länder* forced to act collectively, indeed unanimously, in the council to enact ordinances, Munich was relieved of the threat of being coerced into accepting disagreeable measures.

55. GILLEN, *supra* note 35, at 105.

56. On 5 March 1946, General Clay and the Minister-Presidents of the U.S. zone *Länder* signed the Law for Liberation from National Socialism and Militarism. It required all Germans over eighteen to fill out lengthy questionnaires about their past. Additionally, it turned over to the German people the power to try denazification cases. Much like the previous U.S. military government laws and directives, the new law established five classes of Nazis or Nazi affiliates: (1) major offenders, (2) offenders, (3) lesser offenders, (4) followers, and (5) nonoffenders and those exonerated after trial. See OFFICE OF MILITARY GOVERNMENT FOR GERMANY, MONTHLY REPORT OF THE MILITARY GOVERNOR, U.S. ZONE, NO. 842 (Mar. 20, 1946) [hereinafter Monthly Report No. 842]. Beginning in the summer of 1946, Germans in the U.S. zone would try other Germans for Nazi activity and party membership. As John Gimbel states in his study of the occupation of the town of Marburg: "Denazification was placed under German control because it was felt that the local institutions were sufficiently revived by 1946 to permit German participation at this level. Moreover, it offered Germans the responsibility under this new leadership, and to have a stake in the changes that would ensue." JOHN GIMBEL, A GERMAN COMMUNITY UNDER AMERICAN OCCUPATION 3 (1961). Despite procedural similarities, however, the new law gave almost complete authority to the various *Länder* governments. Under it, the so-called Minister for Political Liberation would have responsibility for the administration and control of the denazification procedures. See *id.* at 3; Monthly Report No. 842, *supra*.

57. According to Clay, "The *Länderrat* became a major influence in shaping German political thought. Since it could only function with unanimity, its members learned to compromise the views of the states which they represented in the common good and such compromise is the essence of democracy." Lucius D. Clay, *quoted in* GILLEN, *supra* note 35, at 96.

The organization of the *Länderrat* also provided a continuation, whether intended or not, of the collegiality inherent in the *Bundesrat* [upper house of the German legislature] of the imperial period.⁵⁸

Secretary of State Byrnes' September speech addressed another concern - the lifting of the borders between the Allied zones, virtually sealed off from each other since the surrender in May 1945.⁵⁹ This seemed the next logical step in German economic development. Clay, beginning in the spring of 1946, had already begun to replicate the *Länderrat* model on a larger scale by attempting to create an Allied interzonal agency that would eventually eclipse the zone authorities and agencies.⁶⁰ While nei-

58. DORONODO, *supra* note 4, at 55. Doronodo's comments were similar to those of the Interdivisional Committee on German Governmental Structure, which stated in its 1946 special report that the *Länderrat*

[f]urnished the first opportunity in fifteen years for German officials to practice democracy and democratic methods--the assumption of personal responsibility, the interchange of ideas, the reconciliation of conflicting interests and views, and the value of compromise and concession--and accordingly it has been an invaluable training tool toward our ultimate goal.

CENTRAL GERMAN AGENCIES, *supra* note 15, at 4.

59. "The United States is firmly of the belief that Germany should be administered as an economic unit and that zonal barriers should be completely obliterated so far as the economic life and activity in Germany are concerned." Byrnes, *supra* note 46, at 93. In Byrnes' view, an economic unification did not conflict with Potsdam's decentralization policies:

The Potsdam Agreement wisely provided that administration of the affairs of Germany should be directed toward decentralization of the political structure and the development of local responsibility. This was not intended to prevent progress toward a central government with the powers necessary to deal with matters which would be dealt with on a nation-wide basis. But it was intended to prevent the establishment of a strong central government dominating the German people instead of being responsible to their democratic will.

Id. at 95.

60. The apparent fear was that the artificially created zonal agencies would harden over time and become, in effect, small autonomous governments that would impede ultimate unification and prevent the free flow of raw and manufactured goods. This would have had a disastrous effect on German economic as well as political life. The permanent zonal boundaries would create "a separation of raw materials and semi-finished goods from their processing plants and a separation of component manufacturers from their markets." CENTRAL GERMAN AGENCIES, *supra* note 15, at 7.

ther the French nor Soviets agreed in joining the Allied interzonal agency, the British did.⁶¹ Such an agreement created another avenue for eventual German reunification, and the opening of the industrial Ruhr in the British zone particularly made the U.S.-occupied *Länder* more economically sustainable.⁶² Washington policy makers also thought the idea sound, since an interzonal agency would, by bringing zones together, help relieve the American financing of German recovery.⁶³

Clay saw the formation of the bizonal agency and the subsequent economic unification of the U.S. and British zones as promoting efficiency, but not along typical German and English models.⁶⁴ “The tendency of the Germans is to an almost complete regimentation of German economy and they have considerable British sympathy for this purpose.”⁶⁵ Clay, who had run the U.S. wartime military procurement program, had a thorough knowledge of wartime price controls and did not want to create a heavily staffed centralized agency to dictate all the details of U.S.-British zone economy. Such an agency would be “much too large for broad policy actions and yet many times too small for detailed controls.”⁶⁶ He instead preferred resource allocations on a broad basis, either at the *Länder* or general industry level. “Microcontrol” of resource allocation at plant levels was not only contrary to American models, but, to Clay, could not possibly succeed “without months if not years of effort to establish the requisite organization.”⁶⁷

Bavarian reaction to bizonal merger was skeptical, if not hostile. The British, as expected, pushed for greater economic centralization, something many Bavarians feared.⁶⁸ In September 1946, after Byrnes’ speech, OMGB intelligence reports indicated Bavarians feared British “bureau-

61. The French agreed to a “trizonal” fusion in the summer of 1948, via piecemeal legislation. Willis, *supra* note 26, at 61-66.

62. According to Jean Edward Smith, Clay saw Bizonia as a “way to bypass French and Russian intransigence: a first attempt to put the splintered pieces of Germany back together.” SMITH, *supra* note 20, at 405.

63. GILLEN, *supra* note 35, at 112.

64. LUCIUS D. CLAY, *Bizonal Economic Matters*, in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 333.

65. *Id.*

66. *Id.*

67. *Id.* A related problem in the bizonal fusion was that, whereas in the U.S. zone, the agencies that would come to form the bizonal organizations came from German-run *Länder* governments, those in the British zone, as of mid to late 1946, still would have to come from the British military government since elections in the British zone lagged significantly behind those in the U.S. zone. GILLEN, *supra* note 35, at 145.

crazy" would "invade" the United States zone.⁶⁹ Reports indicated that the bizonal merger might indeed increase Bavarian separatism, since the merger would require Bavarians to reduce food rations to provide equivalent rations in the British zone to other Germans many Bavarians considered "foreigners" or "outsiders."⁷⁰ On the other hand, reports also indicated Bavarians saw some benefits to the merger, especially in the need for coal from the Ruhr area and the desire to have a consistent denazification policy.⁷¹

The dilemma between decentralized government and centralized economic planning proved difficult to resolve. What ultimately emerged was somewhat of a compromise. By the spring of 1947, the Americans and British had agreed that the bizonal economic agencies needed broad economic powers, and so the agencies obtained general authority over production, allocation, and distribution, to include rationing policies, and also had the authority to control by executive order a small group of scarce commodities and raw materials, such as coal.⁷² But the allocation of such commodities was largely left up to the individual *Länder* themselves. Thus, for example, while each *Land* received coal allocations for domestic heating, the *Land* had control over how the coal was divided among homes, hospitals, schools, and other domestic places.⁷³ As Clay realized, the bizonal arrangement represented "at least as high a degree of centralization as we had in the United States during the war" although not the near-total centralization the British wanted.⁷⁴ The arrangement, on an even grander scale than the U.S. zone *Länderrat*, also seemed to take away *Land* auton-

68. LUCIUS D. CLAY, *Bizonal Merger: Economic Council*, in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 352.

69. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 71 (Sept. 19, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

70. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 69 (Sept. 5, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

71. *Id.*

72. LUCIUS D. CLAY, *Bizonal Merger: Economic Council*, in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 352. The formal agreement was signed by U.S. and U.K. representatives in Washington, D.C. on 2 December 1946, with the agreement taking effect on 1 January 1947. Memorandum of Agreement, The United States and United Kingdom, subject: Economic Fusion of their Respective Zones of Occupation of Germany (December 2, 1946), in UNITED STATES DEPARTMENT OF STATE, DOCUMENTS ON GERMANY, 1944-1985, *supra* note 11, at 110.

73. LUCIUS D. CLAY, *Bizonal Merger: Economic Council*, in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 352.

omy, and thus worked against the proposed American, and presumably Bavarian, decentralizing principles.⁷⁵

The centralizing powers of the bizonal fusion, however, were not as powerful as they appeared to be. One reason for this was that it went into effect after Germans in the U.S. zones had elected members to their own legislatures (*Landtag*) in December 1946, the kind of "check" that the Bavarians had wanted on Byrnes' proposed *Nationalrat*.⁷⁶ At least within the U.S. zone, rather than military government-appointed officials, bizonal representatives were elected from within the various *Länder* parliaments. Thus each *Land* sent officials to the agencies with the respective *Land* interest in mind. Furthermore, the party that dominated in Bavaria, the conservative Christian Social Union (CSU), and its dominant sister party in northern *Länder*, Konrad Adenauer's Christian Democratic Union (CDU), as majority parties, also became dominant in the bizonal departments and executive councils.⁷⁷ These federalist, capitalist-oriented par-

74. *Id.* The structure that emerged was a twofold organization. First, a U.S.-U.K. bipartite organization, consisting of a bipartite board made up of the U.S. and U.K. deputy military governors and advisors, and a bipartite control office, consisting of a chairman and bipartite groups. The bipartite organization, along with the Allied bank commission and the Joint Export Import Agency, oversaw bizonal economic policy. GILLEN, *supra* note 35, at 143-46. Second, the German bizonal agencies, which carried out U.S.-U.K. zone economic policy. *Id.* The main bizonal agency was the economic council, consisting of 54 members, elected from the *Landtage*, which promulgated economic ordinances, an executive committee, which drafted regulations implementing those ordinances, and bizonal departments, which implemented them. *Id.*

75. The bizonal fusion, as conceived and ultimately enacted, proved contrary to federalism primarily because the establishment of such a central German economic agency that was not "truly" representative of either the German people or the "*Länder* government" did not "satisfy the U.S. policy of devolving as much responsibility to German civil administration agencies as possible." CENTRAL GERMAN AGENCIES, *supra* note 15, at 14. It could also be argued that, whereas the U.S. zone had attempted political decentralization, it had not done the same economically, and that the bizonal was the logical culmination of governmental economic centralization. In contrast to the relative freedom given in political reform, U.S. economic zone policies during the occupation were often activist and interventionist. In Bavaria, for example, while OMGB permitted trade unions, it reserved the right to prohibit strikes and lockouts if they would "jeopardize security or military government policies." CASE STUDIES, *supra* note 2, at 81. By the end of 1946, only one strike took place in Bavaria. The Office of Military Government for Bavaria also set wage and price controls, established a forty-eight hour workweek, and mandated the establishment of unemployment compensation for up to thirteen weeks beginning in January 1947. *Id.*

76. *Reaction to Byrnes' Speech*, *supra* note 47.

77. A.J. RYDER, TWENTIETH CENTURY GERMANY FROM BISMARCK TO BRANDT 479-80 (1973).

ties thus acted as a significant counterweight to the bizonal fusion's centralizing tendencies.⁷⁸

Rather than the bizonal agencies, the *Länderrat*, or the *Land* governments completely dominating as separate entities, what emerged from mid-1946 to early 1947 was a complex three-way relationship among the three, as well as with the respective Allied military governments.⁷⁹ The Office of Military Government for Bavaria attempted to clarify the parameters for each. The Office of Military Government for Bavaria Chief of Civil Administration, Albert Schweizer—in the absence of overarching and connecting legislation—scrutinized Clay's statements in particular to determine those limits.⁸⁰ The *Länderrat*, as a U.S. zone creation, ceased to exercise control over the economic policymaking taken over by the bizonal agencies. The *Länderrat*, however, was still a necessary, if temporary, body in order to “study, recommend, and commend on proposed quadripartite [Allied occupation] legislation.”⁸¹ The bizonal agencies were also viewed as contingent governmental bodies that were not to supercede *Länder* prerogatives: “Military Government will not permit the bizonal agencies to assume state responsibilities and will insist that the

78. *Id.* Ryder calls the bizonal agencies a “shadow government” of the CDU. *Id.* at 479. Initially, the bizonal agencies could only recommend agreed views to the respective *Länder*, which made the administration rather weak. In May, 1947, the two zones agreed that the bizonal economic council could issue ordinances dealing with “public finance, currency, credit banking, and property control.” U.S. ARMY PROVOST MARSHAL GENERAL'S SCHOOL, U.S. MILITARY GOVERNMENT IN GERMANY: FINANCIAL POLICIES AND OPERATIONS 89-90 (1950) (on file at the CARL, Fort Leavenworth, KS). Because the economic council consisted of members elected from the respective *Landtäge*, however, the *Länder* interests were still preserved.

79. Albert C. Schweizer, Relationship between *Länderrat*, Bizonal Agencies, and Land Civil Governments (Feb. 3, 1947) (from the papers of Walter J. Muller, Box 15, Item 91, on file at the Hoover Archives, Stanford University, Palo Alto, CA).

80. *Id.* Schweizer laid out the threefold relationship:

Military government has recently entered into an era where the Minister Presidents of the three *Länder* of the U.S. zone are representative officials, chosen by a popularly elected *Landtag* and responsible thereto. As a corollary, the *Länderrat* is composed of Minister- Presidents who are no longer appointees of Military Government. At the same time this situation has developed, another new situation has come into being through the institution of the bizonal agencies.

Id.

81. *Id.*

responsibility for the execution of bizonal policies (e.g., specific resource allocation) remains with the state governments.”⁸²

American military government thus acted as the mechanism that kept the three governmental entities in harmony.⁸³ More significantly, however, was the growing role of the *Land* governments themselves. By early 1947, when Schweizer distributed his memorandum, the bizonal agencies fully emerged and had begun formulating and implementing policies.⁸⁴ By this time too, the U.S. zone *Länder* had popularly elected legislatures and approved Constitutions. The rights of the states, clearly defined in the state Constitutions, and the voice of the populace, expressed in the *Landtag* representatives appointed to the bizonal councils, thus protected the prerogatives of the *Länder* against excessive centralization.⁸⁵

C. The Bavarian Constitution and the *Landtag*: June–December 1946

Along with the establishment of the bizonal zone, the culminating act of establishing democracy at the *Land* level in the U.S. zone was the election of the *Länder* legislatures (*Landtag*), and the popular approval of *Land* Constitutions, both slated to occur in December 1946. With those completed, the next step would be German reunification. The development of Constitutions would require considerable effort before their ultimate approval, but American policy was, once again, to provide general guidance and allow the respective *Länder* to work out the specific details. In a 23 August 1946 message to the War Department, Clay elaborated on this laissez-faire policy:

We have told the German authorities of the basic principles which we consider necessary to a democratic institution and these principles have been furnished to you and to the State Department. As long as these principles are safeguarded in the constitution, we do not propose to comment on the details or on the governmental procedures established in the constitutions [I]t is of utmost importance that comment and suggested changes given to the constitutional assemblies be at a minimum and limited to violations of the fundamental princi-

82. *Id.*

83. *Id.*

84. *See infra* pp. 136-37 and notes 70-72.

85. *See* CONSTITUTIONS OF BAVARIA, HESSE AND WUERTTEMBERG-BADEN, *supra* note 37 (containing the rights constitutionally reserved to the states).

ples which have been laid out. These constitutions go to the German people as a free creation of their elected representatives and with the least possible taint of military government dictation.⁸⁶

There were seven “minimal essentials” required for the constitutions: (1) political power had to “originate with the people and be subject to their control”; (2) programs and political leadership had to be subject to popular elections frequently; (3) elections had to be competitive, with at least two competing parties; (4) political parties had to be democratic in character and distinct from governmental institutions; (5) basic individual rights had to be defined in the constitution and preserved by law; (6) government could only be exercised through the rule of law; and (7) the constitutions had to provide for “some delegation of governmental responsibility to county and community levels.”⁸⁷ Furthermore, Clay wanted the constitutional articles dealing with individual rights to be reasonably similar for all the U.S. *Länder*.⁸⁸

While setting these requirements, the American military government had to proceed carefully, despite the speed of the democratizing process. If it applied too much pressure or attempted to intervene, the end result might be a populace suspicious of the legitimacy of a document tarred “with the brush of an Allied *Diktat*.”⁸⁹ At the same time, there were real concerns that the Germans might not be ready to make such a huge step towards self-government so soon. In June 1946, Bavarian Minister-President Hoegner stated at a meeting with Brigadier General Walter J. Muller, the OMGB Director, and other OMGB officials that Bavarians did not fully understand constitutional government and would need five years to understand the basis of democratic thinking.⁹⁰ Nonetheless, the process went forward as planned. In February 1946, OMGUS directed each *Land* Minister-President to appoint a preparatory commission, to gather neces-

86. LUCIUS D. CLAY, *Constitutions for Länder in U.S. Zone*, in 1 THE PAPERS OF LUCIUS D. CLAY, GERMANY 1945-1949, *supra* note 22, at 260.

87. LUCIUS D. CLAY, *U.S. Policy in Germany*, in 1 THE PAPERS OF LUCIUS D. CLAY, GERMANY 1945-1949, *supra* note 22, at 241.

88. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 66 (Aug. 15, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

89. As in a harsh and unilaterally imposed settlement. DORONODO, *supra* note 4, at 39.

90. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 59 (June 27, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

sary bibliographical and documentary materials for the proposed Constitutional Assembly, to gather proposals from the different parties, and to draft an Assembly election law for American military government approval.⁹¹

The Bavarian Constitutional Assembly elections took place on 30 June 1946 at all governmental levels that had already had elections (the *Gemeinde* (village), *Landkreis* (county), and *Stadtkreis* (municipal) levels).⁹² Nearly seventy-two percent of eligible voters participated. As expected, the CSU candidates received a majority of votes (1.5 million or fifty-eight percent).⁹³ The SPD candidates received 785,000 (twenty-eight percent), the KPD, 144,000 (5.8 percent) and the remainder distributed among splinter parties.⁹⁴

On 15 July, the Constitutional Assembly opened at the University of Munich with a requirement to complete a draft constitution no later than 15 September 1946.⁹⁵ Yet to some OMGUS, if not OMGB officials, what seemed to be emerging from the Bavarian Constitutional Assembly was a reactionary document representing Bavarian particularism and a far-right alliance with the Catholic Church.⁹⁶ Undoubtedly the document being pre-

91. Byran L. Milburn, Elections in the U.S. Zone (Feb. 4, 1946) (from the papers of Walter J. Muller, Box 15, Item 90 on file at the Hoover Archives, Stanford University, Palo Alto, CA).

92. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 60 (July 4, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

93. *Id.*

94. *Id.*

95. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 62 (July 18, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

96. PETERSON, *supra* note 22, at 231. Karl Lowenstein of the OMGUS Legal Division described the proposed Bavarian constitution as:

[T]he embodiment of the dream of Bavarian independence nursed for two generations by Bavarian extremists of whom Dr. Hoegner permitted himself to be a tool. If adopted in this form it will be a great political success of the French because it turns the clock back to the Rhenish Confederation of Napoleon. It serves to prevent the reintegration of Bavaria into a decentralized Germany and presents a permanent roadblock to German unity which only inexperienced persons are apt to identify with German centralism. This declaration of Bavarian independence is a thinly veiled declaration of the secession from Germany.

Memorandum, Karl Lowenstein to Roger Wells (11 Dec. 1945) *quoted in* GILLEN, *supra* note 35, at 25.

pared was more conservative than that of the other U.S. zone *Länder*. To many it contained extremist elements of a church-state alliance based on Catholic "corporatist" principles: state-run "confessional" schools; a non-popularly elected senate from private enterprise, churches, and other institutions; a *Staatspräsident* with more autonomy and power than given to a Minister-President; and declarations of near-independent Bavarian "citizenship."⁹⁷ Perhaps the most significant idea developed was the ten percent mandate rule. According to this rule, any party that did not obtain at least ten percent of the vote in any one *Regierungsbezirk* would be shut out of the *Landtag* entirely.⁹⁸ While proponents contended it was a measure to prevent legislative chaos, at least one influential German newspaper saw it as a "trap for all the smaller parties" set by the CSU and SPD to "secure a parliamentary monopoly."⁹⁹

In reality, the document being developed was in keeping with Bavarian political tradition as well as the result of compromise between the right and left parties.¹⁰⁰ When the final Constitution was published, many of its provisions were taken verbatim from the Weimar Constitution and the

97. The Catholic corporatist model was seen by American military government experts as deeply rooted in Bavarian culture:

The attempt of American military Government to eliminate the corporative tradition in the American Zone of Germany faces heavy odds. It is deeply rooted. To Germans the corporative system seems essentially "right." It is regarded as superior to the American system of government bureaus and voluntary occupational associations. Defenders of the corporative tradition in Germany feel that the democratization of the German governmental structure requires only the establishment of democratic procedures within the corporations and the general government. They tend to dissociate the corporative principles from National Socialism except as the Nazi regime developed the principles to an extreme and "coordinated" the corporations into a totalitarian governmental structure by abolishing internal democratic procedures and subjecting the corporations to the chain of command or "leadership" principle.

John D. Holt, *Corporative Occupational Organization and Democracy in Germany*, 9 PUB. ADMIN. REV. 38 (1948), quoted in GILLEN, *supra* note 35, at 38. Bavaria was the only *Land* that proposed such a Senate. *Id.* at 36.

98. GILLEN, *supra* note 35, at 28.

99. *Coalition Problems in the South*, DER MORGEN, Dec. 4, 1946 (OMGB Intelligence Branch, trans.) (from the papers of Walter J. Muller, Box 14, Item 86 at the Hoover Archives, Stanford University, Palo Alto, CA). In Hesse and Wuerttemberg-Baden, parties that failed to receive 5% of votes cast in the June Constitutional Assembly elections obtained no Constitutional Assembly seats. GILLEN, *supra* note 35, at 28.

Bavarian Constitutions of 1919 and 1923.¹⁰¹ Furthermore, the give-and-take between political parties had led to compromises that muted the alleged extremism. For example, public schools would follow the so-called confessional model, but schools would be Catholic, Protestant, or nondenominational depending on the predominant religion in the area.¹⁰²

Regarding the Senate, the Assembly agreed on a compromise between the SPD, which opposed giving a senatorial body any power, and the CSU, which sought for it a strong role. The Assembly agreed there would be a sixty person Senate elected for six-year terms from within public or private corporations. The Senate would include members chosen from trade unions (at the SPD's insistence), as well as representatives from agriculture and forestry, trade and industry, handicrafts, cooperatives, so-called free professions, and religious institutions.¹⁰³ As another compromise, the Senate would have limited rights of participation in matters such as budgets and constitutional amendments.¹⁰⁴

The *Staatspräsident* was to be a strong executive elected directly by the voters rather than the *Landtag*.¹⁰⁵ He was expected to break legislative

100. It should also be noted that two factions had developed within the CSU, representing different views: a "progressive, liberal-conservative, interdenominational group" led by Josef Müller, and a "traditionalist, fiercely moral, Roman Catholic wing," led by Friedrich Schaeffer, Anton Pfeiffer, and Alois Hundhammer. PETER JAMES, *THE POLITICS OF BAVARIA—AN EXCEPTION TO THE RULE* 95 (1995).

101. CONSTITUTIONS OF BAVARIA, HESSE AND WUERTTEMBERG-BADEN, *supra* note 37. It is important to note that of all the *Länder* constitutions, the Bavarian Constitution least resembled the Weimar models. Interestingly, this actually brought forth favorable comments from Carl Friedrich, an academic who worked with OMGUS in political reconstruction. Friedrich feared that the "Weimar" model too much resembled the French system, with a unicameral legislature, acceptance of a multiple party system, and proportional representation. Carl Friedrich, *quoted in* GILLEN, *supra* note 36, at 45. This could lead, in his view, to the same "paralysis and chaos of Weimar, and thus usher in right-wing populist extremism to restore order." *Id.* The Bavarian model, on the other hand, adopted the "much more stable Swiss type" with a bicameral legislature and restrictions on party representation. *Id.*

102. DORONODO, *supra* note 4, at 43.

103. The sixty members were composed of eleven representatives from forestry and agriculture, five from industry and trade, five from handicrafts, eleven from trade unions, four from the press, five from cooperatives, five from religious societies, five from welfare institutions, three from higher education and academies, and six from the *Gemeinde*. GILLEN, *supra* note 35, at 38.

104. DORONODO, *supra* note 4, at 43. According to Doronodo, the main basis of the compromise was the inclusion, at the insistence of the SPD and the Communist Party (KPD), of trade-union representatives in the Senate. *Id.*

105. *Id.* at 44.

deadlocks through demands for referenda and issue emergency decrees in times of crises. The idea aroused suspicions among OMGUS officials and Washington policymakers.¹⁰⁶ Ironically, in many ways, the *Staatspräsident* was more similar to the American model of a chief executive who also acts as head of state. The concept actually caused a split in the CSU, with CSU party leader Josef Müller voting against it, and in an apparent role reversal, the SPD assembly leader voting for the measure.¹⁰⁷ It failed by one vote in the Assembly, and at least one German newspaper reported on the “dissent and fraction” occurring as a result in both the CSU and SPD.¹⁰⁸

The Constitutional Assembly accepted the proposed Bavarian Constitution by a vote of 134 to 18 on 20 September 1946.¹⁰⁹ The *Staatspräsident* idea had been eliminated, but the Minister-President would still act more independently than Minister-Presidents in other *Länder*.¹¹⁰ The two major parties supported and urged voter approval of the document. The KPD publicly proclaimed it a reactionary document, focusing in particular on the ten percent clause, the Senate chamber, and the provisions for confessional or quasi-confessional schools.¹¹¹ Some Washington policymakers also objected to it more than any other *Land* constitution.¹¹²

106. *Id.*

107. *Id.*

108. *The Political Course in Bavaria*, NEUES DEUTSCHLAND, Dec. 1, 1946 (OMGB Intelligence Branch, trans.) (from the papers of Walter J. Muller, Box 14, Item 86 on file at the Hoover Archives, Stanford University, Palo Alto, CA).

109. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, NO. 72 (Sept. 26, 1946) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

110. As the introductory comments to the constitutions point out,

The executive power is exercised under the direction of the Minister-President and his Cabinet who are chosen by, and responsible to, the *Landtag*. (The Constitutions of Hesse and Wuerttemberg-Baden clearly provide for the parliamentary form of government; the Bavarian Constitution is somewhat ambiguous on this point and reflects convention [sic] sentiment favoring a more independent type of executive.)

CONSTITUTIONS OF BAVARIA, HESSE AND WUERTEMBERG-BADEN, *supra* note 37, at 2.

111. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, NO. 27 (Oct. 31, 1946) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

112. GIMBEL, *supra* note 12, at 92. Gimbel also points out that Clay defended the U.S. zone *Länder* constitutions against War and State Department objections to the point that, if Washington policymakers were adamant with their objections, the President would have to decide the matter. *Id.*

The Office of Military Government for Bavaria, however, did not view the document as extreme as its detractors pronounced it to be, and refused the petitions of the KPD and other small parties to eliminate the 10 percent mandate clause.¹¹³ Clay did not view it as extreme as some Washington policymakers did either. Responding to concerns from the Chief of the War Department's Civil Affairs Division, he took issue with unilaterally changing provisions in the proposed Bavarian Constitution:

The proposed changes can be obtained only by military government decree. If such a decree were issued, I believe as a minimum the full support of both major parties in all three states would be lost and the constitutions would go before the people with only single party support. However, we might fail to get the approval of the constitutional assemblies and therefore have to defer the submission of the constitutions to the German people for ratification. It is our belief that the latter occurrence would be disastrous to our accomplishments in government to date.¹¹⁴

Furthermore, Clay disagreed with many of the comments War Department experts offered. He indicated that he could not see how OMGUS could press for a parliamentary style Minister-President, "since in the United States the President does continue in office whether or not he has full party support in Congress."¹¹⁵ He also disagreed with concerns over constitutional provisions regarding suspension of certain civil liberties in periods of emergency. Clay responded that such restrictions did not convey any more authority than many American governmental officials had under martial law and further believed the provision establishing a Constitutional Court would guarantee that individual rights "would not be abused."¹¹⁶ He also added, "Finally we must point out that the constitutional assemblies of the three *Länder* composed of representatives freely elected by the people have devoted three months of sincere and conscientious effort to the drafting of these constitutions. They are major advances over the Weimar constitutions."¹¹⁷

113. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 76 (Oct. 24, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

114. LUCIUS D. CLAY, *Constitutions for Länder in U.S. Zone*, in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 270.

115. *Id.*

116. *Id.*

117. *Id.*

Washington policymakers did not alter the proposed constitution, and the OMGB and OMGUS approved the proposed Bavarian Constitution with minimal changes.¹¹⁸ The vote for the Constitution and the *Landtag* was set for 1 December 1946. As it had in the prior elections, OMGB deliberately refrained from making comments approving or disapproving any candidates, despite reports indicating Bavarians were “not yet in many instances capable of using [the democratic right of election].”¹¹⁹ During the fall of 1946, reports indicated the CSU was relatively dormant, perhaps confident in its strength.¹²⁰ The KPD, on the other hand, did the most campaigning of any Bavarian party.¹²¹

When election day arrived, once again voter turnout was heavy, with 76 percent of those eligible participating. The Constitution won approval by 70 percent of votes cast. The CSU once again emerged triumphant and became dominant in the *Landtag*, gaining 104 of 180 seats (52 percent). The SPD gained fifty four seats with 28 percent of the vote, and two smaller parties, the Economic Reconstruction Party and the FPD obtained thirteen (7.39 percent) and nine (5.64 percent) seats, respectively. The KPD was shut out of the *Landtag* entirely, having failed to obtain at least ten percent in any single *Regierungsbezirk*.¹²² The Office of Military Government for Bavaria reports attributed the shutout to the conservative Bavarian peasantry and the strong anti-Communist stance of the Catholic and Protestant churches: “Only one conclusion can remain. The conservative, highly religious Bavarian peasantry rejects any political influence which is at variance with the dogma of its faith. In times of trouble and uncertainty such as these, they continue to seek solace and advice from their local minister or priest.”¹²³

The CSU, the passage of the more conservative Constitution, and the KPD shutout aroused concern among Germans outside Bavaria. Many northern Germans were skeptical of the CSU dominance and concerned about the incoming CSU Minister-President Hans Erhard.¹²⁴ Within Bavaria, there was also concern about the KPD shutout. A Munich news-

118. As evidenced by the final product itself. See CONSTITUTIONS OF BAVARIA, HESSE AND WUERTTEMBERG-BADEN, *supra* note 37.

119. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, NO. 82 (Dec. 5, 1946) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD) [hereinafter Report No. 82].

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

paper stated that it was to “be regretted,” because Communist opposition was traditional in the Bavarian *Landtag* and “the Communists can claim the fact of having been the most decisive fighters against National Socialism and doubtless they sacrificed the greatest number of victims in penitentiaries and concentration camps.”¹²⁵

Once again, however, no claims were made that OMGB had turned the results with any sort of overt or covert influence. Furthermore, there were no significant reports of unrest, rioting, or voter fraud.¹²⁶ If the CSU victory and the KPD shutout significantly reduced Communism as an influence in postwar Bavaria, it occurred within the broad parameters OMGUS and OMGB had set. The Bavarians, however, had taken significant actions themselves—party organizing, campaigning and voting. Thus, by the end of 1946, barely eighteen months after the surrender and amidst extreme material deprivation and hardship, Bavarians not only elected governmental officials at all levels, but also approved a democratic, federalist-oriented constitution—significant steps towards a democratic, decentralized German nation.

D. Democratic Reform in Bavaria: An Assessment

Boyd Dastrup, who studied the occupation of Nuremberg, has argued that the military government’s policy in Bavaria was paradoxical in that it used “authoritarian means to establish a democracy.”¹²⁷ It appears, however, that while OMGB resorted to compulsion at times to guide Bavarians away from a radical separatism or antidemocratic extremism, it tried to intervene as seldom as possible.¹²⁸ Rather, the kind of government the American military government wanted for Germany, a federalist democracy, comported well with postwar Bavarian desires. Bavarian political

124. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 87 (Jan. 9, 1947) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

125. *Who Will Govern in Bavaria?*, MUNCHNER MITTAG, Dec. 4, 1946 (OMGB Intelligence Branch, trans.) (from the papers of Walter J. Muller, Box 14, Item 86 at the Hoover Archives, Stanford University, Palo Alto, CA).

126. No such references are found in any of the OMGUS or OMGB weekly and monthly reports during this period.

127. Dastrup, *supra* note 23, at 166. This theme has also been explored in other works on the occupation. See JOHN D. MONTGOMERY, FORCED TO BE FREE: THE ARTIFICIAL REVOLUTION IN GERMANY AND JAPAN (1957); John Gimbel, *The Artificial Revolution in Germany*, 76 POL. SCI. Q. 88-104 (1961).

128. See *infra* 144-47.

leaders, especially those in the newly formed CSU, saw advantages in such a governmental structure. While those leaders at times disagreed with the American model in all its respects, such as in its insistence on a nonpopularly elected, advisory Senate, the Bavarian constitution, while more controversial than that of the other *Länder*, was deemed acceptable.¹²⁹

There were, however, more profound difficulties in the American attempt at democratic reform along federalist lines. As John Gimbel points out, the push by OMGUS and OMGB for local and *Länder* elections as well as self-government under *Land* constitutions in turn created resistance to the formation of centralized governmental institutions such as the *Länderrat* and the bizonal economic agencies.¹³⁰ Yet Bavaria had little choice but to accept such arrangements for its own good. Low in industrial goods and raw materials such as coal, it needed other German zones to open their borders in order to revive itself. In turn, those *Länder* needed Bavaria for its agricultural products. In short, the *Länderrat* and bizonal agencies revealed the limits of federalist autonomy and arguably gave the Bavarian government experience in the give-and-take required for a semi-autonomous state to work together, while pursuing its own self-interests.¹³¹

Another criticism is that so-called “grass roots” democracy never took firm hold and that the Americans made misguided efforts to “jump

129. Bavarian influence on the formation of the Federal Republic and the drafting of Germany's Basic Law was especially felt in the adoption of certain federalist principles. Anton Pfeiffer, from the CSU, was the leader of the CDU and CSU fraction at the Parliamentary Council, and Pfeiffer and the other Bavarian representatives insisted on promoting maximum federalism. JAMES, *supra* note 100, at 114. The biggest checks on government centralization in the German government are the Federal Constitutional Court and the Council of Constituent States (*Bundesrat*), which represents the various influences of *Länder* governments and has veto powers over certain laws that could affect financial or administrative interests of the *Länder*. The Basic Law itself contains certain articles (Articles 30, 31, and 50, especially), which provide for a federalist structure. R. Taylor Cole, *Federalism: Bund and Länder*, in *POLITICS AND GOVERNMENT IN GERMANY, 1944-1984: BASIC DOCUMENTS* 325-29 (Carl-Christoph Schweitzer et al. eds. 1995). Federalism's continued vitality, however, is currently a subject of debate in light of the current trend toward European economic and political unification. For an English language description of this debate, see Donald P. Kommers, *The Basic Law: A 50 Year Assessment*, 53 *SMU L. REV.* 487-510 (2000); Helmut Steinberger, *50 Jahre Grundgesetz*, 53 *SMU L. REV.* 494-500 (2000).

130. “Clay's push for local and *Länder* elections and for self-government under constitutions encouraged particularism and states' rights interest groups that resisted his intention to promote economic unity and centralized economic decisions first at the *Länderrat* and then at the bizonal level.” GIMBEL, *supra* note 12, at 69.

start” German democracy.¹³² Clay received criticism from his own staff for establishing structures of democracy within a space of months rather than years. Some critics deemed such measures would be worthless without a large-scale reorientation towards democracy:

Perhaps the greatest weakness in the American efforts in this field lay in their formality. Too much emphasis was placed on the holding of elections, the framing of constitutions and laws, the setting up of the machinery, and other more or less mechanical techniques. Too little attention was given to cultivating Germans disposed to support a democratic system in Germany, filling public offices with able Germans who could be expected to fight for the democratic cause during critical periods of attack in the future, and educating the Germans as to the meaning of representative democracy.¹³³

Such reorientation never occurred within the American zone. Except for denazification, no widespread attempt at “democracy education” occurred.¹³⁴ Joseph Mire, in an OMGUS advisory paper about the German civil service, wrote in 1949 of the need for a “reconstruction of the German society towards a genuinely democratic state”¹³⁵ But by 1949, he was cry-

131. This was made more true by the fact that decisions could only be obtained through unanimous vote from all the *Länder* Minister-Presidents or their representatives, and that the presidency of the *Länderrat* rotated among the *Länder* Minister-Presidents every three months, “thereby working to prevent too great an accumulation of power in any one capital.” DORONODO, *supra* note 4, at 57.

132. See REBECCA BOEHLING, A QUESTION OF PRIORITIES: DEMOCRATIC REFORM AND ECONOMIC RECOVERY IN POSTWAR GERMANY *passim* (1996).

133. ZINK, *supra* note 10, at 185. A related criticism is that the decision to begin a German political revival no sooner than the fall of 1945 was an unnecessary “postponement”:

Public order, a smoothly running bureaucracy, and an expedient material reconstruction took priority for most MG [military government] detachments over any goals of democratization, whether in the form of government accountability to the citizenry or genuine civic participation in government. . . . [O]nce all the cogs of the bureaucratic wheel had been well greased and were functioning smoothly, [the] propitious moment for initiating the process of reconstructing local democracy in Germany was gone.

BOEHLING, *supra* note 132, at 156-57. One could counter that public order, a functioning bureaucracy, and material reconstruction are prerequisites for a healthy and functioning democracy.

134. See *supra* note 21.

ing out far too late. That year, virtually all aspects of American occupation disappeared.

It appears, however, that the social reformers overstated their case considerably in postwar Germany. If Nazism really *was* the expression of the deepest cultural values of the German people, then the reformers' claims would have been borne out by some subsequent rise of militaristic extremism.¹³⁶ Rather, it appears that especially in Bavaria, Nazism represented not the deepest expression of values, but rather a significant departure from Bavarian tradition and experience.¹³⁷ The disasters that the Nazis—many of the most ardent of whom were Bavarians—inflicted upon the world and Germany itself convinced most Bavarians that the federalist democratic model the Americans put forth, with some modifications, was a more viable postwar option and kept with Bavarian political tradition.¹³⁸

Opinion polls and surveys conducted of postwar Germans indicated that they were ready and willing to embrace much of the American occupation policy goals. Unlike the defeat in World War I, only a small number saw the American occupation as a blot on national honor—perhaps because they were disgraced and ashamed by the world's discovery of the crimes against humanity that so many of them had committed.¹³⁹ If the

135. Joseph Mire, Labor Organization in Germany Public Administration and Services, Visiting Expert Series, No. 8 (1949) (from the papers of Walter J. Muller, Box 13, Item 80 on file at the Hoover Archives, Stanford University, Palo Alto, CA).

136. Morgenthau apparently thought that such militarism would reappear. Nearing his death, he told a historian that the United States would "have to fight Germany again before you die." He said this shortly before his own death in 1967. BESCHLOSS, *supra* note 13, at 252.

137. See *supra* notes 4-6.

138. The renowned Third Reich scholar Ian Kershaw argues that Nazism never achieved its purpose of bringing about a true social revolution in Germany. Nazism failed to break down religious allegiances and no evidence suggests that "family structures came anywhere near to breaking down under Nazism." KERSHAW, *supra*, note 14, at 178. Furthermore, while enhancement of existing anti-Semitic and other prejudices undoubtedly occurred, "the growing protest against the 'euthanasia action' and the regime's perception of the need for utmost secrecy in the 'Final Solution' are indirect testimony that exposure to Nazi race values had come nowhere near completely eradicating conventional moral standards." *Id.* at 178-79. Kershaw also examines and critiques the "Goldhagen thesis" that the Holocaust was a natural product of a deeply rooted, racist anti-Semitism in German society. *Id.* at 253-62; see DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS *passim* (1996); see also PETER FRITZCHE, GERMANS INTO NAZIS *passim* (1998) (providing an analysis of how the German people embraced Nazism, not as a "hyperventilated expression of German values," but as a populist movement that sought to rekindle German nationalism prevalent at the outbreak of World War I).

recent Nazi past held nothing but shame, the American model brought forth in Bavaria a sense of renewal, a way to sever the ties, or at least distance itself, from the Third Reich.¹⁴⁰

To a large degree, this severance and renewal occurred. The CSU, and its northern German sister party, the CDU, led by Konrad Adenauer, became the dominant force in postwar German political life, and the CSU subsequently played a major role in drafting the Federal Republic's Constitution, the so-called Basic Law.¹⁴¹ As a result, the Federal Republic put significant checks on the central government's power, which only received powers to it granted by the Constitution itself.¹⁴²

The evidence indicates that Bavarians accepted most of the democratic reforms. It would be incorrect to hold that this ready acceptance

139. MERRITT, *supra* note 14, at 245. In addition to Merritt's analysis of postwar German opinion, American military government Information Control censors reviewed thousands of letters during a four month period:

Based on 21,306 opinions as expressed in 16,048 letters read by Berlin censors between December 1945 and March 1946, the study portrayed the sentiments of the Germans towards each of the occupying powers. Approximately 75 percent of the comments on the American forces expressed satisfaction, whereas a full 80 percent of the remarks on the Russian forces were unfavorable.

Office of Military Government for Germany Information Control Division, Intelligence Summary (ICIS), No. 47 1-4 (June 22, 1946), *cited in* MARGARET L. GEIS & GEORGE J. GRAY JR., *THE RELATIONS OF OCCUPATION PERSONNEL WITH THE CIVIL POPULATION, 1946-1948* 11 (1951) (on file at the CARL, Fort Leavenworth, Kansas).

140. MERRITT, *supra* note 14, at 243. As the German historian Gordon Craig states,

It was not a time conducive to nostalgia, but rather one in which the Occupying Powers encouraged the Germans to reflect upon the consequences of their past political behavior, while they themselves pursued a policy of denazification, disarmament, dismantling and democratization that was designed to prevent a reversion to old ways."

GORDON CRAIG, *THE GERMANS* 35 (1982).

141. Friedrich Glum of the Bavarian Chancellery wrote much of the first draft of the German Constitution, calling it the "Constitution of the United States of Germany." *Quoted in* DORONODO, *supra* note 4, at 79.

142. *Id.* Throughout the Parliamentary Council that led to the creation of the Basic Law and the first Federal Republic government, the SPD stood for strong central government, with powers similar to the old Weimar Republic. The CSU and CDU faction stood for a limited government with "all rights not expressly granted to it reserved to the individual states." GILLEN, *supra* note 35, at 216.

meant that OMGB was unnecessary or even a hindrance in Bavaria, and that the Americans only succeeded when they, in essence, stumbled off the stage.¹⁴³ D. R. Doronodo, who writes positively of the influence of Bavarian federalism on West Germany, gives several reasons for federalism's postwar success, including: no central German government, no hegemonic Prussia, and no ideological division.¹⁴⁴ He makes no mention, however, of the American military government's contribution in setting up the conditions that would allow federalism to flourish in Bavaria, the *Land* most receptive to such a political idea.¹⁴⁵ Edward Peterson, a critic of the occupation, states more openly that the OMGB officials were essentially "irrelevant" in Bavarian political matters.¹⁴⁶ But this begs the question of who, then, *was* relevant. Peterson identifies the real figures as the Bavarian Minister-Presidents: "None so seriously influenced events as to be comparable to minister-presidents in importance."¹⁴⁷ Yet he also asserts that neither Wilhelm Hoegner, the SPD Minister-President for much of the 1945-47 period, nor OMGB, were key players because "political power in Bavaria rested with the Catholic party, the CSU."¹⁴⁸

This consigning of American military government to irrelevance regarding postwar democratization is incorrect. It is more accurate to say that American military government provided the framework for democracy, a framework that Bavarians ultimately accepted. It stressed the need for decentralization and federalism, which Bavarians embraced. Finally, it required a written constitution enshrining individual rights and semiauto-

143. See PETERSON, *supra* note 22, *passim*.

144. DORONODO, *supra* note 4, at 125.

145. *Id.* Doronodo states that "[t]hese circumstances, arising as they did in the wake of war and defeat, conditioned the leading politicians of the western occupation zones to be more amenable to a search for a political organization of the state which would avoid the centralization of the pre-1933 era." *Id.*

146. PETERSON, *supra* note 22, at 215.

147. "What [Minister-President] Hoegner and [General] Muller thought became more and more irrelevant, however. Political power in Bavaria rested in the Catholic party, the CSU." *Id.*

148. *Id.* at 228. It should also be noted that OMGB selected (and, in the case of the first Minister-President, Friedrich Schaeffer, summarily dismissed for allegedly reactionary tendencies) the Bavarian Minister-Presidents. Furthermore, while it permitted the CSU to expand in Bavaria, it also appointed Minister-President Wilhelm Hoegner, a member of the SPD, as Schaeffer's replacement in September 1946. The CSU, while clearly the dominant party in postwar Bavaria, did not have the monopoly on the vote. Its percentage of the popular vote diminished from the time of the first *Gemeinde* elections to the December *Landtag* elections, when it barely achieved an absolute majority with 52.2% of the vote. *Id.* For example, the SPD outpolled the CSU in Munich, 103,912 votes to 97,897, for the *Landtag* elections in December 1946. CASE STUDIES, *supra* note 2, at 83.

nomous local government, which Bavarians voted for by a large margin. Most Bavarians accepted these reforms and have continued to accept them virtually without question for half a century.

The role of Bavarians in the democratizing process was important as well. The Bavarians' stubborn particularism, religious belief, and traditionalist views could prove especially difficult for the Americans. At the same time, these very traits proved beneficial. They provided a means for Bavarians to break away from Nazism. Bavarians looked back to their own history and faith for renewal. Ultimately, Bavaria's unique role in Germany and emphasis on *Land* autonomy helped pave the way for a federalist German state with governmental structures that would provide a counterweight to any future centralizing totalitarianism.

II. Conclusion: Lessons Learned for Future Occupations?

Can lessons be derived from the first years of the American occupation of Germany, and in particular Bavaria, that might be useful in possible future occupations? A simple checklist approach can be dangerous, since historical circumstances vary so significantly. Nonetheless, a recent RAND Corporation study came up with some explicit lessons learned from Germany for Iraq.¹⁴⁹ One can perhaps add four more lessons learned,

149. JAMES DOBBINS, ET. AL., AMERICA'S ROLE IN NATION-BUILDING FROM GERMANY TO IRAQ 3-23 (2003). The seven explicit lessons learned from the occupation of Germany were:

[1] Democracy can be transferred, and societies can, in some situations, be encouraged to change. [2] Defeated populations can sometimes be more cooperative and malleable than anticipated. [3] Enforced accountability for past injustices, through such forums as war crimes tribunals, can facilitate transformation. [4] Dismembered and divided countries can be difficult to put back together again. [5] Defeated countries often need sizable transfers to cover basic government expenditures and quickly provide humanitarian assistance after the conflict. [6] Reparations immediately after the end of the conflict are counterproductive. The economy must grow before a country can compensate the victims of the conflict. [7] Permitting more than one power to determine economic policy can significantly delay economic recovery."

Id. at 20-21.

based upon this study of democratization and federalism in Bavaria from 1945 to 1947.

First, little "social engineering" occurred in Bavaria.¹⁵⁰ The American military government did not accept the Marxist notion that the political was the cultural, and vice versa. Rather, it sought for, and achieved to a large degree, decentralized government, but did so within the framework of Bavarian cultural experience. The military government, for example, did not at all attempt to reform or undermine the confessional school system.¹⁵¹ Instead of alienating the conservative, Catholic and agrarian Bavaria, it saw the region as a place that could foster federalism.¹⁵² Partly as a result, the exclusion of Communist and radical socialist influence in Bavaria, was achieved relatively easily.

Second, and related to the first point, what the American military government sought was not cultural or social revolution, but structural political change.¹⁵³ In achieving this change, the Americans would not be bound by what they would have regarded as a kind of pedantic legalism about what laws would or would not apply. *Debellatio* simply swept all those notions aside.¹⁵⁴ Furthermore, American military government retained, at least during the first two years of the occupation, ultimate control, as evidenced by its power to set the conditions for constitutional approval.¹⁵⁵ Thus, while deliberately not interfering with matters of faith and culture, the Americans had no hesitation in interfering in political or legal matters as they saw necessary.

Third, guidance from above meant less than prompt execution on the ground. General Clay admitted he was given almost no guidance how to carry out the occupation.¹⁵⁶ It is perhaps more accurate to say that the guidance, contained in such documents as the Potsdam Declaration and JCS 1067, was abstract and sometimes platitudinous.¹⁵⁷ Regardless, Clay and the American occupiers simply did not take counsel of the fears of many presumed experts. They launched an ambitious effort to democratize and decentralize almost immediately, probably thinking that any set

150. *See infra* pp. 122-24 and note 21.

151. *Id.*

152. *See supra* note 28.

153. *See supra* note 15.

154. *See supra* note 19.

155. *See infra* pp. 139-42.

156. *See infra* pp. 125-27 and note 30.

157. *See supra* notes 11-12.

plan for constructing democratic federalism was almost sure to be significantly altered very soon in its course.¹⁵⁸ More important was setting democratic federalism in motion. Allowing the mechanics of democratization and decentralization to be put in effect, and allowing the Bavarians to use (and get used to) those procedures, while at the same time keeping ultimate veto power, was the American military government's approach at a kind of "guided" democracy.

Fourth, the American military government did not wear ideological blinders. Clay, for example, clearly thought little of New Deal-type social reformers who wanted to upend German culture.¹⁵⁹ On the other hand, the Americans did not view federalism as the *sine qua non* of Bavarian or German military government in all cases. The establishment of the *Länderrat* to some degree, and even more so of the bizonal merger, was a recognition that economic centralization, at least temporarily, had to occur.¹⁶⁰ This pragmatism perhaps relates back to the previous point. The very lack of guidance was in a profound way a beneficial non-intrusion that provided the American occupiers flexibility in coming up with solutions that perhaps had an improvisatory feel to them. The solutions worked relatively well precisely because they were based upon immediate needs and not set-in-stone, inflexible political philosophies or agendas.

There are no ideal military occupations. The American military government in Bavaria made mistakes during the years 1945-47. However, the opinions of particular columnists, scholars, generals, or statesmen mean much less than history's verdict. Bavaria continues to flourish into the twenty-first century as part of a now united, democratic Germany. If a half-century of peace, prosperity, and democracy is taken as evidence, the reasonable conclusion must be that the American military government's efforts to establish a constitutional, federalist democracy in Bavaria achieved success.

158. *See infra* pp. 128-30.

159. *See supra* notes 33.

160. *See infra* pp. 135-38.