



# Lawyers and Bar Associations Play a Vital Role in Preserving the Rule of Law: A Study of How Hitler Perverted Germany's Judicial System Highlights the Importance of Lawyers

“The only thing necessary for the triumph of evil is that good men do nothing.”

John F. Kennedy<sup>1</sup>

On Law Day, our nation recognizes the importance of the rule of law. President Barack Obama recently described its purpose:

When President Dwight D. Eisenhower established Law Day in 1958, he proclaimed it ‘fitting that the people of this nation should remember with pride and vigilantly guard the great heritage of liberty, justice, and equality under law which our forefathers bequeathed to us.’ Today, we celebrate that enduring legacy and renew our commitment to a democracy sustained by the rule of law.<sup>2</sup>

The Law Day event hosted by the Virginia Beach Bar Foundation and many sponsors (including the Federal Bar Association) in May 2013 involved a study of the fragility of the legal system that protects us, with vivid historical reminders of how the rule of law can be eroded if it is not vigilantly guarded. The program, entitled “Eroding and Restoring the Rule of Law: From Hitler’s Decree to the Nuremberg Trial,” focused on how Adolf Hitler perverted Germany’s judicial system to convert the country from democratic to dictatorial governance. The presentation also described how U.S. leadership in the post-war trial of Nazi leaders helped the survivors in Nazi-occupied lands start to rebuild the rule of law.

President Eisenhower aptly declared, “The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.” The examination of Germany’s rapid decline from democracy to dictatorship in the 1930s provides a perfect example and offers a case study of how lawyers and judges could make a critical difference during trying times by fulfilling their duty to uphold the rule of law. As President Obama declared, “Our courts are the guarantors of civil justice, social order, and public safety, and we must do everything we can to enable their critical work.”<sup>3</sup>

Adolf Hitler understood this and focused on lawyers and judges as potential impediments to his quest for unfettered power. Lawyers, judges, and bar associations are positioned to play a key role in protecting the rule of law when political developments threaten its integrity. Ignoring such threats can lead to dangerous consequences for a nation’s legal process and its citizens.

## Protection of Civil Rights Under the Weimar Constitution

In 1932, the Weimar Republic of Germany was a democratic republic with a parliament and president elected by the people. The system included checks and balances, with a chancellor responsible to the parliament and courts of justice protecting the rights of individuals.

Among the rights guaranteed by the Weimar Constitution were equality before the law for all German citizens, women’s suffrage, freedom of religion, and freedom of speech. The constitution protected economic rights, including rights to acquire property and pursue a trade. It also mandated judicial independence, stating that judges were subject only to the law.

Individual liberties could be limited only on the basis of the law. One’s home was considered an inviolable asylum and could not be invaded without legal process. The privacy of mail, wire, and telephone communications was also protected against unwarranted government intrusion.

The legal profession was vibrant and diverse, with active bar associations in major cities. In many German cities, a significant portion of the lawyers and judges were Jewish. As of Jan. 1, 1933, Berlin alone had more than 1,700 Jewish lawyers, including some women lawyers.<sup>4</sup>

Well before the Nazi SS enforcers sent 6 million Jews and 5 million other non-Aryans to concentration camps and ultimately death camps, they seized Jewish citizens’ property and stripped their livelihoods. Did the victims of property seizures seek legal recourse in German courts? Did they hire Jewish lawyers to file claims over what was unfairly taken?

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## Hitler's Assault on the Legal System

Adolf Hitler took early measures to prevent those victims from engaging their brethren to seek restoration of their legal rights. Hitler recognized that lawyers and judges could pose impediments to his grandiose plans for a vast Aryan empire. In March of 1933, just two months after he became chancellor, Hitler and his cronies began issuing decrees barring Jewish lawyers and judges from German courts.<sup>5</sup> Consequently, the legal experts who were most likely to protect the Jewish citizens against property seizures and involuntary transfers of their businesses to Aryans were unable to do so. This move went unchecked and paved the way toward a methodical erosion of the rights of Jews and other citizens who did not meet the Nazi definition of Aryan.<sup>6</sup> The incursions into human rights ultimately affected all persons under Nazi rule—even Aryan German citizens lost rights previously protected by the Weimar Constitution.

How did Hitler manage to override the rights guaranteed in the constitution? In 1930, the Nazis won only 18 percent of the parliamentary seats, but that result made it the second-largest party in the Reichstag. Hitler and his devotees worked on amassing their power, pursuing their agenda, and eliminating those who would try to stop them. They were ruthless in their use of violence and terror for political gain. Nazis launched violent attacks against communists, socialists, and many other groups they regarded as impediments to their increasing power.

One Jewish lawyer in Berlin had previously tried to challenge the Hitler-led violent assaults against political opponents. In 1931, Hans Litten subpoenaed Hitler, as Nazi party leader, to testify in a case against four Nazis accused of killing communists. Litten grilled Hitler for three hours, showing how the Nazis plotted revolution and used violence against political adversaries. Hitler defiantly testified that the Nazis were a peaceful democratic movement. The testimony could have exposed him to criminal charges for perjury, but the Nazi-leaning judge was sympathetic. Instead, Litten was one of the first political opponents the Nazis rounded up for persecution after Hitler became chancellor.

In 1933, the Nazis arrested Litten and sent him to a concentration camp. Despite his mother's appeals through her political connections, including to Prince Wilhelm of Prussia, she could not secure her son's freedom. According to a story later told by the Nazi President of the People's Court, Hitler once yelled at Crown Prince Wilhelm, "Anyone who advocates for Litten lands in the concentration camp, even you!" Litten died in a concentration camp after five years of torture and interrogation.<sup>7</sup> Such tactics effectively eradicated and deterred those who opposed Hitler's rise to power.

## The Making of "The Führer"—He Who Must Be Obeyed

On Feb. 25, 1932, Adolf Hitler (born in Austria) acquired German citizenship through bureaucratic maneuvering so he could run for president in March. A run-off election was required in April between Hitler and the incumbent, President Paul von Hindenburg. Hitler came in second to the aging war hero von Hindenburg. President Hindenburg later succumbed to Nazi pressure and appointed Hitler as chancellor of Germany on Jan. 30, 1933.

Hitler then pushed Hindenburg to dissolve the Reichstag and schedule a new general election for March 5, 1933. Hitler and his Nazi party leaders developed elaborate schemes to remove and intimidate their political opponents before the election. Although

the Weimar Constitution protected free speech and freedom of association, Chancellor Hitler immediately banned all political demonstrations except those of the Nazi (National Socialists German Workers') Party.

Hitler's plans to quash the opposition were greatly advanced by the February 27, 1933, fire in the Reichstag parliament building. Hitler used the fire as an effective propaganda ploy. He argued publicly that the fire was a sign of a massive communist plot and the start of what would be a series of terrorist attacks against Germans by communists. He pressed Hindenburg to issue the Reichstag Fire Decree, which suspended basic legal rights and allowed detention without trial.

Hitler successfully asserted that the communist threat required emergency measures so that suspected communists could be eliminated. (Litten was among the "suspected communists" arrested the night of the fire.)<sup>8</sup> With the communists in detention and the remainder of the Reichstag voting under the watchful eye of Nazi Sturmabteilung (SA) troopers who stood guard over the balloting, the Reichstag voted to adopt the Enabling Act on March 23, 1933. The act relinquished all legislative power to Chancellor Hitler and his cabinet for four years. The day prior to this vote, the Nazis had already opened their first concentration camp in Dachau, with space for 5,000 political prisoners.

Hitler used his expanded authority to broaden his attacks and target the groups he thought might oppose his increasing powers. He targeted groups he suspected of being anti-Nazi and groups that did not fit his Aryan ideal, such as Jews, Freemasons, homosexuals, and the handicapped. Later, he even declared Rotary Club membership to be incompatible with Nazi party membership. After Hitler issued the decree barring Jewish lawyers and judges from German courts, the Nazis publicly warned people not to use Jewish lawyers.<sup>9</sup> Hitler continued to manipulate the legal system to amass greater powers.

Although he never gained an absolute majority of votes in Germany that could have entitled him to become chancellor or president directly, Hitler obtained these titles through political maneuvering. Anticipating Hindenburg's death, the Reichstag passed a law allowing Hitler to become Hindenburg's successor as president, while remaining chancellor. The next day, August 2, 1934, Hitler took both mantles and subsequently claimed the moniker "Führer." Later that month, he made all remaining judges and lawyers swear an oath of loyalty to the Führer. No longer could Germany hope to have an independent judiciary subject only to the law.

A review of the Nazi erosion of the rule of law reveals thousands of decrees and laws issued by Hitler and the Nazi government that systematically perverted the justice system and obliterated the protection of individual rights. The Nazis exploited the people's distress and developed wide-sweeping propaganda plans to unite the German people against a common enemy: first the alleged communists and then those identified as Jewish. They also targeted other groups or individuals who opposed their agenda.

The new rules under the Nazi regime:

- Banned all political parties except for the Nazi party;
- Prohibited Jews and other non-Aryans from holding government jobs;
- Created a secret state police (the Gestapo) to gather intelligence

on what citizens were doing;

- Confirmed that no court had authority to review any action by the Gestapo;
- Required Jewish landowners and business owners to transfer their property to Aryans;
- Ultimately deprived Jewish Germans of all of their rights as citizens and revoked their passports;
- Prohibited Jewish people from marrying or having relations with non-Aryans; and
- Banned all Germans from listening to foreign broadcasts and even sentenced some to death for listening to BBC News.

Hitler created special courts to try political enemies and the People's Court to dole out punishments of forced labor, imprisonment, and death to those who opposed the Nazi Party and those who did not fit his vision of a vast expanding empire of "pure Aryans." Often the same individual served as prosecutor, judge, and jury, with verdicts frequently determined ahead of time, and the defendants had no right of appeal. The so-called "trials" were frequently conducted just for show, to set an example for others who did not support the Nazi program.

According to H.W. Koch, the People's Court "seemed to embody one of the most chilling aspects of the Third Reich: the use of legal, even constitutional, means to thwart imperceptibly at first, the course of justice and impose in specific areas of the law its own definitions of right and wrong. In the hands of Hitler's judges, an important portion of the courts became a virtual arm of the state and its instrument of terror."<sup>10</sup> Nazi Propaganda Minister Joseph Goebbels advised a group of People's Court judges that they must recognize the court's political objective. "Whether a judgment was just or unjust was unimportant; what mattered was that it fulfilled its purpose."<sup>11</sup>

Thus, Hitler's early decree stripping Jewish lawyers and judges of their professional capacities marked an early step in the decline from liberty to dictatorship. According to research conducted by the German Federal Bar and documented in its exhibit, "Lawyers without Rights: Jewish Lawyers under the Third Reich," Hitler's 1933 decree barring Jewish lawyers and judges from German courts did not trigger any formal protests or objections from non-Jewish lawyers or judges. There were many respected bar associations in Germany, but they did not oppose this action. The events that followed, after Hitler perverted the judiciary to do his bidding and left the Nazi extremists unfettered to pursue their plans for massive crimes against humanity, resulted in the deadliest war in history.

It took a hard-fought military victory by the Allies against the Nazis and their Axis cohorts to bring the murders, genocide, torture, and slave labor to an end. Then it took an extraordinary courtroom drama in Germany to restore faith that the rule of law could prevail.

## The Nuremberg Trials

In 1941, President Franklin D. Roosevelt nominated Robert H. Jackson to serve as associate justice of the U.S. Supreme Court. As World War II was ending, President Harry S. Truman asked Justice Jackson to figure out how to handle the Nazi leaders who committed war crimes and atrocities against both Germans and non-Germans. He also requested that Justice Jackson represent the United States as chief prosecutor before the International Military Tribunal in Nuremberg, Germany.

The situation raised questions of grave importance concerning humanity, morality, the conduct of civilized nations, and whether and how the rule of law could apply to actions committed during a horrifically aggressive and destructive war. Justice Jackson faced profound questions of professionalism applicable to his role as a prosecutor involving the most heinous of crimes against humanity and legal challenges defining what conduct should result in criminal charges.<sup>12</sup> Previous definitions of war crimes did not contemplate the commission of crimes by a leading power against its own citizens.

Earlier in 1945, Justice Jackson had presented a major address at the American Society of International Law in Washington, D.C., in which he advocated that Nazi leaders who had been captured during the war should be given a fair trial. In his view, the impending victory that the Allies were about to secure to wrap up the most destructive war in human history should be followed by a civilized proceeding where a court of law would judge the guilt or innocence of those accused of war crimes and crimes against humanity. His position was not widely supported initially. Some of the Allied nations supported using military court martial proceedings and some favored the summary execution of Nazi leaders.

Ultimately the view held by Justice Jackson prevailed. The nations involved conferred for two months during the summer of 1945 and finally reached a consensus. The American, British, French, and Soviet governments signed the agreement, which came to be known as the London Charter, on August 8, 1945. It became the basis for the trials before the International Military Tribunal held in Nuremberg from October 18, 1945 through October 1, 1946.

The concept that individuals who commit crimes against humanity could be tried by an international tribunal and found personally responsible—even during times of war—broke new ground in the protection of human rights. President Truman assigned to Justice Jackson many tasks: determining how the trials should be conducted, defining the crimes that could be charged, finding the evidence, and leading the prosecution.<sup>13</sup> Many regard Justice Jackson's opening and closing statements as two of the most eloquent and important addresses in international law.

Through his leadership, standards of evidence were developed, rights of defendants were defined, evidence was organized, and the prosecution commenced. He also made the bold decision to film the trial, so that the people of all nations—including Germany—could see that the defendants received a fair trial. The film also gave Germans proof of the evidence that resulted in convictions for many defendants. Justice Jackson's vision and leadership played a key role in the restoration of the rule of law in Germany and Nazi-occupied lands.

Justice Jackson expected that the film would also be shown throughout the United States. However, the U.S. Department of State prevented that—for decades. A featured speaker at the Virginia Beach Law Day event, accomplished producer Sandra Schulberg described the creation of the Nuremberg trial film by her father, Stuart Schulberg, and the intriguing story of its suppression during the Cold War. The program, moderated by Susan Blackman, also included a discussion by U.S. District Judge Henry Coke Morgan, Jr., comparing the victors' post-war efforts after each world war and explaining how the Nuremberg trial and other U.S.-led initiatives created a more lasting peace than the Versailles Treaty, which ended World War I. Judge Morgan also provided examples of

highlights and low points involving the rule of law in U.S. history, to illustrate that our own country is not immune from human rights infractions but we can learn from our past to offer better protections for the future.

The Law Day event attracted an audience of 350 lawyers, students, and members of the public, who gathered before the program for a reception featuring the aforementioned German Federal Bar exhibit. Following positive reviews, bar groups in New York, Minnesota, and elsewhere are planning similar programs. FBA President Robert DeSousa attended the Virginia Beach event, which was co-sponsored by the Tidewater Chapter of the FBA, and has encouraged FBA circuit vice presidents to consider whether similar programs could be offered by their chapters.

It is appropriate that we study these lessons in our celebration of Law Day. Under the professional guidelines issued by the American Bar Association and the various states, every lawyer has a duty to uphold the constitution and protect the legal process. Judges are required to perform their duties fairly and impartially, without being swayed by political clamor or fear of criticism. In his 1958 proclamation, President Eisenhower urged the people of the United States, and especially the legal professional, to promote and participate in ceremonies and activities dedicated to the principle of government under laws. Accordingly, we celebrated Law Day 2013 by remembering the importance of the rule of law, studying how easily it can slip away, and committing ourselves to guard vigilantly the legal process and the independence of our judiciary. ☺

#### Endnotes

<sup>1</sup>President John F. Kennedy, Address to the Canadian Parliament (May 17, 1961).

<sup>2</sup>President Barack Obama, 2012 Law Day Proclamation (May 1, 2012).

<sup>3</sup>*Id.*

<sup>4</sup>See *Lawyers without Rights: Jewish Lawyers in Germany under the Third Reich*, GERMAN FEDERAL BAR, [www.schildhaus.com/downloads/BroschüreLWR\\_USA.pdf](http://www.schildhaus.com/downloads/BroschüreLWR_USA.pdf) (last visited Aug. 5, 2013).

<sup>5</sup>Richard Lawrence Miller, NAZI JUSTIZ: LAW OF THE HOLOCAUST, 84 (Praeger Publishers 1995); *Lawyers without Rights: Jewish Lawyers in Germany under the Third Reich*, GERMAN FEDERAL BAR, [www.schildhaus.com/downloads/BroschüreLWR\\_USA.pdf](http://www.schildhaus.com/downloads/BroschüreLWR_USA.pdf) (last visited Aug. 5, 2013).

<sup>6</sup>Defined in a decree issued on April 11, 1933, to exclude anyone who descended from non-Aryan, especially Jewish, parents or grandparents; those who had converted to Christianity could not qualify as Aryan.

<sup>7</sup>Hans Litten, Wikipedia, available at [en.wikipedia.org/wiki/Hans\\_Litten](http://en.wikipedia.org/wiki/Hans_Litten).

<sup>8</sup>*Id.*

<sup>9</sup>*Lawyers without Rights: Jewish Lawyers in Germany under the Third Reich*, GERMAN FEDERAL BAR, [www.schildhaus.com/downloads/BroschüreLWR\\_USA.pdf](http://www.schildhaus.com/downloads/BroschüreLWR_USA.pdf) (last visited Aug. 5, 2013).

<sup>10</sup>Hannsjoachim W. Koch, IN THE NAME OF THE VOLK: POLITICAL JUSTICE IN HITLER'S GERMANY, ix (introduction)(St. Martin's Press 1989).

<sup>11</sup>*Id.* at 4.

<sup>12</sup>Prof. John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASHINGTON UNIV. GLOBAL STUDIES L. R. 511 (2007).

<sup>13</sup>*Id.*



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