"Der Richter ist konservativ.": The German Reichsgericht and the Reichstag Fire Trial of 1933

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Abstract

For almost sixty years the *Reichstag* fire of 27 February 1933 and the events that followed have been the subjects of historical inquiry. The criminal trial against those accused of starting the fire was held before the German Supreme Court, the *Reichsgericht*.

This thesis examines the conduct of the *Reichsgericht* during the *Reichstagsbrandprozess* of September to December 1933. It shows that the trial was conducted by an independent but conservative Supreme Court which managed the proceedings according to its own historical antecedents and precedents. The evidence is based on published government documents and other primary and secondary sources.

Abrégé

L'incendie du Reichstag du 27 février 1933, ainsi que les événements qui ont suivi, ont fait l'objet de recherches historiques. Le procès contre les personnes accusées d'avoir commencés cet incendie fut tenu à la Cour Suprème allemande, la Reichsgericht.

Cette thèse étudie le comportement de la Reichsgericht durant le Reichstagsbrandprozess de septembre à décembre 1933. Elle démontre qu'une cour suprème independante mais conservatrice a dirigé ce procès selon ses propres antécédants historiques. La preuve est basée sur des documents gouvernementaux publié et sur des référence primaires et secondaires.

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Glossary

Because of the numerous German positions, codes, and terms used in this paper, a German to English glossary of the most commonly used terms is provided in order to avoid constant translation throughout the thesis:

Amtsgericht ---------- Local Court

Amtsgerichtsrat ---------- ordinary judge of an *Amtsgericht*

aufrüherische Brandstiftung --- insurrectionary arson

Beamtenbeleidigung --------- insulting an official

Bundesoberhandelsgericht --- Supreme Federal Commercial Court

Bundesrat ---------- *Reich* Federal Council

Ergänzungsrichter ---------- replacement judge

Fehlurteil ---------- false judgement; miscarriage of justice

Gerichtsverfassungsgesetz (GVG) --- Law Relating to the Constitution of Courts; Court Organization Act

Gesetz - ---------- statute; enacted law

Gleichschaltung ---------- coordination; equalization

Hauptverhandlung ---------- trial (especially a criminal trial)

Hochverrat ---------- high treason

Kommunistische Partei Deutschlands --- German Communist Party

Landgericht ---------- District or Regional Court

Landesverrat ---------- treason against the nation

Oberlandesgericht ---------- Provincial High Court

Oberreichsanwalt ---------- Federal Public Prosecutor

Reichsanwaltschaft --------- *Reich* Public Prosecutors' Office

Glossary (continued)

Reichsgericht (RG) --------- Supreme Court of the German *Reich*

Reichsgerichtsrat ---------- ordinary judge of the *RG*

Reichsgerichtsprasident ---- President of the *RG*

Reichsgesetzblatt (RGBl) --- *Reich* Law Gazette, volumes of laws, decrees, etc. published by the German government

Reichsjustizgesetze -------- laws of the *Reich* concerning justice

Reichsoberhandelsgericht --- *Reich* Supreme Commercial Court

Reichstag ------------------ Parliament

Reichswehr ----------------- German Army in the Weimar era

Schöffengericht ------------ local court with a jury

Schöffenrichter ------------ lay judge

Senatsprasident ------------ presiding judge of a division of the *RG*

Sondergericht -------------- Special Court

Staatsgerichtshof ---------- high court of state; constitutional court

Strafgesetzbuch (StGB) ----- Penal or Criminal Code

Strafprozessordnung (SPo) -- Code of Criminal Procedure

Strafsenat ----------------- division of a criminal court

Urteil --------------------- judgment; verdict; final decision

Volksgerichtshof (VGH) ----- People's Court

Zivilprozessordnung (ZPo) -- Code of Civil Procedure

Zivilsenat ----------------- division of a civil court

Introduction

On 27 February 1933 the German parliament building, the *Reichstag*, was set on fire. Although the actual damage was minimal, the effects of the conflagration were extensive and significant for the history of the German nation. The criminal trial of those accused of starting the fire, heard before the *Reichsgericht*, is also of importance when trying to understand the early months of the National Socialist regime.

The *Reichstag* fire trial and the conduct of the *Reichsgericht* within the trial has received relatively little attention from historians over the last sixty years. The trial has always been overshadowed by the controversy over the origins of the fire itself.

All observers and historians seem to agree on two facts regarding the fire: Marinus van der Lubbe was involved in starting the fire; the *Kommunistische Partei Deutschlands* was not. But that is all historians have been able to agree upon regarding this topic.

From 1933 to the late 1950s almost no one questioned the assertion that the National Socialists were responsible for the fire. Hans Bernd Gisevius in To the Bitter End was a prime example of this school of thought.[1] André François-Poncet, the

[1] Hans Bernd Gisevius, To the Bitter End, trans. Richard and Clara Winston (Boston: Houghton Mifflin Company, 1947), pp.3-36.

French Ambassador to Germany from 1931 to 1938, thought much the same way.[2] By the late 1950s this firm conviction was beginning to waver as some historians began to question "whether Hitler was waiting for the fire as a pretext for initiating his long-planned action against the Communist Party, or whether it came as a welcome surprise to him".[3]

Fritz Tobias triggered the controversy with the publication of his serial article "Stehen Sie auf, van der Lubbe" in the popular magazine, Der Spiegel. This article, published in eleven parts from 1959 to 1960, put forth the thesis that van der Lubbe set the *Reichstag* on fire by himself.[4] This thesis was immediately and vehemently attacked by Hans Bernd Gisevius in March 1960 in a series written in the newspaper Die Zeit.[5]

Since 1960 two schools of thought have developed their arguments over responsibility for the fire.[6] On one hand,

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[2] André François-Poncet, The Fateful Years. Memoirs of a French Ambassador in Berlin, 1931-1938, trans. Jacques Le-Clercq (London: Victor Gollancz Ltd., 1949), p.55.

[3] Hermann Mau and Helmut Krausnick, German History 1933-45. An Assessment by German Historians, trans. Andrew and Eva Wilson (London: Oswald Wolff, 1971 [reprint of 1959 ed.]), p.23.

[4] Fritz Tobias, "Stehen Sie auf, van der Lubbe," Der Spiegel, Nr.43 (21.Oktober 1959) - Nr.2 (6.Januar 1960).

[5] Hans Bernd Gisevius, "Reichstagsbrand im Zerrspiegel. Widerlegung eines Reinwaschungsversuches," Die Zeit, Nr.10-13 (4.-25.März 1960).

[6] For a more detailed discussion of the development of this debate see A.J.P. Taylor, "Who Burnt the Reichstag? The Story of a Legend," History Today, vol.10 (1960): 515-522; Robert E. Neil, "Who Burned the Reichstag? The Present State of an Old Controversy," in A Festschrift for Frederick B.

Tobias and Professor Hans Mommsen have asserted, with scientific and historical methodologies, that van der Lubbe was the lone arsonist.[7]

The other school of thought and research continues to argue that the National Socialists were responsible for starting the fire. This group is led by Professor Walther Hofer and Dr. Christoph Graf. It is their contention that it was impossible for van der Lubbe to have started the fire on his own. They further argue that his accomplices were National Socialists.[8]

The historical literature dealing with the origins of the fire are useful sources for this study. This is despite the fact that their interest in the *Reichstag* fire trial is largely directed at National Socialist involvement or non-involvement and not at the conduct of the *Reichsgericht* during the trial. Although this study does not deal with the origins of

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Artz, eds., David H. Pinkey and Theodore Ropp (Durham, N.C.: Duke University Press, 1964), pp.181-206; and, more recently, Ulrich von Hehl, "Die Kontroverse um den Reichstagsbrand," Vierteljahrshefte fur Zeitgeschichte, 36:2 (1988): 259-280.

[7] Tobias further developed his views in Der Reichstagsbrand. Legende und Wirklichkeit (Rastatt/Baden: G. Grote'sche Verlagsbuchhandlung KG, 1962). This book was very controversial and was the subject of legal actions brought by Gisevius in the 1960s. Hans Mommsen supported Tobias in his article "Der Reichstagsbrand und seine politischen Folgen," Vierteljahrshefte für Zeitgeschichte, 12 (1964): 351-413.

[8] These arguments have been put forward in numerous works by Hofer and Graf, especially in Der Reichstagsbrand. Eine wissenschaftliche Dokumentation, 2 Band (Berlin: Arani Verlag-GmbH, 1972 [Bd.1] und 1978 [Bd.2]). See also the articles by Hofer and Graf, "The Reichstag Fire of 27 February 1933," Wiener Library Bulletin, vol.28 (1975): 21-30 and "Neue Quellen zum Reichstagsbrand," Geschichte in Wissenschaft und Unterricht, 27:2 (1976): 65-88.

the fire, much material was gleaned from sources searching for the origins of the fire.[1]

The other method of approaching the topic of the *Reichstag* fire trial is that of legal history. As the focus of this study is the *Reichsgericht* and its conduct of the trial this work will examine the trial using available primary and secondary sources. These sources fall into two basic categories: 1) those dealing with the history of the *Reichsgericht* from its inception in 1879 to the early 1930s and 2) those that deal with the *Reichstag* fire trial.

The *Reichsgericht* has, as yet, not been the subject of a complete historical treatment. In this thesis it was necessary to reconstruct the overall history of the Court, especially in its treatment of treason, from 1879 to 1933. Primary sources used to do this include the Reichsgesetzblatt for the years from 1871 to 1933, Dr. Adolf Lobe's Fünfzig Jahre Reichsgericht am 1. Oktober 1929 (this work comes as close as any to

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[1] It is my opinion that the arguments put forward by Tobias and Mommsen are much more plausible than those of Hofer and Graf. Part of my research led me into the minutes of the government's cabinet meetings in late February and early March 1933. These documents show a government which is confused, hesitant, and ultimately opportunistic. They do not show a government which had any foreknowledge of the events on 27 February 1933. A strong case has been put forward saying that van der Lubbe did it alone, just as he said he had done. But, it is also true, as Hans Mommsen wrote, that it is still correct that (in the view of those who hold the National Socialists responsible) "even today the burden of proof rests on anyone who denies that the Nazis started the fire". Hans Mommsen, "The Political Effects of the Reichstag Fire," in Henry Ashby Turner, Jr. (ed.), Nazism and the Third Reich (New York: Franklin Watts, 1972), pp.137-138.

being an official history of the Court during its first fifty years), as well as other collections of documents.

The closest attempt yet made at an overall history of the Court was the publication of Friedrich Karl Kaul's Geschichte des Reichsgerichts in 1971. But this work only deals with the Court between 1933 and 1945. It was published as volume four of a series on the history of the *Reichsgericht*. It seems that the other three volumes, which were meant to cover the years before 1933, were never written. Overall, Kaul's book cannot be called an impartial treatment of the subject. As the product of a high-ranking East German jurist the book is filled with Communist doctrine and ideological material. On the other hand, Kaul also seems to have been the only historian allowed to use material from the *Reichsgericht*'s archives in Potsdam (under East German control until 1989) in the last forty years. His book, therefore, is filled with material, quotes, and information which, until recently, were beyond the reach of Western historians.

There are many secondary sources, in addition to Kaul, which were useful for this study. These include works on justice in the Third Reich which, although not focused specifically on the *Reichsgericht*, contain information on the Court, law in National Socialist Germany, and the position of the Supreme Court in National Socialist Germany.

Dr. Alfons Sack, a participant in the trial, stated in his memoirs: "Der Prozeß ist deutsche Geschichte, der Prozeß ist

Weltgeschichte."[10] Nevertheless, the *Reichstag* fire trial in and of itself has not been the subject of any detailed, historical account. Histories of law during the Third Reich are numerous, but they also tend to confine the *Reichstagsbrandprozess* to a few pages at most.[11]

This light treatment may partly be the long-term effect of the perception held by many individuals, then and now, that the proceedings were nothing more than a "show trial".[12] According to The Oxford English Dictionary, a show trial is defined as "a judicial trial attended by great publicity: usu. used with specific reference to a prejudged trial of political dissidents by a Communist government".[13] Although the trial was given great publicity, it will be shown that it was not a prejudged trial.

Primary sources are of the highest importance in dealing with the trial. Those used in this work include Douglas Reed's three memoirs, specifically The Burning of the Reichstag

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[10] Dr. Alfons Sack, Der Reichstagsbrand Prozess (Berlin: Ullstein Verlag, 1934), p.324.

[11] For a summary of the development of the legal history of Nazi Germany see Dennis L. Anderson, "Historians and Lawyers: On Writing the History of Law in the Third Reich," Research Studies, 50:3/4 (September/December 1982): 119-132.

[12] The trial in Leipzig was described as a show trial by Neil, p.185; Gisevius, p.28; and Morris Ploscowe, "The Organization for the Enforcement of the Criminal Law in France, Germany and England," Journal of Criminal Law and Criminology, vol.27 (1936): p.317.

[13] The Oxford English Dictionary, 2nd ed., Prepared by J.A. Simpson and E.S.C. Weiner, Volume XV: Ser-Soosy (Oxford: Oxford University Press, 1989), p.356.

(1934) which is one of the few day-by-day records of the trial. Other works of great importance are Dr. Alfons Sack's Der Reichstagsbrand Prozess (1934) and Arthur Garfield Hays' City Lawyer (1942). Other memoirs were also useful at various times for some of the information they provided.

Other primary sources include volumes of documents on National Socialist Germany including those put together by Jeremy Noakes and Geoffrey Pridham, Henry Picker, Norman Baynes, Max Domarus, Herbert Michaelis, Ernst Schraepler, and Karl-Heinz Minuth.[14] Newspaper reports are especially useful in recreating and verifying the events of the trial. Those used most often in this thesis include The Times, The New York Times, the Manchester Guardian, and the Völkischer Beobachter.

The secondary source most often relied upon for information on the trial itself was Fritz Tobias' The Reichstag Fire (a 1964 translation of Der Reichstagsbrand).

By using the primary and secondary sources listed above, and many more, this thesis will show that the *Reichstag* fire trial was conducted by an independent but conservative *Reichsgericht* which managed the proceedings according to its own historical antecedents and precedents.

This will be accomplished by an examination of the historical background and legal development of the *Reichsgericht* and the German judicial system from 1879 to 1933; the political

[14] See the bibliography for full details on these works.

and legal developments under the fledgling National Socialist regime from 30 January to 21 September 1933; the *Reichstag* fire trial itself; and the effects of, and reaction to, the Court's final decision.

Chapter 1
The *Reichsgericht* and the German Judicial System, 1879-1933

In the year 1870 the German states did not have a central supreme court to deal with civil and criminal cases at the highest level. As a result of the Franco-Prussian War and the subsequent unification of Germany in 1871 the judicial system began to be unified and consolidated.

The first stage in the process was introduced in a decree by *Kaiser* Wilhelm I, the new German emperor, on 15 May 1871 barely one month after the establishment of the Second *Reich*. The imperial decree stated that the *Strafgesetzbuch* of the former North German Confederation introduced on 31 May 1870 would continue as the criminal code for the new German *Reich*. The North German code would be in force for the entire empire from 1 January 1872.[1]

Over the next few years a new judicial system was created in Germany based on the *Reichsjustizgesetze*. The system was to consist of the 1871 *Strafgesetzbuch* as well as the *Gerichtsverfassung* of 27 January 1877, the *Strafprozessordnung* of 1 February 1877, and the *Zivilprozessordnung* of 30 January 1877.

[1] "Gesetz, betreffend die Redaktion des Strafgesetzbuchs für den Norddeutschen Bund als Strafgesetzbuch für das Deutsche Reich. Vom 15. Mai 1871," Reichsgesetzblatt [hereafter referred to as RGBl] (Berlin: Reichsverlagsamt, 1871), pp.127-205. See also Dr. Franz Liszt, et. al., Strafgesetzbuch für das Deutsche Reich mit Nebengesetzen (Berlin: Walter de Gruyter & Co., 1930).

The new judicial organization came into effect on 1 October 1879.[2] The *Gerichtsverfassungsgesetz*[3] outlined the judicial structure and dealt with jurisdiction, judicial offices, technical matters and the different types of courts in the new judicial hierarchy. The four levels of courts included *Amtsgerichte* (local courts) and *Schöffengerichte* (local courts with juries), *Landgerichte* (district courts), *Oberlandesgerichte* (provincial high courts), and the *Reichsgericht* (the Imperial Supreme Court). The *Zivilprozessordnung*[4] and the *Strafprozessordnung*[5] outlined the rules and procedures the courts would use to enforce the Criminal Code of 1871.

The *Reichsgericht* was created as the highest judicial institution in Germany and successor to the *Bundesoberhandelsgericht*. In 1869 the legislature of the North German Confederation passed two federal commercial and exchange laws: the *Allgemeine Deutsche Wechselordnung* and the *Allgemeines Handelsgesetzbuch*. The government was not convinced that the

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[2] Gerhard F. Kramer, "The Influence of National Socialism on the Courts of Justice and the Police," in International Council for Philosophy and Humanistic Studies (ed.), The Third Reich (London: Weidenfeld and Nicolson, 1955), p.597.

[3] "Gerichtsverfassungsgesetz. Vom 27. Januar 1877," RGBl, 1877, pp.41-76. See also Dr. R. Sydow (Hg.), Zivilprozessordnung und Gerichtsverfassungsgesetz. Mit Anmerkungen unter besonderer Berücksichtigung der Entscheidungen des Reichsgerichts, Sechzehnte Auflage (Berlin und Leipzig: Walter de Gruyter & Co., 1920).

[4] "Zivilprozessordnung. Vom 30. Januar 1877," RGBl, 1877, pp.83-243.

[5] "Strafprozessordnung. Vom 1. Februar 1877," RGBl, 1877, pp.253-346.

individual states of the Confederation would be able to apply these new trade laws on an uniform basis. There was concern that "this system of [federal] law would be broken up into several systems by the conflicting interpretations given to it by state courts".[6] Therefore, the *Bundesoberhandelsgericht* was also created in 1869 and placed in the Saxon city of Leipzig. It was hoped that this new institution would help to create, interpret, and apply a uniform commercial law for all of the states of the Confederation.[7] Soon after the beginning of the Franco-Prussian war, Dr. Pape, the president of the *Bundesoberhandelsgericht*, thought it imperative to expand the court's jurisdiction to other non-commercial matters for: "dem deutschen Vaterlande für die Erhaltung und Befestigung eines der kostbarsten nationalen Güter, für die Entwicklung und Ausbildung eines einheitlichen nationalen Rechts."[8]

Dr. Pape's dream began to come true on 16 April 1871 when, with the founding of the Second *Reich*, the *Bundesoberhandelsgericht* of the North German Confederation became the *Reichsoberhandelsgericht*.[9] The southern German states were then

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[6] Richard Hudson, "The Judicial System of the German Empire," Michigan Law Review, vol.1 (1902): pp.122-123.

[7] Walter Simons, "One Hundred Years of German Law," in Law. A Century of Progress 1835-1935, ed. Alison Reppy, vol.I (New York: New York University Press, 1937), p.93.

[8] Dr. Adolf Lobe (Hg.), Fünfzig Jahre Reichsgericht am 1 Oktober 1929 (Berlin und Leipzig: Walter de Gruyter, 1929), p.4.

[9] Lobe, p.4.

added to the sphere of the *ROHG*.[10] The introduction of the new *Strafprozessordnung*, *Zivilprozessordnung* and *Gerichtsverfassungsgesetz* in 1877 meant that on 1 October 1879 the *ROHG* would be replaced by a *Reichsgericht* with a vastly extended jurisdiction.[11]

The new *Reichsgericht* was to remain in the city of Leipzig where the old *Reichsoberhandelsgericht* had been located.[12] Leipzig was the most important centre for international commerce in Germany as well as the customary site of the biggest fair in Europe.[13] Politics also played a part in this decision because many of the states in the new Reich did not want to see the *Reichsgericht* being established in Berlin, i.e. Prussia. There was a fear that if this happened it would help make Berlin and Prussia even more important in Germany. They were concerned that the court might tend to favour Prussian interests in its decisions.[14] Leipzig was finally chosen as the court's location after a lively debate in the *Reichstag*. When the final vote was counted Leipzig was chosen

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[10] William L. Burdick, The Bench and Bar of Other Lands (New York: Metropolitan Law Book Company, 1939), pp.402-403.

[11] Simons, p.102.

[12] As laid out in "Gesetz über den Sitz des Reichsgerichts. Vom 11. April 1877," RGBl, 1877, p.415.

[13] Simons, p.93.

[14] J.J. Cook, "The Judicial System of Germany," The Juridical Review, vol.1 (1889): p.190.

over Berlin by only two votes.[15]

The jurisdiction of the *Reichsgericht* was defined in §§125 to 141 of the *Gerichtsverfassungsgesetz* of 1877.[16] The Court's areas of jurisdiction, appointments, age requirements, number of divisions and procedures were covered in this document. It was the highest appellate court and court of review as well the only court used "für die Untersuchung und Entscheidung in erster und letzter Instanz in den Fällen des Hochverraths und des Landesverraths, insofern diese Verbrechen gegen den Kaiser oder das Reich gerichtet sind".[17] The Supreme Court was also the only national court in the country. Only the *Reichsgericht* was directly subject to the *Kaiser* and the *Reichstag*. All of the other high courts in the judicial system were regional and under the control of local legislatures. Legal documents emanating from all German courts other than the *Reichsgericht* were issued in the name and under the authority of the state in which that court resided. Any such documents issued by the *Reichsgericht* were signed by or issued under the name of the Emperor.[18] As well, the *Reichsgericht*

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[15] James W. Garner, "The Judiciary of the German Empire. I," Political Science Quarterly, vol.17 (1902): p.508.

[16] Chapter 9 of the GVG, "Reichsgericht," RGBl, 1877, pp.64-67.

[17] "Reichsgericht," RGBl, 1877, p.66, §136, part 1. The definitions of Hochverrath and Landesverrath were included in the Strafgesetzbuch of 1871 as §§80-93. RGBl, 1871, pp.142-44.

[18] Cook, p.75. Also in The Statesman's Year-Book. Statistical and Historical Annual of the World for the Year 1890, ed. J. Scott Keltie (London: Macmillan, 1890), p.528:

was the only high court whose jurisdiction covered the entire Empire. Its jurisdiction was *reichsstaatlich* while the other high courts were responsible only for *landesstaatlich* or state matters.[19]

When the *Reichsgericht* opened its doors on 1 October 1879 it contained five civil and three criminal senates (or panels) which included eight *Senatspräsidenten* and sixty *Reichsgerichtsrate*.[20] The composition of the court was open to change under the direction of the government. By 1889 there were six civil and four criminal senates. Most of the judges were at the height of their careers after many years in the judicial system of the one of the states of the *Reich*. Some of them were chosen directly from the Bar since: (a) judges of the *Reichsgericht* were directly appointed by the government, and (b) lawyers in Germany had basically the same legal education as judges. It was therefore not impossible for a prominent public prosecutor or public defender to be appointed as a judge in the German system even at the level of *Reichsgerichtsrat*.[21] The judges were appointed by the Emperor after

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"with the exception of the Reichsgericht, all courts are directly subject to the Government of the special State in which they exercise jurisdiction, and not to the Imperial Government".

[19] Garner, p.508.

[20] Lobe, p.21; John P. Dawson, The Oracles of the Law (Ann Arbor, Michigan: The U of Michigan Law School, 1968), p.446.

[21] Cook, pp.190-191.

being nominated by the *Bundesrat*.[22] Nowhere in the *Gerichtsverfassungsgesetz* was there any mention of how new positions on the bench would be divided up among the states of the *Reich*. But it seems to have been an unwritten rule that appointments were made on a quota basis. An open seat on the Supreme Court would be retained by a given state. For example, if a *Reichsgericht* judge from Saxony retired he would likely be replaced by a nominee from the state of Saxony.[23]

The *Reichsgericht* did not hold many trials dealing with *Hochverrat* or *Landesverrat* during the years of the Second *Reich*. The Court produced fifty-two volumes of decisions in criminal cases (called *Entscheidungen des Reichsgerichts im Strafsachen*) between 1879 and 1918 dealing with all of the criminal cases it had heard.[24] In all of those volumes are to be found only one conviction for high treason and sixteen convictions for incitement or preparation of high treason.[25] Walter Wagner, in one of the few modern works on criminal justice in Imperial Germany, said that this was "ein Beweis für das feste Gefüge des Reichs, aber auch dafür, dass sich

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[22] "Reichsgericht," RGBl, 1877, p.65, §127.

[23] R.C.K. Ensor, Courts & Judges in France, Germany, and England (London: Oxford University Press, 1933), pp.62-63.

[24] Walter Wagner, "Politische Justiz. Prozesse und Urteile im wilhelminischen Deutschland," Die politische Meinung, 6:56 (January 1961): p.60.

[25] Howard Stern, Political Crime and Justice in the Weimar Republic (Ph.D. dissertation, Johns Hopkins University, 1966), p.10.

die Opposition in legalem Rahmen hielt".[26]

All of this was to change after 9 November 1918. With the downfall of the Empire in the German revolution the road to the Weimar Republic was created. The *Reichsgericht* survived the events of 1918-19 basically unscathed. From the very beginning it looked as if the position and privileges of the *Reichsgericht* and the German judicial system would be respected. On 16 November 1918 the Prussian government stated that it would not infringe upon the independence of the courts. The government refused to allow court decisions to be taken before workers' and soldiers' councils to be confirmed. The largest state in Germany continued to respect the decisions of the courts.[27] In 1929 former *Präsident* of the *Reichsgericht*, Dr. Walter Simons, said: "The [1918-19] revolution did not touch the judiciary at all."[28]

The constitution of the new Weimar Republic came into effect on 11 August 1919 and it, too, respected the position and privileges that the *Reichsgericht* and other German courts had held under the Empire.[29] Judges continued to be indepen-

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[26] Wagner, p.60.

[27] Stern, p.19.

[28] Walter C. Simons, "Relation of the German Judiciary to the Executive and Legislative Branches," American Bar Association Journal, vol.15 (December 1929): p.764.

[29] "Die Verfassung des Deutschen Reichs. Vom 11. August 1919," RGBl, 1919, pp.1383-1418; Rene Brunet, The New German Constitution, trans. Joseph Gollomb (New York: Alfred Knopf, 1922), pp.297-339. The relevant sections are located in section 7: "Die Rechtspflege," RGBl, 1919, pp.1403-04, §§102-108.

dent of direct control by the republican government and were only subject to the rule of law as before. The Weimar government could not, therefore, direct the *Reichsgericht* in its judicial actions. If it tried to do so the German Supreme Court was free to ignore the requests of the superior authority (i.e. the *Reich* government) within the limits of the law.[30] The judges of the *Reichsgericht* were appointed for life and could not be permanently removed from office except for reasons of judicial incompetence or ill health. Even though Germany had undergone a large-scale transformation in most areas of life, for the Supreme Court the judicial system barely changed from that of a few years before.[31]

The Weimar judicial system still had the same four levels of ordinary courts as before 1919: *Amtsgerichte, Landgerichte, Oberlandesgerichte,* and the *Reichsgericht*. On 22 March 1924 a new *Gerichtsverfassungsgesetz* was passed along with a new *Strafprozessordnung*.[32] The section dealing with the Supreme Court under the republican regime was largely the same as it had been under the Imperial German government.[33] The Supreme

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[30] Frederick F. Blachly and Miriam E. Oatman, The Government and Administration of Germany (Baltimore: The Johns Hopkins Press, 1928), p.439.

[31] "Die Rechtspflege," RGBl, 1919, pp.1403-04; Blachly, pp. 663-664.

[32] "Bekanntmachung der Terte des Gerichtsverfassungsgesetzes und der Strafprozessordnung. Vom 22. März 1924," RGBl, 1924, Teil I, pp.299-370.

[33] Laid out in Chapter 9 "Reichsgericht," RGBl, 1924, Teil I, pp.314-16, §§123-140.

Court still held jurisdiction "für die Untersuchung und Entscheidung in erster und letzter Instanz in den Fällen des Hochverrats, [und] des Landesverrats".[34]

The German judiciary and judicial system during the Weimar Republic repeatedly came under attack as unequal and biased in its treatment of those who came before the bench as political defendants.[35]

There seems to be some statistical evidence to support the claim of inequality before the law during the Weimar Republic. Howard Stern has written, citing statistical material gathered by E.J. Gumbel, that between 1919 and 1922 there were three hundred and seventy-six politically-motivated murders in Germany. Three hundred and fifty-four of the murders were committed by right-wing nationalists, only twenty-two by left-wing radicals. Of these, only twenty-eight of the rightists (or less than eight percent) were convicted while eighteen of the leftists (or eighty-two percent) were found guilty by the courts.[36] Stern, again citing Gumbel, states that after the fall of the short-lived Bavarian Soviet Republic in 1919 the

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[34] "Reichsgericht," RGBl, 1924, Teil I, p.315, §134.

[35] See Gotthard Jasper, "Justiz und Politik in der Weimarer Republik," Vierteljahrshefte für Zeitgeschichte, 30:2 (1982), pp. 167-205; Stern, Political Crime and Justice in the Weimar Republic; Heinrich and Elisabeth Hannover, Politische Justiz 1918-1933 (Frankfurt am Main: Fischer Bücherei, 1966); and Karl D. Bracher, Die Auflösung der Weimarer Republik (Villingen: Ring-Verlag, 1955) as some of the more prominent examples.

[36] E.J. Gumbel, Vier Jahre politischer Mord (Berlin, 1922), pp.73-81 cited in Stern, pp.1-2.

judicial system convicted 2,209 leftists for their participation in the failed regime.[37] Four hundred and seven individuals were sentenced to fortress imprisonment, 1,737 to prison terms of various lengths, and sixty-five people were sent to prison with hard labour.[38] Franz Neumann, who also cites Gumbel, states that those rightists implicated in the abortive Kapp Putsch of 1920 were treated with much more leniency. After much delay, on 21 May 1921 the *Reichsjustizminister* charged seven hundred and five individuals with high treason for their part in the attempted overthrow of the republican government. Of those, four hundred and twelve came under the general amnesty of 4 August 1920 and therefore could not be prosecuted, one hundred and eight had the charges against them dropped because of death, ill health, or other reasons, and one hundred and seventy-four of those indicted were not tried as the charges against them were dropped by the state. Of the remaining eleven indictments, only one, that of former Berlin Police President von Jagow, ended in an actual sentence when he received five years' honourable confinement.[39] Howard

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[37] E.J. Gumbel, Verschwörer: Beitrage zur Geschichte und Soziologie der deutschnationalistischen Geheimbünde seit 1918 (Vienna, 1924), pp.119-120 cited in Stern, p.2.

[38] E.J. Gumbel, Vier Jahre politischer Mord, in Franz Neumann, Behemoth. The Structure and Practice of National Socialism 1933-44, rev.ed. (New York: Oxford University Press, 1944), pp.21-22.

[39] E.J. Gumbel cited in Neumann, pp.21-22 and Charles B. Flood, Hitler: The Path to Power (Boston: Houghton Mifflin, 1989), pp.135-136.

Stern, using the records of the Prussian Justice Ministry and a statement by Franz Gürtner, argues that within a period of less than a month in 1923 two uprisings took place which, when prosecuted, again showed some imbalance. After a leftist and communist uprising in Hamburg on 23 October 1923 eight hundred and ninety-two participants were sentenced. But, after the unsuccessful Nazi-led Beer Hall Putsch in Munich on 9 November 1923 only seventy-two of those involved were actually sentenced and they were given very mild sentences.[40]

In general, the courts of Weimar Germany were not the best and most enthusiastic supporters of the Republic. In the early years of the new regime the first major political court cases dealt with the Republic trying to put down its left-wing enemies. The courts tended to side with the Republic in these cases. But, as the 1920s progressed, the political cases coming before the courts often involved the republican government trying to prosecute right-wing nationalists and counter-revolutionaries. In these cases the courts tended to decide in favour of the rightists and not the government. In many cases counter-revolution, political murder and libel, allegedly in support of the German nation, was seen by the courts as patriotic and nationalistic and was treated with much more leniency. At times it appeared to the courts that the govern-

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[40] Bundesarchiv Koblenz, Prussian Justice Ministry (P-135), volume 215, pp.48ff and the statement of Franz Gürtner in July 22, 1924, Verhandlungen des bayerischen Landtags, 1924-1925, Stenographische Berichte, Bd.I, p.274 cited in Stern, p.iii.

ment was less patriotic than the right-wing radicals it was trying to prosecute. As a result, the courts put the idea of the protection of the nation above that of the republic.[41]

It was obvious very early that the democratic government of Germany did not have the total support of the judicial system. In general, the courts were not willing to protect the constitution and the regime by evenly applying the law to all of those who intended to overthrow the Weimar system.[42] This meant that if support of the Republic and what was considered to be good for Germany as a nation came into conflict, the interests of the democratic government might be ignored. This could only help rightist organizations because it was usually perceived that they were striving for the good of the German nation.[43] The majority of the judiciary was quite willing to assist the government in prosecuting its leftist enemies but they tended to ignore and sympathize with the political criminals from the right-wing.[44] Franz Neumann felt that "the Weimar criminal courts were part and parcel of the anti-democratic camp".[45] Some members of the judicial system

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[41] A.J. Nicholls, Weimar and the Rise of Hitler (London: Macmillan, 1968), pp.47-48.

[42] Kramer, p.596.

[43] Nicholls, p.48.

[44] Otto Kirchheimer, Political Justice: The Use of Legal Procedure for Political Ends (Princeton: Princeton University Press, 1961), pp.213-214.

[45] Neumann, p.21.

leaned far enough to the right that even "if [right-wing radicals were] caught redhanded, the judiciary let the perpetrators off, either completely or with ridiculous sentences, granting them pensions to boot, covering up the traces of rightist murderers, and white-washing them".[46] In general, the courts of the Weimar era tended to rule: with discrimination between political criminals depending on whether they were left- or right-wing; in favour of those representing older ideas such as nobility, militarism and authority; against those who held modern ideas such as pacifism, atheism and equality; and with contempt and disregard for the Republican government, its institutions and its representatives.[47] After a decade of this judicial inequality, a critic of Weimar justice, Prof. Dr. Kahl, said in 1929: "Der Glaube an das Recht, der Respekt vor dem Recht ist vielfach gesunken."[48]

In order to understand the type of judicial system which Weimar Germany had it is important to try to understand those who filled the positions in the courts. The number of paid judges in Germany ranged from 9,464 to 10,669 between the

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[46] Kirchheimer, pp.213-214.

[47] Edgar Ansel Mowrer, Germany Puts the Clock Back (London: Bodley Head, 1933), pp.215-216.

[48] Cited in Dieter Kolbe, Reichsgerichtspräsident Dr. Erwin Bumke. Studien zum Niedergang des Reichsgerichts und der deutschen Rechtspflege (Karlsruhe: C.F. Müller Juristischer Verlag, 1975), p.79.

years 1919 and 1931.[49] In the German judicial system paid and trained judges were used in all levels of courts. There were no German equivalents to the justice of the peace in British law, very few lay judges were used, and jury courts were rare. In 1931 over ten thousand judges were needed to fill the benches of 1,737 *Amtsgerichte*, one hundred and fifty-nine *Landgerichte*, twenty-seven *Oberlandesgerichte* and the *Reichsgericht*.[50] Compared to the United States or Great Britain Germany had a very large number of jurists for its population. A large judiciary was common in continental European countries but, even when compared to France and Italy, their number in Germany was much higher:

Table I. Judicial Populations in the late 1920s[51]

	Population	Paid Judges	People : Judge
Great Britain	40,000,000	175	228,571 : 1
New York state	10,000,000	450	22,222 : 1
Italy	42,000,000	4,300	9,767 : 1
France	42,000,000	5,400	7,778 : 1
Germany	65,000,000	9,933	6,544 : 1

Some Germans were worried about the possible effects of the large number of jurists in the system. Dr. Müller, a contemporary critic of Weimar justice, said in 1929 that "a first

[49] The Statesman's Year-Book, 1921, p.924 and The Statesman's Year-Book, 1926, pp.924-925.

[50] The Statesman's Year-Book, 1933, pp.934-935.

[51] Morris Ploscowe, "The Career of Judges and Prosecutors in Continental Countries," Yale Law Journal, vol.44 (1934-35): p. 270; The Statesman's Year-Book, 1930, pp.931-932.

class judiciary which has not alone a few outstanding personalities but whose entire membership consists of men of the highest calibre can not be obtained where the number of judges required is so great".[52] In 1928 another German critic, Dr. Schiffer, was also concerned about the quality of the nation's jurists, especially those who were low-paid and appointed to courts in small communities where they

> are far from the stream of life, excluded from the fountains of intellectual development. They may become very easily, without their fault, small and narrow at a time when in the confusion of opinions, struggle of parties, opposition of ideas...it is especially necessary that they perform their duties with clear views and wide conceptions.[53]

The status and social position of the judiciary during the Weimar Republic was not very high as German judges never received the prestige or respect that judges in Britain did. This may have partly resulted from the fact that German judges were perceived as civil servants and bureaucrats since they were appointed by the state. To the average German a judge was probably viewed as a representative of government authority, not as the protector of the common citizen. The judicial branch of the bureaucracy was seen as inferior to other occupations such as the foreign service, military service, or even the administrative sections of the civil service. As well, the

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[52] Dr. Müller, Amt und Stellung des Richters (1929), p.11 cited in Ploscowe, p.281.

[53] Dr. Schiffer in an article in Die deutsche Justiz, 1928, p.117 cited in Ploscowe, p.283 (ellipsis in source).

salary for judges was only moderate and the possibilities for promotion were not very good with so many other jurists in the system. If a seat on the *Reichsgericht* was seen as the high point in a judicial career it could be quite a struggle to get there past the other nine or ten thousand jurists.[54]

In the early years of the Weimar Republic the judges in Germany were mostly the same men who had served under the Empire. The new regime, in consideration of the concepts of judicial independence and the irremovability of judges, had transferred the entire Imperial judiciary into the new legal system.[55] Also, the Weimar government and constitution stated that the judges were only subordinate to the written and legislative law. They did not have to pay heed to any member of the government who attempted to influence the courts outside of legislative acts and decrees. The republican government hoped that by leaving the judiciary intact and independent it would create an unbiased court system in Germany. After all, German judges had life-long tenure, a reasonable salary, a good pension system and were independent of political control by the democratic government.[56]

But, as a group, the German judiciary did not wholeheartedly support the Weimar Republic. Most German judges in the

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[54] Jeremy Noakes and Geoffrey Pridham (eds.), Documents on Nazism, 1919-1945 (New York: The Viking Press, 1975), pp.271-72.

[55] Mowrer, p.213.

[56] Blachly, p.439.

early 1920s began their careers under the Imperial German government before 1918 and were not appointed by the republican regime after its inauguration. Many thought that the 1918 revolution and its institutions (from which the Weimar government sprang) were illegitimate and offensive.[57] This anti-revolutionary sentiment was part of the character of many judges who, as monarchists, nationalists, and patriots "detested the Weimar Republic from an instinctive distaste of everything revolutionary".[58] These judges had grown up in a monarchical society and therefore saw the republic as illegal, unlawful, and the result of high treason against the German *Reich*.[59] Monarchists in the judiciary believed that the monarch was sovereign. When the 1918 revolution took place the *Kaiser's* rule was broken and, in legal terms, a *Rechtsbruch* had taken place. As the new Weimar constitution was based on popular, democratic sovereignty it could not heal the *Rechtsbruch* in the eyes of monarchist judges. From this point on, many judges mistrusted the republican government and the parliament, the *Reichstag*, and believed that they, the judges, were now responsible for preserving justice in Germany.[60] What made

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[57] Nicholls, p.46-47.

[58] The opinion of German historian Albrecht Wagner in Stern, p.3.

[59] Kramer, p.601.

[60] Michael L. Hughes, "Private Equity, Social Inequity: German Judges React to Inflation, 1914-24," Central European History, 16:1 (March 1983): p.80.

relations between the government and the judiciary even worse was the erosion of the judges' living standards. By many accounts they were underpaid to begin with, their financial situation worsened with the hyperinflation of 1923, and again deteriorated with the Great Depression and the government's economic measures from 1930 to 1933.[61]

The German judges kept stating that they were non-political. In fact they were about as non-political as the German *Reichswehr*.[62] Like many other institutions during the Weimar era they were not, and could not be, apolitical. Finding themselves in powerful positions they could not escape having their decisions shaped to some extent by their political views, whether pro- or anti-republican, monarchist or democratic, pro-left, pro-right, or neither.

Attempts were made to politically direct German judges through their judicial associations. In the late nineteenth century each German state had separate judicial associations. In 1908 they were all combined into the *Deutscher Richterbund* (Association of German Judges) in order to support and educate the thousands of German magistrates. For example, the *Richterbund* published the Deutsche Richterzeitung (German Judges' Times) which included court decisions and articles by promi-

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[61] H.W. Koch, In the Name of the Volk. Political Justice in Hitler's Germany (New York: St. Martin's Press, 1989), p.10.

[62] Kramer, p.601. For the German Reichswehr and its "non-politicalness" see Francis L. Carsten, The Reichswehr and Politics, 1918 to 1933 (Oxford, 1966).

nent jurists.[63] In January 1922 the *Republikanischer Richterbund* (Association of Republican Judges) was established by republican jurists in order to try to bring the judiciary and the republican system and constitution together and "to free the courts...from the tradition of authoritarian thought and institutions".[64] The *Richterbund*'s manifesto said: "We will serve the just movement for the reform of justice in the new state; we will not fail to criticize whenever the application of laws or the practices of the administration requires it."[65] The Association, which published the legal periodical Die deutsche Justiz (German Justice)[66], won the direct support of only a small group of jurists in Germany. Many of those jurists opposed to the *Republikanischer Richterbund* saw it as an attempt to impose party politics on the judicial organization.[67]

German judges, as a whole, were seen to be, and have been described since, as anti-democratic, anti-republican, and pro-right-wing. There were leftist attacks on the judiciary within the confines of the parliament at various times in the 1920s.

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[63] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10. Nuernberg, October 1946 - April 1949, Vol.III: The Justice Case (Washington, D.C.: U.S. Government Printing Office, 1951), p.95.

[64] Cited in Stern, p.267 (ellipsis in source).

[65] Cited in Stern, p.268.

[66] The Justice Case, p.95.

[67] Stern, p.268.

The most prominent was the debate or argument between Communist Party deputy Dr. Rosenberg and the *Reichsjustizminister*, Oskar Hergt, in the *Reichstag* on 22 February 1927.[68] After Rosenberg criticized the judiciary and the practice of the *Reichsgericht* in particular, Hergt defended his judges while, as the same time, admitting that they had not yet adapted to the republican system:

> Sie wissen auch ganz genau dass in der monarchistischen Vergangenheit - und damals war das ganz zu Ihren Gunsten - der Richterstand eine starke Steifnackigkeit gezeigt hat und - ich wiederhole es - nicht zu seiner Unehre, sondern zu seiner Ehre. So war es nur zu naturlich, dass sich gerade der Richterstand nicht so leicht wie vielleicht andere Kreise, die sich eher von heute auf morgen auf die neue Zeit eingestellt haben, auf all das Neue umstellen konnte.[69]

The majority of historians since the downfall of the Republic have been critical of the Weimar judiciary for similar reasons.[70] In 1933 Edgar Mowrer thought that "the judges seemed the most resolute and effective opponents of the Republican regime, and in studying their activity under the

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[68] Germany. Reichstag, Verhandlungen des Reichstags, Band 392, 22 February 1927, pp.9162-9163. Some other leftist attacks on the judicia y were on 24-26 January 1921 (Band 347, p.2077ff, 2096ff, 2127ff) and 24 February 1922 (Band 353, p.6019ff, 6055ff, 6064).

[69] Verhandlungen des Reichstags, p.9163.

[70] see Bracher, Die Auflosung, pp.191-198; Eberhard Kolb, The Weimar Republic, trans. P.S. Falla (London: Unwin Hyman, 1988), p.36; and Eliot Barculo Wheaton, Prelude to Calamity. The Nazi Revolution 1933-35. With a Background Survey of the Weimar Era (Garden City, New York: Doubleday, 1968), p.406 as examples.

democratic Republic the word sabotage involuntarily arises to the inquiring mind".[71] In 1960, a prominent German attorney, Max Hirschberg, wrote: "It can be definitely stated that the majority of judges of the Weimar Republic were enemies of the state which paid them."[72] The problem with Hirschberg's generalization is that he does not offer statistics or other proof to back up his claim and does not give the basis for this appraisal. Also, where do the jurists of the Supreme Court fit into all of this discussion of Weimar judges?

The *Reichsgericht* occupied the highest level of the Weimar judicial system while employing the fewest number of jurists of any level. The total number of judges employed by the *Reichsgericht* between 1918 and 1933 varied between ninety-one and one hundred and three. They filled the four to six criminal and seven to nine civil senates in the court.[73] In addition to its other duties the Court still had first and final jurisdiction over cases of treason against the German *Reich*.[74] In the Second *Reich* the *Reichsgericht* handed down only seventeen convictions for treasonable activities. Between

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[71] Mowrer, p.210.

[72] Max Hirschberg, Das Fehlurteil im Strafprozess: Zur Pathologie der Rechtsprechung (Stuttgart, 1960) cited in Stern, p.3.

[73] The Statesman's Year-Book, 1918-1933, various pages.

[74] "Reichsgericht," RGBl, 1924, p.315, §134. Also see Johannes Mattern, Principles of the Constitutional Jurisprudence of the German National Republic (Baltimore: The Johns Hopkins Press, 1928).

1922 and 1925 alone, they convicted seven hundred and twenty-six individuals for high treason, treason against the *Reich*, and incitement or preparation of treason.[75]

The large number of political trials held before the *Reichsgericht* during the Weimar Republic meant that the judges of the Supreme Court were closely observed, scrutinized and criticized. In whatever cases they heard, how they conducted the trial or what verdict they finally handed down, the judges of the *Reichsgericht* could always be assured that they would be loudly criticized and condemned by some political group, be it the Social Democrats, the Communists, or the National Socialists.[76] A typical example of what the judges faced is a statement in the 26 July 1930 edition of Das Tagebuch when the jurists of the Court were described as "die Halbgotter in den roten Roben".[77]

Some *Reichsgericht* judges did their best to counter the negative image and bad press they were receiving by proclaiming their allegiance to the Weimar government and constitution. In a speech at the celebration of the sixth annual *Deutschen Richtertag* in September 1926, *Reichsgerichtsrat* Josef Reichert stated: "wir als Richter auch sonst uns bestreben, nicht am Buchstaben und der Form zu haften, sondern den Geist und Kern einer Sache zu erforschen, so haben wir uns

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[75] Stern, p.10.

[76] Koch, p.17.

[77] Cited in Hannover, p.28.

auch bemüht, in den Geist der Verfassung einzudringen", and "Die deutschen Richter ehren und achten die Verfassung, sie haben auf sie ihren Eid geleistet und ein deutscher Richter hält seinen Eid hoch".[78] There were also other *Reichsgericht* judges who supported the republic by writing pro-Weimar articles in legal journals. *Landgerichtsrat* Dr. Nauck in 1926, Reichert again in 1927, and *Reichsgerichtsrat* Friedrich Helber in 1929 all published supportive works in the periodical Deutsche Richterzeitung.[79] Dr. Walter Simons, president of the *Reichsgericht* from 1922 to 1929, also defended his judges in a speech to the Society of Legal Studies in Munich on 9 November 1926:

> Bei uns ist das Richtertum der Monarchie als Ganzes in den neuen Staat hereingegangen, hereingegangen mit vollem Bewusstsein...an der Spitze der Gerichte stellte sich das Reichsgericht in den Dienst der Republik..., aber mit dem neuen Regime bekam der Richter nicht den neuen Geist. Es wäre erstaunlich, wenn es anders gewesen wäre. Der Geist musste bleiben. Der alte Richter konnte den Geist auch da nicht wechseln, wo der Wechsel vielleicht viel für sich gehabt hätte. Der Richter ist konservativ.[80]

Even the first president of the Republic, Friedrich Ebert,

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[78] Cited in Friedrich Karl Kübler, "Der deutsche Richter und das demokratische Gesetz," Archiv für die civilistische Praxis, Bd.162 (1963): p.116. Reichert was a Bavarian jurist who had been made a Reichsgerichtsrat on 1 April 1914 and was later appointed a Senatspräsident in the Reichsgericht on 15 January 1926. Lobe, p.347.

[79] Kübler, p.116.

[80] Cited in Friedrich Karl Kaul, Geschichte des Reichsgerichts, Band IV: 1933-45 (Berlin: Akademie-Verlag GmbH, 1971), p.10 (ellipses in source).

praised the *Reichsgericht* in 1922: "Das Reichsgericht hat in bedeutsamen Entscheidungen bewiesen, dass es seiner Aufgabe bewusst, ihrer Erfüllung mächtig ist."[81] Also, a teacher of criminal law in Berlin, James Goldschmidt, wrote in Deutsche Richterzeitung in 1926: "Meines Erachtens hat sich kein Richter jemals so sehr vom Geiste der Weimarer Verfassung erfullt gezeigt, wie der Richterverein des Reichsgerichts."[82]

Three of the major legal events which are used to praise or condemn the *Reichsgericht* during the Weimar era are the proceedings involving the Act for the Protection of the Republic from 1922 to 1926, the *Reichswehr* officers' trial of 1930, and the conclusion of the libel case involving the late *Reichspräsident* Friedrich Ebert.

After the murder of the German foreign minister, Walther Rathenau, on 24 June 1922 the government passed the "Law for the Protection of the Republic".[83] Parts of the law were meant to protect members of the government by creating a *Staatsgerichtshof* which would deal with cases that violated the Law, involved high treason, assassination, or attempted

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[81] Cited in Werner Neusel, Die Spruchtätigkeit der Strafsenate des Reichsgerichts in politischen Strafsachen in der Zeit der Weimarer Republik (Marburg: Goerich & Weierhaeuser, 1971), p.15.

[82] Cited in Neusel, p.13 (emphasis in source).

[83] "Gesetz zum Schutze der Republik. Vom 21. Juli 1922," RGBl, 1922, Teil.I, pp.585-590. The most extensive coverage of the topic is Gotthard Jasper, Der Schutz der Republik. Studien zur staatlichen Sicherung der Demokratie in der Weimarer Republik (Tübingen: J.C.B. Mohr, 1963).

assassination of former or present members of the republican government. The Court was made up of three members of the *Reichsgericht* and six other members. The other six could be *Schoffenrichter* and were, along with the Supreme Court representatives, chosen by the *Reichsprasident*.[84] The government had created a hand-picked court in order to protect itself. There was concern that the lower courts were pro-right and anti-republican and a tribunal of this nature was seen as being necessary for the survival of the republican leaders. The fact that *Reichsgericht* jurists were chosen to serve on this bench shows some trust on the part of the political leadership as well as respect for the fact that treason cases were within the traditional jurisdiction of only the Supreme Court. The chairman of the new court was a *Senatsprasident* of the *Reichsgericht*, Dr. Hagens. The court also included two other judges of the Supreme Court. Arnold Brecht wrote the Law for the Protection of the Republic in cooperation with the Ministry of Justice. He said in his autobiography: "The composition of the new court [the *Staatsgerichtshof*] was perfectly fair."[85] The Court for the Protection of the Republic operated until 1926 when it was dissolved.[86]

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[84] "Gesetz zum Schutze der Republik," RGBl, 1922, Teil I, pp.587-88, §§12-13; Stern, pp.274-75.

[85] Arnold Brecht, The Political Education of Arnold Brecht. An Autobiography 1884-1970 (Princeton: Princeton University Press, 1970), p.232.

[86] "Gesetz zur Abänderung des Gesetzes zum Schutze der Republik. Vom 31. März 1926," RGBl, 1926, Teil I, p.190.

The event most often used to criticize the *Reichsgericht* before the rise of Hitler is the *Reichswehr* officers' trial (*Reichswehrprozess*) of 1930.

From 23 September to 4 October 1930 three German army officers (named Scheringer, Ludin and Wendt) were tried for treason before the IV. *Strafsenat* of the *Reichsgericht*. These three officers, while based in the town of Ulm, had attempted to "nazify" the local army units to the point where they would not obey any orders to put down the next Nazi *Putsch* attempt. The trial itself, which took a backseat to Hitler's testimony, resulted in the three men receiving sentences of eighteen months' fortress imprisonment. The court, in reaching its verdict, confirmed the officers' noble and honourable qualities and their good intentions.[87] The court, in an unnecessary diversion (as far as the case against the defendants was concerned), gave Adolf Hitler a chance to testify in order to determine whether the *NSDAP* intended to overthrow the republican government by violent means. This gave Hitler an opportunity to spread propaganda about his intentions to gain power through legal means and how, when he got there, the traitors of the 1918 revolution would be dealt with.[88] Hitler took the stand for two hours in order to deliver a harangue against the Weimar regime and proclaim his intentions. Karl Dietrich

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[87] Ingo Müller, Hitler's Justice: The Courts of the Third Reich, trans. Deborah L. Schneider (Cambridge, Mass.: Harvard University Press, 1991), pp.19-21.

[88] Hannover, p.279.

Bracher has argued that the Supreme Court, in allowing this to go on, showed its true loyalties by allowing Hitler to break the code of court conduct and, at the same time, violate the *Republiksschutzgesetz* (the Law for the Protection of the Republic) without charging him with contempt of court or any other crime.[89]

An event which can be used to show the nationalist leanings of the German judicial system and the more impartial decisions of the *Reichsgericht* is the libel case involving the late *Reichspräsident* Friedrich Ebert.

In 1922 a nationalist named Gannser called Ebert a traitor while the President was travelling through the city of Munich. Ebert took Gannser to court for libel but dropped the case when the Munich tribunal ordered Ebert to testify before the court. In 1924 Gannser again repeated his charges in a letter published in the anti-democratic Mitteldeutsche Presse in Magdeburg. This time President Ebert sued the editor of the newspaper, Rothardt, for libel.[90]

The trial began on 23 December 1924 before the *Schöffengericht* in Magdeburg.[91] In order to prove whether there was a defamation of Ebert's character the defense attempted to

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[89] Bracher, p.195.

[90] David Riesman, "Democracy and Defamation: Fair Game and Fair Comment I," Columbia Law Review, 42:7 (September 1942): p.1094n.

[91] Neusel, p.105. A very detailed work on the 1924 case and its background is Karl Brammer, Der Prozess des Reichspräsidenten (Berlin: Verlag für Sozialwissenschaft, 1925).

prove that the President had committed treason in January of 1918. At that time Ebert, as a member of the *SPD*, had joined a radical left-wing strike committee. The nationalists argued that he had done so in order to bring an end to the war by undermining the German war effort. Ebert's lawyers argued that he had joined the committee in order to temper and restrain its actions.[92]

The case before the court in Magdeburg went from examining the question of libel to that of treason. Not only was Ebert's reputation at stake but also "the legitimacy of the new republican establishment itself and, with it, the historical role played by its first president during what one might call the incubation period of the Republic, the January days of 1918".[93] The court, which was presided over by two nationalists, gave a very contradictory ruling. It ruled that by joining the strike committee, and therefore damaging the German war effort, Ebert was indeed guilty of treason even though he had acted for patriotic reasons. The newspaper's editor, Rothardt, was found innocent of libel but was given a three month sentence for using insulting language against the President in the article.[94]

In 1931 the *Reichsgericht* was able to clear the late *Reichspräsident*'s name. In a different case of libel Ebert had

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[92] Riesman, p.1093 and Kirchheimer, pp.78-79.

[93] Kirchheimer, p.77.

[94] Riesman, p.1094 and Kirchheimer, p.83.

once again been accused of treason based on the same grounds as the case held in 1924. The I. *Strafsenat*, in a ruling on 20 October 1931[95], was able to clear Ebert of all charges of treason. In its decision the Court ruled that Ebert had not committed treason and found the defendants guilty of defamation of character of the late President. The court used section five, part three of the 1930 Law for the Protection of the Republic to find the defendants guilty. This section prohibited defamation of a late President of the *Reich*.[96]

By 1933 the judiciary in Germany had played a part in the undermining of the Weimar regime. The judicial system did not provide a large amount of support for the republic. In general, the German jurists were not ardent supporters of the democratic government. As well, the courts tended to favour the right-wing enemies of the state over those of the left-wing. But, it can also be said that the *Reichsgericht* seemed to be more supportive of the Weimar government. The court, although by no means perfect, tended to be more objective and impartial in the cases it heard.

On 30 January 1933 Hitler and the Nazis came into power. Life would never be the same for Germany, the *Reichsgericht* and its judges included.

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[95] Neusel, p.106.

[96] Riesman, p.1094n. The Reichsgericht's decision was recorded in Entscheidungen des Reichsgerichts in Strafsachen, Bd. 65, p.421ff. The 1930 Law for the Protection of the Republic was the "Gesetz zum Schutze der Republik. Vom 25. März 1930," RGBl, 1930, Teil I, pp.91-93.

Chapter 2
The Pre-trial Period from 30 January to 20 September 1933

On the 27th of February 1933 the German *Reichstag*, or parliament building, was set on fire. The actual physical damage done to the building was modest compared to the political and social tempest it released.

Only the Session Chamber and the glass dome or cupola were destroyed by the blaze. When the glass dome cracked during the fire it acted as a chimney drawing the flames upward and preventing them from spreading outside the chamber. As a result the rest of the *Reichstag* was spared.[1] The architectural loss sustained does not seem to have upset very many people. The *Reichstag* was widely considered to be unappealing and as Fritz Tobias wrote: "The ugliness of the Reichstag must have cushioned the blow of its destruction quite considerably."[2] Even Kaiser Wilhelm II once said that the cupola in the centre of the building was "the height of bad taste".[3]

With the fire in the *Reichstag*, Adolf Hitler and the National Socialists began to consolidate their hold on power

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[1] Fritz Tobias, The Reichstag Fire, trans. Arnold J. Pomerans (New York: G.P. Putnam's Sons, 1964), p.75.

[2] Tobias, The Reichstag Fire, p.74.

[3] Cited in Abbe E. Wetterle, Behind the Scenes in the Reichstag. Sixteen Years of Parliamentary Life in Germany, trans. George Lees (New York: George H. Doran Company, 1918), pp.29-30.

in Germany. Hans Gisevius said in his memoirs that: "While the fire consumed the desolate home of the 1918 Republic, it also illumined the beginning of a new order of things."[4]

The persecution and oppression unleashed by the National Socialists against their political opponents, especially the Communists and the Social Democrats, was swift and severe. The Nazis seem to have believed that the fire was a *Fanal*, a signal, meant to trigger a nationwide Communist uprising. Hitler, after being brought to the smouldering *Reichstag*, demanded that all Communist members of the *Reichstag*, *Landtag*, and other prominent Communists officials be arrested and that all Communist newspapers be closed down.[5] During the cabinet meeting on February 28 *Reichsminister* Göring stated that he had issued orders to close down the Communist and Social Democratic newspaper presses in Prussia and to arrest any Communist politicians and officials that could be found.[6] In addition to the crackdown on the *Kommunistische Partei Deutschlands* the government introduced new laws and decrees which helped to fasten their hold on power within Germany.

The first of these was the "Decree of the Reich President for the Protection of People and State" of February 28. Some

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[4] Gisevius, p.5.

[5] Tobias, The Reichstag Fire, p.86.

[6] Karl-Heinz Minuth (Hg.), Akten der Reichskanzlei: Regierung Hitler 1933-1938, Teil I: 1933/34, Band I: 30. Januar bis 31. August 1933 (Boppard am Rhein: Harald Boldt Verlag, 1983), p.130.

felt that the decree had already been written before the night of the fire. Albert C. Grzesinski, former police president of Berlin, was convinced that the decree "had been obviously prepared beforehand".[7] The decree was not, in a strict sense, original. Although the development of the decree of February 28 is obscure it can be stated that it did not exist in its final form before the fire. The 1933 decree was actually the descendant of a Weimar *Schubladen-Verordnung* (a decree kept in reserve to deal with a specific situation). The National Socialist proclamation can be seen as a significantly altered version of the Prussian Emergency Decree of 20 July 1932.[8]

This decree, also known as the *Reichstag* Fire Decree, suspended almost all civil liberties of the German population including personal liberty, freedom of speech, freedom of the press, and the rights of assembly and association. It also stated that citizens' homes could be searched and their property confiscated by the authorities without a search warrant.[9] With this law in place, Hitler was able to throw his political enemies in jail and prison camps in the name of protecting the German people from Communist insurgents. This *Gleichschaltung* of political power by the National Socialists continued after the March 5 election. In the elections the

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[7] Albert C. Grzesinski, Inside Germany, trans. Alexander S. Lipschitz (New York: E.P. Dutton & Co., 1939), p.215.

[8] Mommsen, pp.120 and 128.

[9] "Verordnung des Reichspräsidenten zum Schutz von Volk und Staat. Vom 28.Februar 1933," RBGl, 1933, Teil I, p.83.

Nazis once again received the most seats in the *Reichstag* although they still did not hold a majority by themselves. This led to the introduction of the "Gesetz zur Behebung der Not von Volk und Reich" or Enabling Law of 24 March 1933 which allowed the government to rule Germany without the consent or support of the parliament.[10]

The Enabling Law allowed the executive of the government, i.e. Hitler, to issue decrees and laws which could deviate from the Weimar constitution. The government did not need the approval (through a passing vote) of the *Reichstag* in order to issue new legislation.[11] By passing this law, the *Reichstag* of the German *Reich* signed its own death warrant. In effect, the new law made the parliament useless and gave complete control of the government to the executive and to the *Reichspräsident*.

As the fire burned, an arsonist, a young Dutchman named Marinus van der Lubbe, was caught and arrested by the Berlin police. Over the next few weeks Hitler, von Hindenburg and the government deliberated over what to do about the situation.

Understandably, the domestic and foreign press were closely watching events in Germany in early March. Close attention was paid to the burning of the *Reichstag* and the government's crackdown on its political opponents. On 2 March Hitler said

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[10] "Gesetz zur Behebung der Not von Volk und Reich. Vom 24. März 1933," RGBl, 1933, Teil I, p.141.

[11] "Gesetz zur Behebung der Not von Volk und Reich. Vom 24. März 1933," RGBl, 1933, Teil I, p.141.

in that day's cabinet meeting that the agitation in the international press would never have taken place if van der Lubbe had have been hanged immediately after being captured.[12]

Another cabinet meeting on March 7 again dealt with the *Reichstag* fire. The *Reichsminister des Innern*, Dr. Frick, felt that van der Lubbe should be punished immediately by hanging him on the *Königsplatz*. He knew that the maximum legal penalty for arson was only a prison sentence but felt that this particular crime should carry a death sentence. This would mean a violation of the legal maxim *nulla poena sine lege*[13] which was in force in the German legal system. The *Reichskanzler*, Hitler, agreed with his Minister of the Interior and felt that it was absolutely necessary to hang van der Lubbe at once. Because of *nulla poena sine lege*, van der Lubbe and any accomplices of his that might be found were exempt from the death penalty laid down under the clauses of the *Reichstag* Fire Decree. In the decree arson and high treason were now criminal acts punishable by death but only if committed after February 28.[14]

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[12] Minuth, p.147.

[13] *Nulla poena sine lege* (roughly meaning "no punishment without law") is defined by Jeremy Noakes and Geoffrey Pridham as: "The principle that no one should be tried for an act which was not a crime at the time he committed it or be given a punishment which was not stipulated for the act at the time he committed it." Noakes and Pridham, p.267. For a detailed look at *nulla poena sine lege* see Jerome Hall, "Nulla poena sine lege," The Yale Law Journal, 47:2 (December 1937), pp.165-193.

[14] Minuth, pp.163-164.

Later in the same meeting *Staatssekretär* Dr. Schlegelberger of the Ministry of Justice[15], agreed that the law might have to be changed under these circumstances. He announced that a preliminary investigation had begun against van der Lubbe charging him with high treason and arson. He asked Hitler to give the *Reichsjustizministerium* time to study the doctrine of *nulla poena sine lege* in this case.[16] If van der Lubbe was indicted on charges of arson and high treason it meant that the trial would fall under the jurisdiction of the *Reichsgericht* which had first and last rights to judge cases of *Hochverrat*. *Reichskommisar für das Preußische Finanzministerium* Dr. Popitz was not sure that the *Reichsgericht* would recognize a retroactive decree from the government setting aside normal legal maxims in order to allow van der Lubbe to be given a death sentence. Hitler stated that he would discuss this issue with *Reichsgerichtspräsident* Dr. Erwin Bumke in the near future. The next step Hitler intended to take was to discuss the entire matter with President von Hindenburg.[17]

Over two weeks later Hitler still felt the same about the best way to deal with van der Lubbe and his accomplices. In his speech to the *Reichstag* assembly on March 23 he said:

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[15] Dr. Schlegelberger was standing in for Dr. Gürtner, the Reich Minister of Justice, who was ill.

[16] Documents on German Foreign Policy 1918-1945, Series C, Volume I (London: Her Majesty's Stationary Office, 1949), p.118.

[17] Documents on German Foreign Policy, p.118.

> The burning of the *Reichstag*, one unsuccessful attempt within a large-scale operation, is only a taste of what Europe would have to expect from a triumph of this demonical doctrine. When a certain press, particularly outside Germany, today attempts, true to the political lie advanced to a principle by Communism, to link Germany's national uprising to this disgraceful act, this can only serve to strengthen my resolve to leave no stone unturned in order to avenge this crime as quickly as possible by having the guilty arsonist and his accomplices publicly executed![18]

The next day *Staatssekretar* Dr. Meissner informed Hitler that President von Hindenburg would not sign any order allowing van der Lubbe to be summarily executed because, as he later said: "public executions are not in keeping with German sentiments or with German history."[19]

Von Hindenburg, as President of the Reich, was still a man of great power and prestige in Germany. The National Socialists did not hang van der Lubbe or his alleged accomplices. In 1941 Hitler was still angry that he had been unable to hang the arsonist immediately.[20]

On the 29 March 1933 the government passed the law which

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[18] Max Domarus (Ed.), Hitler Speeches and Proclamations 1932-1945, Volume I, The Years 1932 to 1934, Trans. Mary Fran Gilbert (Wauconda, Ill.: Blachazy-Carducci Publishers, 1990), p.277. By March 23 all five future defendants were in police custody: Ernst Torgler surrendered himself to police on February 27 and was placed under arrest and the three Bulgarians, Dimitroff, Popoff, and Taneff, were arrested on March 9. Douglas Reed, The Burning of the Reichstag, (London: Victor Gollancz, 1934), pp.25-26.

[19] Cited in Tobias, The Reichstag Fire, p.71.

[20] Henry Picker, Hitlers Tischgespräche im Führerhauptquartier (Stuttgart: Seewald Verlag, 1977), p.279.

Hitler and Frick had been demanding. It removed the legal maxim of *nulla poena sine lege* from the *Reichstag* fire case. Under article five of the *Reichstag* Fire Decree of 28 February certain crimes were, from that point on, punishable by death. These crimes included high treason and arson. With the new law, known as the "Lex van der Lubbe", the death penalty also applied to similar criminal acts committed between 31 January and 28 February 1933. If the new law was upheld by the *Reichsgericht*, then van der Lubbe and his accomplices, if convicted, could be sentenced to death.[21]

By the end of March the preparations for a trial to be held against van der Lubbe and the four Communists was well underway. It was too late to quickly and quietly execute the accused. It has been argued, by Martin Broszat in particular, that the events during March dealing with the background to the trial were another example of a compromise reached between the new government and an established institution in German society. The government came to an agreement with the leaders of the justice system just as they had, or would, with the existing bureaucracy and the armed forces. Because the Ministry of Justice resisted any change to *nulla poena sine lege* Hitler was forced to let the investigation and trial of van der Lubbe and the Communists take place. In return "Lex van der Lubbe" was passed without any protest on the part of

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[21] "Gesetz über Verhängung und Vollzug der Todestrafe. Vom 29. März 1933," RGBl, 1933, Teil I, p.151.

judicial authorities. As Broszat said: "A principle of law had been waived but the authority of the judicature had been successfully defended."[22]

By late spring some Nazis were even warming up to the idea of an anti-Communist trial. A letter written by *Oberregierungsrat* Thomsen on 18 May 1933 stated: "Der Prozess gegen den Brandstifter wurde zudem in aller Deutlichkeit beweisen, dass es sich um eine grossangelegte kommunistische Verschwörung mit den Ziel der Machtergreifung gehandelt habe."[23] There was little doubt that a publicly-held criminal trial with a lot of domestic and foreign press coverage might help the fledgling National Socialist regime. A judicial decision condemning the secret Communist conspiracy against the government would help to give Hitler the excuse he needed for the oppression of his political enemies within Germany.[24]

In the German legal system of the period there were three stages in the process of a criminal case: the police investigation, the preliminary judicial investigation, and, if there were sufficient grounds for an indictment, the trial itself.

The first investigation into the *Reichstag* fire was undertaken by the police. It was the task of the police to collect

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[22] Martin Broszat, The Hitler State. The Foundation and Development of the Internal Structure of the Third Reich, trans. John W. Hiden (London: Longman Group, 1981), pp.328-30.

[23] Minuth, p.463.

[24] Gerald Dickler, Man on Trial. History-Making Trials from Socrates to Oppenheimer (New York: Dell Publishing, 1962), p.210.

all information relating to the crime, take statements from prisoners and witnesses, offer rewards for information, make arrests, and check the history of the accused, including their past political and social connections. The police investigation in Germany was handled by Detective-Inspector Dr. Walter Zirpins. His investigation resulted in a report submitted on 3 March. The report contained, among other material, two major conclusions: Marinus van der Lubbe burned the *Reichstag* on his own, and, he did it under the direct orders of the German Communist Party.[25]

In addition to the police investigation in Germany, Detective-Inspector Helmut Heisig was sent to Holland by his supervisor, Rudolf Diels (the first chief of the *Gestapo*), to investigate van der Lubbe's background. Heisig interviewed friends and associates of the arsonist and came to the conclusion that van der Lubbe was indeed a Dutch Communist. The German detective also felt that van der Lubbe started the fire in the *Reichstag* on his own.[26]

The police report was disappointing for the National Socialist government because the police felt that van der Lubbe acted alone and not with Communist conspirators. But, the police were also of the opinion that van der Lubbe was a Communist acting under Communist orders. This was enough

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[25] Tobias, The Reichstag Fire, pp.59-63; Reed, pp.30-31; R. John Pritchard, The Reichstag Fire. Ashes of Democracy, (New York: Ballantine Books, 1972), pp.86-87.

[26] Tobias, The Reichstag Fire, pp.64-67.

reason for van der Lubbe to be held over for trial as the investigation went into its second stage, the preliminary judicial inquiry.

As the case dealt with high treason the preliminary investigation was handled by a judge attached to the *Reichsgericht*. This investigation examined the police reports, reexamined the evidence, witnesses, and the prisoners. The judge's conclusions were then forwarded to the *Reichsanwaltschaft* to see if there was sufficient cause for a trial to be held.[27]

The examining magistrate attached to the *Reichsgericht* at the time was *Landgerichtsdirektor* Dr. Braune. During the 2 March cabinet meeting both Göring and Hitler objected to his being assigned to the case. They did not trust his mental capability or his political beliefs in this case. They remembered that he was the judge who put the three officers on trial for high treason in the 1930 *Reichswehr* officers' trial.[28] Pressure was put on Dr. Schlegelberger to find a judge who was more politically acceptable to the government. A *Landgericht* judge, Paul Vogt, was chosen to replace Dr. Braune.[29]

On 28 September 1933 the Swiss newspaper, Neue Zürcher Zeitung, described Judge Vogt by saying that: "His bearing is that of a typical Prussian reserve officer. His legal know-

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[27] Reed, p.30.

[28] Documents on German Foreign Policy, pp.94-95; Pritchard, p.87.

[29] Tobias, The Reichstag Fire, p.179.

ledge and loyalty are beyond question."[30] Even Hans Bernd Gisevius felt that Vogt was capable and could not have been coordinated by the National Socialists so soon after the assumption of power.[31] From early March to 1 June 1933 his investigation of the case filled twenty-four volumes with the testimony of over five hundred witnesses. He was convinced from early on that van der Lubbe was a Communist and had been in contact with both German and foreign Communists. In the end he recommended that the five accused men be held over for trial before the *Reichsgericht*.[32] Vogt's recommendation and reports were given to the Public Prosecutors' Office. The accused were then indicted on charges of high treason and arson in a legal document two hundred and thirty-five pages long.[33] The indictment was never published during the entire course of the trial. What was known was that the accused were being charged with insurrectionary arson and crimes against public security.[34]

The *Reichstag* Fire trial was scheduled to take place before the IV. *Strafsenat* of the *Reichsgericht*. On 24 December 1932 the Presidium of the Supreme Court set down its jurisdictional

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[30] Cited in Tobias, The Reichstag Fire, p.179.

[31] Gisevius, p.27.

[32] Pritchard, pp.86-88 and Tobias, The Reichstag Fire, p.195.

[33] Tobias, The Reichstag Fire, p.203.

[34] Reed, p.33.

boundaries for individual panels within the court. The IV. *Strafsenat* was responsible for all cases of high treason, treason against the nation, and espionage which had case names beginning with the letters A to L.[35] The three defendants in the 1930 *Reichswehr* officers' trial had been tried before this senate. The only judge who had served on this senate in 1930 and also served on it in 1933 was Judge Coenders.[36] Douglas Reed, who represented The Times at the trial, said that it was "one of the most eminent seats of that German justice which even in the turmoil of a patriotic revolution claimed to maintain its austere aloofness from political considerations".[37]

All five judges in the IV. *Strafsenat* had been in the judicial system since the imperial regime. The presiding judge was *Senatsprasident* Dr. Wilhelm Bünger. During the trial he conducted the proceedings. In the German system the presiding judge held the most responsibility because he alone was allowed to question the accused, examine all of the witnesses, and keep control in the court.[38] Bunger had a long and successful legal and political career:

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[35] Kaul, pp.34-35.

[36] Tobias, The Reichstag Fire, p.205.

[37] Reed, p.34.

[38] Reed, p.42.

Justice Wilhelm Bünger[39]

1870 (8 Oct.)	born in Elsterwerda, Prussia
1893	*Referendar*
1897	*Gerichtsassessor*
1902-1913	*Staatsanwalt* in Frankfurt am Main
1913-1914	*Kammergerichtsrat* in Berlin
1914-1917	Captain in 351. Infantry Regiment
1919	*Reichsanwalt*
since 1920	elected member of the Saxon *Landtag*
1924-1927	Saxon Justice Minister
1927	received Dr.jur.h.c.
1929	Saxon Popular Education Minister
1929-1930	Saxon Prime Minister
1931-1934	*Senatspräsident* of IV. *Strafsenat*
1934-1936	*Senatspräsident* of V. *Strafsenat*
1937 (21 Mar.)	passed away

As a politician Bünger was a member of the *DVP*, the German Peoples' Party, and had a reputation of being liberal at home and abroad except when it came to dealing with Communists. Münzenberg's second Brown Book said that Bünger dealt with Communists "with exceptional severity".[40] He had come out of politics as a politically liberal sixty-one year old and was named President of the IV. *Strafsenat* on 2 July 1931.[41] His appointment to the *Peichsgericht* was authorized by *Reichspräsident* von Hindenburg.[42] The fact that he stepped into

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[39] Kaul, pp.87 and 326-327; Leo Just (Hg.), Handbuch der Deutschen Geschichte, Band 6: Gesamtregister (Essen: Akademische Verlagsgesellschaft Athenaion, 1985), p.63; Lobe, p.403; Herrmann A.L. Degener (Hg.), Degeners Wer ist's?, X. Ausgabe (Berlin: Verlag Herrmann Degener, 1935), p.224; The New York Times (22 March 1937), p.23.

[40] World Committee for the Victims of German Fascism, The Reichstag Fire Trial. The Second Brown Book of the Hitler Terror (New York: Howard Fertig, 1969 [1934]), pp.76-77.

[41] Kaul, p.87.

[42] The Justice Case, p.35.

such a high-ranking position after being out of the judicial system for some time makes it seem that this was a political appointment much to the displeasure of many *Reichsgerichtsrate* who were in a more direct line for the position.[43] In August 1933 the German government wanted everyone at home and abroad to know that Dr. Bunger was not a Nazi stooge. The second Brown Book printed instructions it allegedly intercepted from Dr. Goebbels stating that the objectivity of the IV. *Strafsenat* was to be emphasized. It also said that it was "to be stressed that Dr. Bünger was a member of the German Peoples' Party until its dissolution and is thus not a National-Socialist".[44]

During the *Reichstag* fire trial the President of the Court was by far the most vocal and most important member of the court. In the German legal system the other judges on the panel, although important in reaching judgement in a case, were less important in the general direction of a trial itself. Even in the final verdict of a trial individual judges did not express their own opinions and feelings about the case. A group document was read out as a verdict. If there was minority decision on the panel its members did not give the reasons for their dissent from the majority.[45]

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[43] Fritz Tobias, Der Reichstagsbrand. Legende und Wirklichkeit, (Rastatt/Baden: G. Grote'sche Verlagsbuchhandlung KG, 1962), p.347.

[44] World Committee, The Reichstag Fire Trial, p.77.

[45] Cook, p.76.

The other four judges on the panel included Hermann Coenders, a Prussian magistrate appointed to the position of *Reichsgerichtsrat* in 1925[46]; Walter Frölich, an ex-member of the German Peoples' Party and German National Peoples' Party and a recent appointee to the Court as a *Reichsgerichtsrat* (June 1932)[47]; Emil Lersch, a *Hilfsrichter* to the *Reichsgericht* in 1932 and appointee to the *Reichsgerichtsrat* position on 1 November 1933[48]; and *Landgerichtsdirektor* Gerhard Rusch, a *Hilfsrichter* to the Court since 1932.[49] Dr. Full was named *Erganzungsrichter* for the upcoming trial.[50]

As the trial approached, what many people in Germany and abroad must have been asking is would the IV. *Strafsenat* of the *Reichsgericht* be independent and objective during this trial? Had the judiciary been completely consolidated by the government by September of 1933?

The new government proceeded with the *Gleichschaltung* of the German civil service, including the judiciary, after assuming power in January. From 1931 the Nazis had intended to

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[46] Kaul, p.264; Lobe, p.386. Coenders retired from the *Reichsgericht* in 1934.

[47] Kaul, p.269. Frölich was eventually awarded three Nazi service medals.

[48] Kaul, p.279. Lersch went on to join the *NSDAP* in 1937 and received two Nazi service orders.

[49] Kaul, p.288. Rusch was appointed Reichsgerichtsrat on 1 December, 1934. He died in 1936.

[50] Petr Stojanoff, Der Reichstagsbrand. Die Prozesse in London und Leipzig (Wien: Europa Verlag, 1966), p.207.

reform the judiciary for its own purposes. On 16 March 1931 the *Bund Nationalsozialistischer Deutscher Juristen* (*BNSDJ* or Association for National Socialist Jurists) reported in Die Volkszeitung: "One day, we will forget the independence of the judges which has no significance in itself."[51] In 1933 this forecast began to come true.

Under the Weimar constitution judges were independent of the government and were appointed for life. If the new regime wanted to gain complete political control over Germany it would have to get around judicial independence and irremovability. The judicial system had to be brought under Hitler's control as part of a more general *Gleichschaltung*.[52]

Coordinating the judiciary would be no small task. In 1933 there were over ten thousand judges in the system.[53] Not many jurists (judges and lawyers) were members of the National Socialist Party. In January 1933 only 30 of the approximately seven thousand judges in Prussia were members of the *NSDAP*. The *BNSDJ*, founded by Hans Frank in 1928, only had 30 members in 1929 (judges and lawyers), 233 members in 1930, 1,347 members in 1932, and 1,614 members in April 1933.[54] Obviously

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[51] cited in The Justice Case, p.96.

[52] Noakes and Pridham, p.272.

[53] The Statesman's Year-Book, 1934, p.946. There were 10,069 judges in the *Amtsgerichte*, *Landgerichte*, and *Oberlandesgerichte* and 102 judges in the *Reichsgericht*.

[54] Karl D. Bracher, Wolfgang Sauer und Gerhard Schulz, Die nationalsozialistische Machtergreifung. Studien zur Errichtung des totalitären Herrschaftssystems in Deutschland

most of the legal profession did not hold specific Nazi beliefs. If anything, German jurists were authoritarian, not totalitarian.[55] Politically most of the judges seemed to be nationalists and tended to agree with the National Socialists as opposed to the Communists or Social Democrats.[56]

The new government could not expect, therefore, to receive wholehearted support from the judiciary. Although well affected towards the government the judiciary was also self-interested. It wanted to protect its right to govern and educate itself and its members through appropriate recruitment and by training its own future replacements.[57] The judicial structure in Germany did not simply give up without a struggle. The coordination of the judiciary took a number of years to complete if for no other reason than the fact that a legal system with a long and stable history could not be transformed overnight. It has even been argued that the legal system, because of its sense of justice, offered at least passive resistance to the takeover of Germany by the Nazi system.[58]

1933/34, Zweite Auflage (Köln: Westdeutscher Verlag, 1960), p.518; Wheaton, p.406.

[55] Richard Grunberger, The 12-Year Reich. A Social History of Nazi Germany 1933-1945 (New York: Ballantine Books, 1971), p.128.

[56] Tobias, The Reichstag Fire, p.269.

[57] Kirchheimer, p.300.

[58] Fabian von Schlabrendorff, The Secret War Against Hitler, trans. Hilda Simon (New York: Pitman Publishing, 1965), p.60.

The first major infringement the government made into the judicial court system was the creation of the *Sondergerichte* on 21 March 1933. These Special Courts were to be set up within the region of every *Oberlandesgericht* and were to deal with the crimes listed in the *Reichstag* Fire Decree of February 28 and the new decree against vocal attacks on the National Socialist regime which was also issued on March 21. These courts were not allowed to deal with crimes that tell within the jurisdiction of the *Reichsgericht*. But they were allowed to try cases against defendants who were charged with numerous crimes as long as at least one of the crimes was within the competence of the Special Court. Crimes that did fall within the range of the new court included disobeying government orders, sabotage, rioting, or acts against the common good. A case could be called before a *Sondergericht* within one to three days, without a preliminary judicial investigation being conducted. The trial itself took place before a panel of three regional judges whose had the right to refuse any evidence if they felt it would not assist in clearing up the case. The final verdict could not be appealed.[59] The *Sondergerichte* were a direct creation of the Nazi regime. The decree itself was signed by the Chancellor, Hitler, and by Vice Chancellor Franz von Papen acting "Für den Reichsminister

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[59] "Verordnung der Reichsregierung über die Bildung von Sondergerichten. Vom 21. März 1933," RGBl, 1933, Teil I, pp.136-138.

der Justiz".[60] The amount of judicial input into this decree can be called into question. It was obvious that the new law was intended to speed up trials of enemies of the state. It was clear from the procedure for the *Reichstag* Fire trial that allowing these crimes to be prosecuted through the ordinary legal system was slow and cumbersome and allowed the government to come under fire from the international press. Quick trials with no appeals would make the task of oppressing the government's enemies both faster and less painful.

With the establishment of the Special Courts Hitler made it known to the nation what he expected of the judiciary. In his speech before the *Reichstag* on 23 March 1933, when the Enabling Law was about to be passed, he said:

> Our legal institutions must above all work to preserve the *Volksgemeinschaft*. The irremovability of the judges on the one hand must ensure a flexibility in their judgements for the welfare of society on the other. Not the individual but the *Volk* as a whole must be the focal point of legislative efforts. In future, high treason and betrayal of the *Volk* (*Landes-* and *Volksverrat*) will be ruthlessly eradicated. The foundations on which the judiciary is based can be none other than the foundations on which the nation is based. Thus may the judiciary always take into consideration the difficult burden of decision carried by those who bear the responsibility for shaping the life of the nation under the harsh dictates of reality.[61]

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[60] "Verordnung der Reichsregierung über die Bildung von Sondergerichten. Vom 21 März 1933", RGBl, 1933, Teil I, p.138.

[61] Domarus, p.280. The translation in Norman H. Baynes (ed.), The Speeches of Adolf Hitler, April 1922 - August 1939, Volume I (London: Oxford University Press, 1942), p.523 is basically the same.

Some jurists within the legal community agreed with Hitler. The Prussian *Justizminister*, Hans Kerrl, said on 27 March 1933: "It is obvious that the judicial system of a nation which is fighting for its existence cannot be inspired by a lifeless objectivity."[62] A German lawyer by the name of Dr. Heinrich Lange also thought that the legal system should rid itself of liberal ideas. In a speech on 9 May 1933 he said:

> The coup d'état of this year is the real revolution: it not only changed the leadership of the state, but it established in the place of liberalism a new state sentiment. This bases itself upon the ideas of duty and common weal. The individual is significant not for himself but for his position in the commonwealth.[63]

The largest threat to the judiciary before the *Reichstag* Fire trial was found in the government's attempts to consolidate their hold on the German civil service. Since jurists were part of the bureaucracy they were affected as well.

On 7 April 1933 the government issued the "Law for the Restoration of the Professional Civil Service".[64] This law, commonly known as the *BBG* (short for *Berufsbeamtentumsgesetz*), originated in a March 24 cabinet meeting when Wilhelm Frick, the *Reichsminister des Innern*, demanded that the German civil

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[62] cited in Konrad Heiden, A History of National Socialism, trans. from the German (London: Methuen, 1934), p.319.

[63] cited in F.C. Auld, "Law Reform in Germany," The Canadian Bar Review, 12 (1934): pp.28-29.

[64] "Gesetz zur Wiederherstellung des Berufsbeamtentums. Vom 7. April 1933", RGBl, 1933, Teil I, pp.175-177.

service be "reformed".[65]

The *BBG* was basically an attempt by the new government to regulate the personnel of the civil service. The law stated that unqualified officials within the civil service would fired without any kind of pension. Civil servants who could not guarantee unconditional loyalty to the National Socialist state because of their previous political conduct were to be dismissed with a reduced pension. In other words, officials without formal qualifications, non-Aryans, and politically suspect civil servants were to be purged from the civil service. In addition, the government was also allowed to ignore tenure provisions by transferring officials to other posts (the civil servant in question could request retirement instead) or by eliminating a position in the interests of administrative simplification.[66]

Those who, because of their previous political activity, could not be trusted in a position of power could be retired or transferred if they could not prove that they would work for the National Socialist government wholeheartedly. This meant that most of the judges hired since 1918 were in danger of losing their positions if they could not display loyalty to

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[65] Hans Mommsen, Beamtentum im Dritten Reich. Mit ausgewählten Quellen zur nationalsozialistischen Beamtenpolitik (Stuttgart: Deutsche Verlags-Anstalt GmbH, 1966), p.40.

[66] "Gesetz zur Wiederherstellung des Berufsbeamtentums. Vom 7. April 1933," RGBl, 1933, Teil I, pp.175-177; Jane Caplan, Government Without Administration. State and Civil Service in Weimar and Nazi Germany (Oxford: Oxford University Press, 1988), pp.141-143.

the new regime.[67] In addition civil servants who were non-Aryan could have their tenure and positions terminated as they were seen as untrustworthy by the Nazis.[68]

Because they were civil servants and bureaucrats it was possible that the German judiciary could be organized, coordinated and controlled by the National Socialist government. Their sense of loyalty to the state meant that there was not much that they could do, or would do, about the government's actions.[69] This new decree meant that judicial irremovability had disappeared. Judges could now be retired or demoted if they were not seen as being politically reliable. Also the concept of judicial independence had been undermined. If a judge could be fired by the government for being politically incorrect then a judge was required to keep in line with what the leaders were preaching in order to keep his position.[70]

The immediate effects of this decree on the *Reichsgericht* were minimal. The number of judges who were of Jewish origin or were unacceptable politically was at that time fairly small.[71] In early 1933 there were seven Jewish magistrates (one Senate President and six *Rate*) out of one hundred and two

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[67] William Ebenstein, The Nazi State (New York: Farrar & Rinehart, 1943), p.82.

[68] Ploscowe, "The Career of Judges," p.285.

[69] Kenneth C.H. Willig, "The Bar in the Third Reich," American Journal of Legal History, 20 (1976): 1.

[70] Noakes and Pridham, p.272.

[71] Neumann, p.454.

judges in the entire *Reichsgericht*.[72] The most prominent was Dr. Alfons David, the president of the VIII. *Zivilsenat*.[73] After the decree was passed Dr. David protested to the government and declared his loyalty to Germany. He even wrote to Hitler personally to plead his case but was put under enough pressure that he retired on 1 August 1933.[74] The only Supreme Court judge dismissed in April 1933 because of his political history was Hermann Grossmann, a Social Democrat, who would not swear loyalty to the National Socialists.[75]

On the same day the government issued a law "Concerning Admission to the Practice of Law". This law was meant to help the government control who entered the legal profession in the future. It restricted the independence of the bar and helped to further "aryanize" the judiciary.[76] The decree stated that present non-Aryan members of the legal profession could be retired and that in the future non-Aryans would not be allowed to enter the legal system. The law also prohibited Communists,

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[72] Lothar Gruchmann, Justiz im Dritten Reich 1933-1940. Anpassung und Unterwerfung in der Ära Gürtner (München: R. Oldenbourg Verlag, 1988), p.165.

[73] Dr. Alfons David was born in 1866 in Prussia. He became a Reichsgerichtsrat in 1918 and a Senatspräsident in 1929. Lobe, p.348.

[74] Kaul, pp.53-54.

[75] Kaul, pp.54-55.

[76] Karl Dietrich Bracher, The German Dictatorship. The Origins, Structure, and Effects of National Socialism, trans. Jean Steinberg (New York: Praeger Pub., 1970), pp.213-214.

or former Communists, from working in or entering the legal profession.[77]

On April 22 a new government office was created in order to further consolidate the judiciary. Dr. Hans Frank, the lawyer of the *NSDAP*, was named "Reichskommissar für die Gleichschaltung der Justiz in den Ländern und fur die Erneuerung der Rechtsordnung" (the Reich Commissioner for the Consolidation of Justice in the States and for the Restoration of the System of Law).[78] In addition, over the next few years Dr. Frank's positions within the legal system multiplied until he was also President of the Academy of German Law, a *Reichsleiter* of the National Socialist Party, the founder of the Institute of German Law, and President of the International Chamber of the Law.[79] From now on, German law and the legal system would be under the watchful eyes of the government as the coordinating of the judiciary continued.

The reaction of the judiciary, and the judges of the *Reichsgericht* in particular, to the *Gleichschaltung* of the

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[77] "Gesetz über die Zulassung zur Rechtsanwaltschaft. Vom 7. April 1933," RGBl, 1933, Teil I, p.188.

[78] Herbert Michaelis und Ernst Schraepler (Hg.), Ursachen und Folgen: Vom deutschen Zusammenbruch 1918 und 1945 bis zur staatlichen Neuordnung Deutschlands in der Gegenwart, Band 9: Das dritte Reich: Die Zertrummerung des Parteienstaates und die Grundlegung der Diktatur (Berlin: Dokumenten-Verlag Dr. Herbert Wendler & Co., 1964), p.327.

[79] Eugene Davidson, The Trial of the Germans. An Account of the Twenty-Two Defendants Before the International Military Tribunal at Nuremberg, (New York: The Macmillan Company, 1966), p.429.

legal system in Germany was, at first, tentative but supportive toward the new government. The responses seem to show a mix of mild excitement, fear of the future, and an angry reaction to comments made about the reliability and strength of the German judiciary. In the first issue of the Deutsche Richterzeitung (the German Judicial Journal) for 1933 the Chairman of the German Federation of Judges, Karl Linz, stated in his outlook for 1933 that "all signs point to new attacks and new struggles to maintain the rule of law and an independent legal system".[80] He wrote in another article written in the same issue that he also feared that the new regime might attempt to alter the irremovability and independence of the courts but said, in a hopeful tone: "German judges place their full confidence in the new government."[81] On 19 March 1933 the Presiding Committee of the Union of German Judges issued a resolution to the government which said that: "The German Judge was from time immemorial conscious of his responsibility and inspired by national feelings. He has invariably delivered judgement in accordance with the law and the dictates of his conscience. That must continue!"[82] Dr. Schlegelberger of the Reich Ministry of Justice said on 21 March, in response to

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[80] Karl Linz, "Zum neuen Jahre," Deutsche Richterzeitung [hereafter referred to as DR], 25 (1933): p.1 cited in Müller, p.36.

[81] Karl Linz, "Zeitspiegel," DR, 25 (1933): pp.121-122 cited in Müller, pp.36-37.

[82] Cited in Heiden, p.320.

attacks made on the judiciary that: "It was self-evident that the judicature would give the utmost support to any government, but particularly the present government of national recovery, in any efforts aiming to protect the state against high treason and treason and such similar tasks."[83]

The Supreme Court responded to the Hitler's March 23 speech to the *Reichstag*. On 31 March a statement from the *Reichsgericht* read:

> The Supreme Court desires to express its gratitude to the Reich Chancellor for having recognized in the Government's declaration of March 23, 1933, that the irremovability of the Judges is the basis of the legal system. Only the consciousness of his independence gives to a Judge that inner freedom which he needs in the exercise of his high office. In the enjoyment of such freedom, and subject only to the Law, the true task of the Judge is to assist in his judgements to maintain the existence of the nation."[84]

The statement was either a quiet attempt by the *Reichsgericht* to get the government to let them judge the way they were doing (and therefore not to consolidate them), or, it was a complete misreading of what Hitler had actually said on 23 March.

With the passing of the April 7 Civil Service Act the response of the judiciary to government actions swiftly began to change. On April 7, Karl Linz met with the *Reichkanzler* and later said that Hitler had agreed to maintain the independence

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[83] Cited in Broszat, p.343, note 4.

[84] Cited in Heiden, p.320.

of the judiciary with only some minor changes. Linz concluded: "We may therefore rest assured that the regulations contained in the law on the civil service will be dropped again as soon as possible."[85]

The resolve of the legal profession to hold out against coordination by the government seems to have slowly disappeared after the issuance of the Civil Service Act. After April 7 it was very difficult for the judiciary to try to remain completely independent when their security and tenure had been removed by the new decree. A troublemaking judge could now be removed from office by the government. Throughout April and May judicial organizations across Germany began to coordinate themselves instead of waiting for the government to do it for them. On 21 April 1933 the Association of Prussian Judges and Public Prosecutors sent out an appeal "to enter the front line of Adolf Hitler's ranks and join the Federation of National Socialist Jurists, for unconditional solidarity is a necessity for the success of our struggle".[86] On 29 April the Oldenburg Judges' Association voted to disband itself; on 10 May the members of the *Reichsgericht* Judges' Association resigned to allow for coordination; and on 21 May the Saxon Association of Judges and Public Prosecutors placed itself under the leadership of Hitler.[87] At the end of May the

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[85] Linz in DR, 25 (1933): p.156 cited in Müller, p.37.

[86] DR, 25 (1933): p.156 cited in Müller, p.37.

[87] DR, 25 (1933): pp.189-190 cited in Müller, pp.37-38.

leaders of the national judicial organizations sent a telegram to Dr. Frank entering the entire legal profession into the Association of National Socialist Jurists, the *BNSDJ*, and accepting the leadership of Hitler.[88]

As the summer passed the *Reichsgericht* began to be pressured from two different sources regarding the upcoming trial. The pressure from the government involved the coordination of the judiciary and the veiled threats directed at the judges of the Supreme Court if they did not conform to the new system. The judges of the IV. *Strafsenat* must have known that Hitler and the government expected them to conduct the trial in a manner which kept the best interests of the National Socialist government and Germany in mind. This pressure, at least before the trial, was conciliatory and covert in nature. There were no open threats made to the Court before the trial began.

On the other hand, the pressure from outside Germany before the trial was openly critical of the German court. Most of this criticism came from the Communist press of Europe, specifically from Willi Münzenberg, the Chief of the Communist "Agitprop" (Agitation and Propaganda Department) in Paris.[89] It was his department which brought forward two different means of pressuring the German government and Supreme Court: the Brown Books and the London Counter-Trial.

The Brown Books were written as "documentary" accounts of

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[88] DR, 25 (1933): p.187 cited in Müller, p.38.

[89] Tobias, The Reichstag Fire, pp.75-76.

the terror which the Nazi government brought to Germany. As well, they said that van der Lubbe and his alleged accomplices were innocent as the Nazis themselves were responsible for the burning of the *Reichstag*. They were published by the "World Committee for the Relief of the Victims of German Fascism" which Arthur Koestler later said was nothing more than the Comintern's propaganda headquarters in Paris.[90] The two books were published in 1933 (before the trial) and 1934 (after the trial was completed) as The Brown Book of the Hit- ler Terror and the Burning of the Reichstag (1933) and The Reichstag Fire Trial. The Second Brown Book of the Hitler Terror (1934). Although the proof (that the Nazis were guilty of the fire) provided by these books was marginal at best they were influential in the world press and in public opinion.

The London Counter-Trial was another of Münzenberg's ideas. He thought he could convict the German government of complicity in the fire through the use of a "Commission of Inquiry into the Burning of the *Reichstag*" which would be directed by an "International Committee of Jurists and Technical Experts". The eight jurists from around the world which served on the Commission were all liberal-minded lawyers. None were Communists and all were respectable.[91] The purpose and task of the

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[90] Arthur Koestler, The Invisible Writing. The Second Volume of an Autobiography: 1932-1940, (London: Hutchison & Co., 1969 [reprint of 1954 ed.]), p.242.

[91] Tobias, The Reichstag Fire, p.120. The eight lawyers were: Dr. Betsy Bakker-Nort (Holland), Maitre Gaston Bergery (France), Mr. Georg Branting (Sweden), Mr. Arthur Garfield

Commission was to hold a pseudo-trial, what Arthur Hays later called a "pretrial of a trial, involving German justice and the Nazi party. While it was clear that the judgement of any such commission would have no legal standing, yet there was no doubt that it would have considerable effect upon public opinion".[92]

The Counter-Trial began deliberations on 14 September 1933 and heard a wide range of evidence, from the real to the unbelievable. On the 20th of September, the day before the trial in Leipzig was to open, the Commission published its preliminary conclusions. The Commission found that van der Lubbe was not a Communist; that there was no connection between the burning of the *Reichstag* and the Communist Party; that van der Lubbe had accomplices; and that the only group to gain from the fire and its aftermath was the Nazi party.[93] The conclusions drawn by the Commission were based more on political theories than on fact. Nonetheless they were effective in forming public opinion against the German government and legal system. World opinion in this trial was important especially since four of the five defendants were not German. The *Reichsgericht* was going to have to attempt to refute the

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Hays (USA), Mr. Vald Hvidt (Denmark), Maitre de Moro-Giafferi (France), Mr. D.N. Pritt, K.C. (England), and Maitre Pierre Vermeylen (Belgium). Tobias, The Reichstag Fire, p.120.

[92] Arthur Garfield Hays, City Lawyer (New York: Simon and Schuster, 1942), p.343.

[93] Manchester Guardian (21 September 1933), page 9.

Brown Book and undermine the verdict of the Counter-Trial if it was going to keep an untarnished reputation outside of Germany.[94]

On the eve of the trial the *Reichsgericht* was in a position in which it had to live up the expectations of the German government and people, its own legal traditions, and to the critical pressure from outside of Germany.

[94] Frederick L. Schuman, The Nazi Dictatorship. A Study in Social Pathology and the Politics of Fascism (New York: Alfred A. Knopf, 1935), pp.331-332.

Chapter 3
The *Reichstag* Fire Trial
21 September to 16 December 1933

A contemporary observer stated on 23 September 1933 that the *Reichstag* fire trial in Leipzig was "a political trial in every sense of the word".[1] This is at least partly true as the case against Torgler and the three Bulgarian defendants was brought about by the new government's fears of Communism in Germany. For the National Socialist leadership the *Reichs- tag* fire was an event of minor importance. What was important was the Communist insurgence which they believed it foreshadowed. This, for the government, was the essence of the trial. They hoped to demonstrate the connection between van der Lubbe's burning of the *Reichstag* and the Communist conspiracy against the new regime.

The indictment made no secret of this fact. The five defendants were charged with insurrectionary arson and high treason against the state based on the government's contention that the fire was meant as a signal for a Communist uprising against the National Socialist regime.[2]

The National Socialists hoped that the trial would prove that the Communists had started the fire. The Communists, on

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[1] Dr. Leopold Franz, "The Reichstag Fire Inquiry," Weekend Review, 23 September 1933, p.289.

[2] The Times (22 September 1933), page 12.

the other hand, were convinced that the National Socialists were the culprits and tried by all means to prove that it was a government conspiracy. The trial shaped up as a battle between the two groups, Communists and National Socialists, to prove the other guilty of starting the fire.

The judges of the IV. *Strafsenat*, before whom the case was brought, were positioned in between the two antagonists, and therefore exposed to pressure from both of them. Dr. Hans Frank, *Reichsjustizkommissar*, was optimistic. He issued a statement on September 21, the day the trial began, entitled: "Der Glaube an das Recht. Reichsjustizkommissar Dr. Frank vor den Auslandsberichterstattern über den Leipziger Prozeß". In the article Dr. Frank proclaimed his faith that the German legal system would show itself equal to the upcoming trial.[3]

On 21 September 1933 the trial began with a lot of enthusiasm. Sir Eric Phipps, British Ambassador to Germany, wrote that the German press gave entire columns to the proceedings.[4] The IV. *Strafsenat* of the *Reichsgericht* consisted of *Senatsprasident* Dr. Bünger, *Reichsgerichtsrate* Coenders, Dr. Lersch, Dr. Frölich, and *Landgerichtsdirektor* Rusch. The state prosecutors were *Oberreichsanwalt* Dr. Werner and *Landgerichts-*

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[3] Völkischer Beobachter (22 September 1933), Münchener Ausgabe, p.2.

[4] Documents on British Foreign Policy 1919-1939, eds. E. L. Woodward and Rohan Butler, Second Series, Volume VI: 1933-1934 (London: Her Majesty's Stationary Office, 1957), p.952.

direktor Dr. Parrisius.[5] Counsels for the defendants were Dr. Alfons Sack (for Torgler), Dr. Teichert (for Taneff, Popoff, and Dimitroff), and Dr. Seuffert (for van der Lubbe).[6] An ironic part of this situation was the fact that the defense attorney of the Communist *Reichstag* Deputy, Ernst Torgler, was Dr. Alfons Sack, an adherent of National Socialist beliefs.[7] Dr. Sack first gained notoriety before the IV. *Strafsenat* in 1930 when, with Hans Funk, he defended the three army officers in the *Reichswehr* trial.[8]

On September 21 the five judges of the panel entered the courtroom in Leipzig. Before taking their seats the judges gave the Hitler salute to the audience. It was reported that a judge who had failed to give the salute in an earlier case had been arrested in open court as a result.[9] The most important criminal trial of the Nazi regime to date had begun. The domestic and international press covered the trial in large numbers. Eighty-two foreign and forty-one German journalists were present at the opening events.[10] Twelve of the

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[5] "Anklageschrift in der Strafsache gegen van der Lubbe und Genossen (15 J 86.33)", p.2 reproduced in Kaul, p.342.

[6] Sack, pp.212, 248, 274.

[7] Tobias, The Reichstag Fire, p.199.

[8] Schlabrendorff, p.154. Dr. Sack died in an air raid in Berlin in 1945.

[9] The Times (22 September 1933), page 12; Reed, p.41.

[10] Völkischer Beobachter (22 September 1933), Münchener Ausgabe, p.2; The Times (21 September 1933), p.9; Stojanoff, p.208.

German journalists were considered reliable Nazi members of the press.[11] Hans Bernd Gisevius later commented on a possible reason for the large numbers of foreign correspondents present. He cynically commented that since everyone thought "that a judicial murder was about to take place, the world press was, so to speak, eager to attend to try the case on its own hook".[12]

Senatsprasident Bünger opened the trial with a long speech meant for foreign and domestic ears:

> The enormous repercussions of the event which constitutes the background of this trial have had the consequence of elevating the subject-matter of these proceedings to the rank of universal interest. It has formed the object of passionate discussion and speculation in the press of the whole world. Attempts have been made to anticipate the results of these proceedings. It does not, however, follow that this Court is entering upon its task with preconceived views or with its mind already made up. So far that has never been the custom either in Germany or abroad. Nor has prejudgment of the issues of a trial in the press been usual.
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> The struggle between these various conflicting theories has not affected the Court before which these issues come to be tried. The Court will pass sentence solely upon the results of the proceedings within its cognizance. For the purpose of this Court's decision only facts which are revealed in the course of the proceedings before it can have weight. Not only is this trial open to the public of all lands without restriction but the prisoners are represented by counsel without let, hindrance or condition. It has been said that no foreign lawyer has been permitted to appear for the defence. In this connection it must be observed that the law only permits such a course in exceptional circum-

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[11] Willi Frischauer, The Rise and Fall of Hermann Goering (Boston: Houghton Mifflin Company, 1951), p.93.

[12] Gisevius, p.28.

> stances. In the present case, the Court in the free exercise of its unfettered discretion has not seen fit to permit the admission of foreign lawyers. Not only has the Court seen no occasion for their admission but it holds the view that such applications as were made for this purpose were not directed to serve exclusively the interests of the prisoners, but were chiefly intended to cast doubt on the independence of German justice.[13]

The speech made it quite clear that the judges realized that not only the German government but also the *Reichsgericht* was on trial in the eyes of the world.[14] Dr. Bünger was asked by a reporter how he would conduct the proceedings. He answered: "According to the German penal code and the rules of German criminal court procedure.[...] I am astonished that such a question should be put to me. Law and justice still rule in Germany."[15]

The *Reichstag* fire trial was governed by the indictment put forward by the *Oberreichsanwalt*, Dr. Werner. This unpublished document stated that the defendants were charged with "actions preparatory to high treason, with the object of changing by violence the Constitution of the German Reich".[16] The

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[13] Tobias, The Reichstag Fire, pp.206-207. This translation of Bünger's speech was made from the official trial protocol. The speech was also printed, with modifications, in the Völkischer Beobachter on 22 September 1933 (Munchener Ausgabe, p.7) under the title "Der erste Tag im Reichstagsbrandstifterprozeß". The VB version was also printed with major modifications in World Committee, The Reichstag Fire Trial, p.110.

[14] Hays, pp.352-353.

[15] The New York Times (21 September 1933), page 9.

[16] Reed, p.33; Schuman, p.332.

punishment for these crimes was the death penalty as prescribed by the *Reichstag* fire decree of February 28, 1933. National Socialist Germany did not take the crime of treason lightly. E.A.M. Wedderburn stated in 1936 that high treason in Germany was seen not only an infraction against the constitution but also "a serious breach of loyalty to the nation itself".[17] An obvious reason for the intended heavy punishment was self-preservation. The government could only remain firmly planted in power if those who wanted to oust them from the leadership were either imprisoned or dead. Alfred Rosenberg, the National Socialist philosopher, gave another reason why the regime punished the crime of treason so strictly:

> Punishment is not a means of education, as our apostles of humanity pretend. Nor is it a vengeance. Punishment is the simple elimination of foreign types....A man who doesn't regard the essence of the people and their honor as the highest value has lost the right of being protected by the people. As for cases of treason against the *Volk* or treason against the country, penitentiary confinement and the death penalty are the only punishment that ought to be used; that goes without saying.[18]

With Dr. Bünger's speech the *Reichstag* fire trial began. In

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[17] E.A.M. Wedderburn, "Criminal Law in the Third Reich," The Juridical Review, 48 (1936): p.376. Early National Socialist views on *Hochverrat* and *Landesverrat* are dealt with in Hanns Kerrl, Nationalsozialistisches Strafrecht. Denkschrift des Preußischen Justizministers (Berlin: R.v. Decker's Verlag, 1933), pp.28-32.

[18] Alfred Rosenberg, Der Mythos des 20. Jahrhunderts, (München: Hoheneichen-Verlag, 1934), p.580 cited (translated) in Barton L. Ingraham, Political Crime in Europe. A Comparative Study of France, Germany, and England (Berkeley: University of California Press, 1979), p.260 (ellipsis in source).

Germany a criminal trial proceeded much differently than it did in Great Britain or North America. An observer from The Times felt that "the forms of German justice,...are for good or evil quite unlike anything to which Englishmen are accustomed or which they can readily imagine".[19]

A German trial (*Hauptverhandlung*) was much less formal than American or British hearings of the time. The objective of the proceedings was to discover the impartial truth of the case before the court. As laid out in the *Strafprozessordnung* this was done through an oral hearing of the testimony unhampered by formal rules of evidence.[20]

The *Reichstag* fire trial itself can be broken down into three distinct sections each corresponding to the changes in geographical location of the proceedings.[21]

The first part of the trial took place in the *Reichsgericht*

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[19] The Times (14 December 1933), page 15 (ellipsis in source).

[20] "Strafprozessordnung. Vom 1. Februar 1877," RGBl, 1877, p.300, §261. The procedure for a criminal trial is dealt with in chapter six, entitled *Hauptverhandlung*, pp.294-303. For a more detailed discussion of German criminal procedure (mainly pre-Nazi) see Hans Julius Wolff, "Criminal Justice in Germany: II," Michigan Law Review, vol.43 (1944), p.155-178.

[21] The following is only a summation of the actual trial itself. For a more detailed examination of the day-to-day happenings, including more details on witnesses, testimony, etc., see Fritz Tobias, Der Reichstagsbrand. Legende und Wirklichkeit (Rastatt/Baden: G. Grote'sche Verlagsbuchhandlung KG, 1962) or his The Reichstag Fire (the abridged English translation -- New York: G.P. Putnam's Sons, 1964); Douglas Reed, The Burning of the Reichstag (London. Victor Gollancz Ltd., 1934); and Dr. Alfons Sack, Der Reichstagsbrand Prozess (Berlin: Ullstein Verlag, 1934).

building in Leipzig between September 21 and October 7, 1933. The next step after the Presiding Judge's opening speech was the examination of the defendants Marinus van der Lubbe, Ernst Torgler, Georgi Dimitroff, Blagoi Popoff, and Wassil Taneff by the Court.

From September 21 to 25 the defendants were read a summary of the charges against them and any previous criminal convictions of the accused were read to the Court. According to German criminal procedure each defendant was encouraged to take this opportunity to present his own side of the story. The accused could also be asked relevant questions about their past. These questions, under the direction of the Presiding Judge, could come from the judges, the prosecutor, the other defense attorneys, and even the other defendants.[22]

Marinus van der Lubbe was questioned first, on September 21 and 22. Van der Lubbe was unable or unwilling to give an account of his life before 27 February 1933, so Dr. Bünger was forced to reconstruct his past from the statements made by van der Lubbe after his arrest (these were contained in the indictment). Van der Lubbe answered all questions put to him in court about his political background and the days before the fire with a simple 'yes' or 'no'. On the second day of the trial the Court called witnesses to the stand to confirm that van der Lubbe was able to follow the proceedings. They swore

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[22] "Strafprozessordnung," RGBl, 1877, pp.296-297, §§238-243.

that he was mentally competent and the case continued.[23]

The next defendant examined, on September 23, was the Bulgarian Communist leader, Georgi Dimitroff. His testimony, his appearance, and the impression he made sharply contrasted those of van der Lubbe. Dimitroff gave a history of his life and proclaimed his innocence and his outrage over what had happened to him. He testified before the Court in a righteous and aggressive tone which the judges, especially Dr. Bünger, took offence to. The mutual dislike between the two men would last throughout the trial and would result in Dimitroff's expulsion from the proceedings on five occasions. At the end of the day on September 23 Bünger said: "In short, the result of your examination is this: you are a Communist through and through, you are an enthusiastic supporter of Communism, but you repudiate individual terrorist acts and you dispute that you had anything to do with the Reichstag fire."[24]

On September 24, Blagoi Popoff was examined. He gave a sketch of his recent past and activities and proclaimed his innocence of any involvement in the *Reichstag* fire.[25] The German Communist *Reichstag* deputy Ernst Torgler came before the Court on September 25. After stating his innocence, he gave a brief history of his life and political activities.

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[23] Reed, p.43-50. Reed also stated that even though van der Lubbe's answers were limited to 'yes' and 'no' these answers seemed to him to be truthful.

[24] Reed, pp.50-54; Tobias, The Reichstag Fire, pp 212-214.

[25] Reed, pp.55-57.

Wassil Taneff, the third Bulgarian Communist charged, also testified on the 25th. His testimony was much the same as that of the other Bulgarians--he gave his life history and stated his innocence in the case.[26]

From September 25 to October 7 the trial went through the process of accusation and reply. The state prosecutor, Dr. Werner, confronted each of the defendants with the charges against them. The depositions made by the witnesses for the prosecution during the preliminary investigation were then presented to the Court. Then each defendant was given the opportunity to reply to the charges against him by stating his version of the events in question.[27]

On September 25 the allegations began with attempts by the Court to trace the defendants' movements up to night of the *Reichstag* fire. The prosecution began with Marinus van der Lubbe. Once again van der Lubbe himself was uncooperative and again Dimitroff questioned the Dutchman's mental competence to stand trial. Douglas Reed wrote that foreign lawyers observing the trial agreed that in their nations the lawyers for the defence would have demanded, and obtained, and examination of van der Lubbe's mental capacity to stand trial.[28]

As the trial progressed a British observer noted that the proceedings were unlike anything he had ever seen in England.

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[26] Reed, pp.57-63.

[27] Reed, p.64.

[28] Reed, pp.85-86.

The atmosphere was informal and impetuous as "the judge, the counsel, the witnesses and the accused are allowed considerable freedom to exchange remarks, to wander into irrelevant bypaths, and to indulge in repartee". He also noted that "counsel and the accused are allowed to interrupt witnesses and opposing counsel almost without restraint".[29]

On October 6 this freedom and informality claimed its first victim when Georgi Dimitroff was excluded from his own trial. Dimitroff, who was constantly holding the proceedings, the bench, and the German government in contempt, was warned by Dr. Bünger that he would not tolerate any more of Dimitroff's insults against German officials. Soon after, Dimitroff stated that the German police were incompetent. As a result the Court expelled him from the premises.[30] The legal basis for this ruling was the law against insulting an official, or *Beamtenbeleidigung.*[31] Over the course of the trial Dimitroff was expelled from the court on five separate occasions in his continuous feud with the Presiding Judge.[32] One eyewitness noted that Dimitroff's questions "though often tartly phrased,

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[29] Documents on British Foreign Policy, pp.952-953.

[30] Ferdinand Kugler, Das Geheimnis des Reichstagsbrandes (Amsterdam: Munster, n.d.), p.81 cited in Tobias, The Reichstag Fire, pp.216-217.

[31] The Times (14 December 1933), page 15; Reed, p.98.

[32] Dimitroff was excluded from the Court proceedings on October 6 and 11, November 2, 3, and 4 (after his argument with Göring). Tobias, The Reichstag Fire, pp.217-228.

were also often highly pertinent".[33]

By October 7 all five defendants had been told, in general, what witnesses and evidence were to be used against them. The general outline of the Dr. Werner's case was already apparent and, according to Douglas Reed, it "astonished all observers of the trial by its meagreness. It had been expected that some more convincing evidence than this would be produced".[34]

The second part of the trial took place between October 10 and November 18 in Berlin in the *Reichstag* itself. According to the *Strafprozessordnung*, the prosecution was allowed to request that the proceedings be moved to the *Reichstag* because of its intrinsic value as evidence in the case. The prosecution was allowed to present evidence through the examination of sites, the presentation of documents, and the testimony of witnesses and experts.[35]

In the German system there was no separate case for the defence presented by defence counsels. The lawyers for the accused were required to undermine the case for the prosecution during this stage of the trial, if necessary by producing witnesses to discredit the evidence of the prosecution. It was in this section of the *Reichstag* fire trial that the case for the prosecution began to collapse.

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[33] The Times (14 December 1933), page 15.

[34] Reed, p.107.

[35] "Strafprozessordnung," RGBl, 1877, pp.297-298, §§244-246.

Witnesses for the state fell into two main groups: those who could give testimony about the fire itself and those who could connect the accused to one another or to the fire.[36]

From October 10 to October 23 the Court attempted to re-enact the night of the fire through physical demonstrations and testimony given by witnesses and experts. Witnesses of the fire - civilians, firemen, police officers - described what they had seen on the night of the fire. On two occasions the proceedings took place in specific areas of the *Reichstag* as the prosecution attempted to depict the events on the night in question. Finally, on October 23, three experts on pyrotechnics were brought before the Court to give testimony on the fire itself.[37] Professor Emil Josse, a lecturer on thermodynamics at the Technical College of Berlin, Fire Director Wagner, Chief of the Berlin Fire Brigade, and Dr. Wilhelm Schatz, the *Reichsgericht*'s chemical expert[38], testified on their findings. They could not agree on how the fire had been

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[36] Reed, p.109. Reed also included as witnesses those who "were called to refute the allegations current in the outer world that the National Socialists had caused the fire". The testimony of Göring and Goebbels in early November is not included in this section of this thesis as they did not contribute any relevant evidence to the case against the defendants. Their testimony and the reason for it will be examined later.

[37] Reed, pp.109-180.

[38] Dr. Schatz was director of the "Private Institute for Scientific Criminology" and had a somewhat dubious reputation as an "expert". For some obscure reason he was a court-expert on chemistry, fingerprints and type as well as a graphologist, a pharmacist, a food expert, a botanist, a toxicologist, and a scientific criminologist. Tobias, The Reichstag Fire, pp.257-258.

started but a Dutch reporter observed: "They all agreed that he [van der Lubbe] could not have done it by himself. For the rest they beg to differ. But that is their privilege -- they are the experts, after all."[39]

The point the prosecution was attempting to make was that the fire could not have been started by one individual. As there was little doubt that van der Lubbe had accomplices, Dr. Werner's next task was to prove that the other four defendants were the associates of the Dutchman. From October 25 to 30, the prosecution attempted to prove that the four Communist defendants had conspired with van der Lubbe to set the *Reichstag* on fire. Dr. Werner presented witnesses who testified that they had seen various members of the accused group together in the *Reichstag* on different occasions.[40] More witnesses for the prosecution followed until November 18 as Dr. Werners attempted to connect van der Lubbe with the other defendants.[41]

By late November it was obvious that the prosecution's case against the defendants was weak. The indictment was based on police and preliminary judicial investigations which were incomplete and unsubstantial. It was becoming evident to all

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[39] Feuerschutz (a Dutch newspaper), 1933, p.50 cited in Tobias, The Reichstag Fire, p.257. See also Reed, pp.180-188.

[40] Reed, pp.195-209; Tobias, The Reichstag Fire, pp.232-236.

[41] Reed, pp.209-225, 237-242 and 247-263; Tobias, The Reichstag Fire, pp.237-247.

observers that there was no case to be made against any of the accused except van der Lubbe.[42] John Gunther watched as the trial continued: "With dreadful pertinacity, with true Teutonic thoroughness, the court plodded on, deeper every day in a morass of evidence that ineluctably proved just what it didn't want proved - the innocence of the accused."[43]

It was also during this stage of the trial that questions began to asked about the *Reichsgericht*'s impartiality towards this case. Was the IV. *Strafsenat* as impartial during the trial as Dr. Bünger's opening address claimed it would be?

The conduct of the bench during the *Reichstag* fire trial was a topic much discussed by observers of the proceedings. In the first few days of the trial there seemed to be few complaints about the Court's behaviour. The Times stated on September 23:

> The trial is being conducted with the utmost correctness of judicial procedure, and there can be no doubt that it is scrupulously fair within the Courtroom (sic). It would be misleading not to add that, in a country where arrest and imprisonment without trial are a matter of daily occurrence, with the inevitable effect on witnesses and evidence, the structure of the case is liable to be warped before it reaches the court.[44]

But, as the trial progressed, complaints began to surface

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[42] Reed, p.263.

[43] John Gunther, Inside Europe, 6th ed. (New York: Harper & Brothers, 1936), p.46.

[44] The Times (23 September 1933), p.10.

about the Court and its apparent bias. On October 31 a Dutch newspaper reported:

> National Socialist witnesses quite especially, are protected against every kind of reprimand. All of them are handled like unboiled eggs, indeed with every consideration and politeness. The distinction has become so blatant that the tone in which the Court addresses a witness is a clear indication of the latter's political colour.[45]

Throughout the trial there was a "double standard" in effect. Any evidence which was damaging to the Communists was admitted, even if it had nothing to do with the fire. At the same time, anything which might incriminate the National Socialists was not allowed into the record as evidence.[46] At times during the trial the investigation leaned towards National Socialist involvement in the fire. It was the opinion of Douglas Reed that every time that happened the *Reichsgericht* diverted the proceedings away from those areas which might incriminate the National Socialist government.[47]

One major example given of this double standard began with the testimony of the night doorman of the *Reichstag*, Albert Wendt. Wendt stated that he saw Torgler leave the parliament building at 8:30pm on the night of the fire. He also told the

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[45] Maasbode (31 October 1933), cited in Tobias, The Reichstag Fire, p.211.

[46] Tobias, The Reichstag Fire, p.214.

[47] Douglas Reed, Fire and Bomb. A Comparison Between the Burning of the Reichstag and the Bomb Explosion at Munich (London: Jonathan Cape Ltd., 1940), p.5.

Court that he saw another unidentified deputy leave the burning building at 10pm that evening.[48] The mysterious deputy in question was Dr. Herbert Albrecht, a National Socialist member of the *Reichstag*. Dr. Albrecht testified, on November 13, that he entered the building through Portal Five at about 9:30pm (after being asked for identification by a police official) in order to save important family papers from the fire. He was leaving the building at 10pm when Wendt saw him.[49] The discrepancy, and therefore the controversy, comes from the fact that Wendt testified on October 13 that the unidentified deputy did not enter the building through the only open entrance, Portal Five, where Wendt was working, at any time between eight and ten o'clock.[50] The possibility that Ernst Torgler might not have been the last individual to leave the *Reichstag* before the discovery of the fire was of major importance. The case against Torgler was based on the allegation that the Communist Deputy had been the last person to leave. It that allegation could not be proven then Torgler could not be found guilty. The discrepancy in the testimony of Wendt and Albrecht was not cleared up as the Court made no

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[48] Reed, Fire and Bomb, pp.23-24.

[49] Tobias, The Reichstag Fire, p.169; Reed, The Burning of the Reichstag, pp.253-255.

[50] Tobias, The Reichstag Fire, p.169; Reed, The Burning of the Reichstag, p.129 and 254.

attempt to discover which witness was telling the truth.[51]

As an observer, Arnold Brecht was of the opinion that the Court's failure to pursue leads incriminating the German government reflected a particular attitude: "The justices apparently did not take the rumors that the National Socialists themselves had arranged the fire seriously. They considered it beneath the dignity of the court to pursue such a suspicion against a German government thoroughly."[52]

It was also suggested that the Court veered away from incriminating the government because of the judges' fears that they might be sent to a concentration camp as a result.[53] That possibility had no real basis at the time. The judges were in a part of the bureaucracy which was still relatively free from National Socialist control. In addition, the Law for the Restoration of the Civil Service of April 7, 1933, would not allow the government to fire the five magistrates if they strayed "politically" during the trial. The most the government could legally do was force the judges into early retirement. Even that was not likely to be attempted because of the

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[51] Reed, The Burning of the Reichstag, p.132 and 254-255. Tobias argued that "even while the fire had still been raging, detectives had checked Albrecht's alibi [that he left his home at 9:30pm], and found that it was unshakeable. As a result, Judge Vogt decided quite rightly that there was no need to subpoena Dr. Albrecht to the main trial". Tobias, The Reichstag Fire, p.169. Yet Dr. Albrecht was subpoenaed to testify before the *Reichsgericht* after Wendt's statements in Court.

[52] Brecht, pp.417-418.

[53] Reed, Fire and Bomb, p.15.

high profile of the men in question.

Whether the judges of the IV. *Strafsenat* considered it undignified or simply dangerous to pursue suspicions against the government was, during the trial, unknown. In the final verdict the Court gave an answer to this charge which showed their conservatism, anti-Communism, and their unwillingness to irritate the government:

> Wie Reichsminister Dr. Goebbels als Zeuge mit Recht ausführte, hat die NSDAP vor dem 5.März, infolge ihrer starken Übermacht und der Schnelligkeit ihres Anwachsens, den Wahlerfolg schon in der Tasche gehabt. Sie hatte es nicht nötig, durch ein Verbrechen ihre Wahlaussichten zu verbessern. Die gesinnungsmäßigen Hemmungen dieser Partei schließen derartige verbrecherische Handlungen, wie sie ihr von gesinnungslosen Hetzern zugeschrieben werden, von vornherein aus.[54]

An American lawyer, Arthur Garfield Hays, was concerned about how the trial was being conducted when he wrote to the judges of the IV. *Strafsenat* in early December:

> These men are innocent. The whole world knows they are innocent. The court must know they are innocent. But judges, no less than other men, are influenced by their own predispositions and prejudices. Having become fixed and successful in the *status quo*, they will naturally be influenced to render a decision which will maintain the *status quo* of which they are the beneficiaries. But you men who sit on the bench are judges in Germany of high reputation for impartiality and integrity. You owe your position not to the present Nazi regime. And this case will be a test of whether or not you are judging the case on the facts and the law or from political motives. The highest minions of the state have brazenly and in this court demanded the heads of the defendants

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[54] Sack, p.335.

and, unfortunately, have done this without a rebuke.[55]

Some of the individual judges of the Court were also praised or criticized for their conduct. *Reichsgerichtsrat* Dr. Frolich received favourable attention for his impartiality throughout the trial.[56] *Reichsgerichtsrat* Dr. Coenders, on the other hand, was criticised by a reporter from the Neue Zürcher Zeitung because of his behaviour during Goring's testimony on November 4: "The judges listened to [Göring's] deliberations quite expressionlessly; the only exception was Dr. Coenders who kept nodding with satisfaction, and beaming all over his face."[57]

The individual judge who received the most attention, both positive and negative, was the presiding judge in the *Reichstag* fire trial, *Senatsprasident* Dr. Wilhelm Bunger. This was to be expected because of his leading role in the trial. According to the *Strafprozessordnung* and *Gerichtsverfassungsgesetz* the presiding judge directed the proceedings. He examined the accused, witnesses, and experts before anyone else. He was also responsible for governing the trial from beginning to end.[58] In a discussion of German society and justice Ralf

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[55] Hays, p.385.

[56] Tobias, The Reichstag Fire, p.199 and 205.

[57] Neue Zürcher Zeitung (5 November 1933), cited in Tobias, The Reichstag Fire, p.205.

[58] "Strafprozessordnung," RGBl, 1877, pp.296-297, §§238-242; "Gerichtsverfassungsgesetz. Vom 27. Januar 1877," RGBl, 1877, pp.72-73, §§176-177.

Dahrendorf aptly wrote: "A German judge not only guards the rules of the game, he takes an active hand in the examination of witnesses."[59]

Almost all observers of the trial stressed that Dr. Bünger was not a National Socialist. They emphasized his liberal views and humane character.[60] It was suggested that he began the trial with good intentions, but:

> Like a blind man in a maze, Dr. Bünger followed every possible trail, clinging to every possible clue as Theseus did to Ariadne's thread. Yet the more he tried, the more he became engulfed in a yawning abyss of boredom, and the more he revealed the absolute aimlessness of the whole trial.[61]

It was suggested that Dr. Bünger was impartial and patient in his dealings with the defendants.[62] Only in his exchanges with Georgi Dimitroff did the Presiding Judge run into trouble. Not only was Dr. Bünger unable to beseech or threaten Dimitroff into cooperation but he "had to bear the brunt of the Press and public reproaches which were levelled at the court for its failure to suppress Dimitroff".[63]

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[59] Ralf Dahrendorf, Society and Democracy in Germany (London: Weidenfeld and Nicolson Ltd., 1967), p.135.

[60] Tobias, Der Reichstagsbrand, p.348.

[61] Tobias, The Reichstag Fire, pp.208-211.

[62] Sidney B. Fay, "The Reichstag Fire Mystery," Current History, A Monthly Magazine, vol.39 (November 1933): p.228.

[63] Reed, The Burning of the Reichstag, pp.51 and 75. The conflict between Bünger and Dimitroff was not unknown during Supreme Court trials in Germany. As far back as fifty years before a reporter from The Times argued such situations were

It was obvious that the Saxon judge was under intense political pressure from both National Socialists and Communists. This strain made it very difficult for him to remain impartial and fair in his management of the proceedings."[64] Dr. Friedrich Grimm, a conservative German jurist, later wrote "dass der als Jurist sehr tüchtige Vorsitzende des zuständigen 4. Strafsenats, Senatspräsident Dr. Bünger, aus Gesundheitsgründen der Aufgabe, einen solchen turbulenten Prozess zu führen, nicht gewachsen war".[65]

From November 23 to December 23 the final part of the trial was held once again in the *Reichsgericht*'s courtroom in Leipzig. During the last days of testimony and evidence there were two major incidents: the "awakening" of van der Lubbe and the

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inherent to the system. As a witness to the *Reichsgericht* high treason trial against the "Dynamitards" in 1884 he wrote: "The function of the Judge in a German Criminal Court seems in many respects a very unhappy one. He cross-examines the accused with a view apparently to entrap him into admissions that may prove his guilt; and of course his legal and practised mind often enables him to bamboozle a poor wretch so that he unconsciously and involuntarily says damaging things. In many cases there was absolutely a war of words between Judge and culprit, and when the former did not manifestly get the better of it he seemed rather to lose his temper.....Altogether the chance of the prisoners seems much worse than in England. Their guilt is apparently taken as proved unless they can prove their innocence." The Times (23 December 1884) cited in B.L. Mosely, "German Criminal Courts and Procedure," Law Magazine and Review, 4th ser , vol.10 (1885): 393 (ellipsis in source).

[64] The Times (14 December 1933), page 16; Tobias, The Reichstag Fire, p.99.

[65] Dr. Friedrich Grimm, Politische Justiz. Die Krankheit unserer Zeit (Bonn: Bonner Universität Buchdruckerei, 1953), p.86 cited in Tobias, Der Reichstagsbrand, p.353.

attempts by the prosecution to prove the moral complicity of the Communists in the fire.

Marinus van der Lubbe came out of his stupor on November 23. To the immense surprise of the Court van der Lubbe, on the 43rd day of the trial, stated that he wanted to address the bench. He argued that the proceedings were dragging on unnecessarily and that a verdict should be pronounced. When asked who his accomplices were he answered that he had none: "I am the accused and I want to know the verdict, no matter if it is twenty years in prison or the death penalty. Something simply has to happen."[66] Van der Lubbe refused to answer any more questions from Dr. Bünger or Georgi Dimitroff regarding who his accomplices were. He went back to his lethargy for the remainder of the trial.[67]

The attorneys for the prosecution must have realized their actual physical evidence against the defendants was weak. So, in order to bolster their case, they attempted to prove that Torgler and three Bulgarians were, if nothing else, in moral collusion with van der Lubbe. For seven days, from November 27 to December 6, Dr. Werner tried to prove that the *Kommunistische Partei Deutschlands* (*KPD*) had been planning an armed uprising against the National Socialist government in February 1933. The fire in the *Reichstag* was to have been the *Fanal*, or signal, for the revolt to begin. In response, Dimitroff argued

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[66] Cited in Tobias, The Reichstag Fire, p.282.

[67] Reed, The Burning of the Reichstag, pp.264-271.

that if this were true then "all the Communists in the world ought to be in the dock".[68] The captured Communist documents which Göring claimed to have possession of never came to light during the trial (or since then). These papers allegedly proved that the *KPD* was preparing to carry out a revolution against the National Socialist government. Since the prosecution could not use these documents they were forced to prove moral complicity by using the testimony of police officials and Communist prisoners from jails and concentration camps. Evidence and testimony produced by these witnesses did little to bolster the case for the state.[69]

By December 13 the prosecution had no more evidence to present to the Court against the accused. During the trial over one hundred witnesses gave testimony before the tribunal. Ten court stenographers created an official record of the evidence over ten thousand pages long. Over seven thousand gramophone records of the trial were made so that extracts of the proceedings could be broadcast throughout Germany.[70]

Even with all that testimony the case for the prosecution was extremely weak. Everyone agreed that van der Lubbe had

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[68] Reed, The Burning of the Reichstag, pp.278-279.

[69] Reed, The Burning of the Reichstag, pp.278-295.

[70] Morning Post (7 December 1933) cited in Keesing's Contemporary Archives, Volume No.1: 1931-1934 (Bristol, England: Keesing's Publications Limited, 1936), p.1046; Reed, The Burning of the Reichstag, p.310.

accomplices. But there was no direct evidence to identify van der Lubbe's accomplices, or to prove that they were Communist (or National Socialist). The court reporter for The Times felt that an "opinion formed on this point must base itself on something other than the evidence given at the trial".[71] No reliable proof had been given that van der Lubbe had links with the four other defendants or with any other Communists. The case against the defendants was based on the weak, contradictory, and questionable testimony of "Nazi agents, police spies, stool-pigeons, convicts, lunatics, garrulous charwomen, hysterical women typists and *agents provocateurs*".[72] It was even the opinion of some British and American lawyers observing the trial that under the North American or British judicial system the case against all the defendants except van der Lubbe would have been dismissed at this point. After the presentation of the case for the prosecution the defense attorneys would have suggested that there was not enough evidence for the trial to continue.[73] The judges of the *Reichsgericht* did not have this option. After the trial had begun there was no turning back, not because of legal procedure but because of the political pressure being applied by the government.

The final days of the trial, from December 13 on, saw the

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[71] The Times (14 December 1933), page 16.

[72] Douglas Reed, Insanity Fair (London: Jonathan Cape Ltd., 1938), p.132.

[73] Reed, The Burning of the Reichstag, p.37.

closing arguments of the prosecutor, counsels for the defense, and the accused. The prosecutor, according to law, was given the right to speak first.[74]

Oberreichsanwalt Dr. Werner began his closing arguments with a three-and-a-half hour speech on December 13.[75] Dr. Werner argued that there had been a Communist plan to overthrow the new government and that the four Communist accused were, if nothing else, morally responsible for the burning of the *Reichstag*. After a summary of the evidence produced by the prosecution during the trial Dr. Werner stated what he thought the verdict should be.[76] He proposed that both Marinus van der Lubbe and Ernst Torgler be sentenced to death for the crimes of *Hochverrat* and arson according to the *Reichstag* Fire Decree of February 28 and the "Lex van der Lubbe" of March 29. Dr. Werner then asked that the three Bulgarians, Dimitroff, Popoff and Taneff, be acquitted because the charges of high treason and insurrectionary arson could not be proven against them.[77]

On the 15th of December Dr. Teichert, the defense attorney

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[74] "Strafprozessordnung," RGBl, 1877, p.300, §258.

[75] Dr. Werner's entire closing speech is reprinted in Sack on pp.155-211.

[76] Reed, The Burning of the Reichstag, pp.310-316.

[77] Cited in Sack, pp.210-211. Gerald Dickler wrote that the continued attempt to convict Torgler came about because "this move represented the last best hope of saving the honor of the fledgling Nazi regime". Dickler, Man on Trial, p.221.

of the three Bulgarians, gave his final speech.[78] As a result of the prosecution's closing remarks the previous day, Dr. Teichert's task was much simpler. He insisted that the trial had not produced any evidence proving that the three Bulgarians had anything to do with the *Reichstag* fire and felt that there were more than sufficient grounds for an acquittal for all three defendants.[79]

The lawyer defending van der Lubbe, Dr. Seuffert, also gave his closing remarks on December 15.[80] His task as defense counsel had been the most difficult by far. Douglas Reed noted: "He had to defend a man who had consistently declined to be defended, who had refused even to speak to Dr. Seuffert himself."[81] Dr. Seuffert did not ask the Court to consider van der Lubbe insane or irresponsible for his actions. That course of action would have been doomed to failure because the Court believed that van der Lubbe was accountable for his actions. His only other choice was to try and lighten the penalty for his client. Dr. Seuffert argued that van der Lubbe was guilty of starting the fire in the session chamber of the *Reichstag*. But, he asserted, the allegation that van der Lubbe started the fire with the intention of giving the signal for

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[78] The entire speech is reprinted in Sack, pp.212-247.

[79] Sack, p.247; Reed, The Burning of the Reichstag, pp.317-319.

[80] Dr. Seuffert's final speech is reprinted in Sack, pp.248-273.

[81] Reed, The Burning of the Reichstag, p.319.

an armed uprising against the state was not proven. As a result, the charge of high treason could not be substantiated and a verdict of life imprisonment for common arson must be handed down instead of the death penalty. Van der Lubbe's lawyer also maintained that the retroactive law of March 29 could be used as a basis for punishment only if the Court found van der Lubbe guilty of high treason.[82]

The final summation for the defence came from Dr. Alfons Sack, defence attorney for Ernst Torgler, on December 16.[83] Dr. Sack stated that it was incorrect for the prosecution to argue that since Torgler was not present at the scene of the crime, he must have been assisting the crime from another location. That type of thesis created an impossible situation where the onus of proof was transferred from the prosecutor to the defendant. It was not the task of the accused to prove his innocence, but rather the duty of the prosecutor to prove his guilt. Dr. Sack asked for the acquittal of Torgler because that is what the evidence, or the lack of it, required.[84]

The last event in the trial proper also occurred on December 16 when the accused were given the opportunity to make their final pleas to the Court. Dimitroff, Popoff, Taneff, and

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[82] Sack, pp.269-273; Reed, The Burning of the Reichstag, pp.319-323.

[83] Dr. Sack's closing speech is reprinted in Sack, pp.274-324.

[84] Sack, pp.323-324; Reed, The Burning of the Reichstag, pp.323-325.

Torgler proclaimed their innocence and asked to be acquitted. Van der Lubbe said nothing in his own defence.[85]

At the end of the day's session, Dr. Bünger announced that the Court would adjourn for one week before pronouncing the final verdict. This was within the rights of the Court according to German law and, considering the circumstances of the trial, not very surprising.[86]

Throughout the course of the trial blatant, overt attempts from inside and outside of Germany were made to influence the decision of the Court. These, combined with high-level German criticisms of the proceedings, made the task of the five judges even more difficult.

On November 4 the trial took a detour in order to placate the needs of the German government. The Court, by giving in to government pressure, allowed testimony which had little to do with the case against the accused. At this time, not only were the defendants being tried, but the National Socialist leadership was being given an opportunity to defend itself from attacks that had been made upon it by the Brown Book and the London Counter-Trial.[87]

On October 17, Dr. Werner asked that, among others, *Mini-*

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[85] Reed, The Burning of the Reichstag, pp.326-328.

[86] "Strafprozessordnung," RGBl, 1877, pp.302-303, §§267-275.

[87] Hays, p.373.

sterprasident Göring and *Reichsminister* Goebbels be allowed to testify before the Court. The Public Prosecutor and the Court gave into pressure from the National Socialist leadership to let the government defend itself.[88] Dr. Werner stated the reason for this request was:

> ...the *Brown Book* had made the monstrous allegation - without trying to produce a shred of evidence - that Minister Goebbels was the indirect, and the Prussian Ministerpräsident Goring the direct, instigator of the plan [to burn the Reichstag]. Once such impudent and unsubstantiated slanders were put abroad, the victims must be given the opportunity of clearing their names.[89]

This political interference in the proceedings was another example of the political importance of the entire *Reichstag* fire case.

On November 4 *Ministerprasident* Hermann Göring appeared before the Court. Dr. Bünger told the National Socialist leader that his appearance before the Court was meant to allow him to defend himself against accusations made against his person by certain groups (i.e. the Brown Book).[90] Göring went far beyond the instructions given to him by the Court. In a three hour speech Göring defended himself against the allegations contained in the Brown Book, gave his view of the political events of early 1933, and outlined the Communist conspiracy in

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[88] Tobias, The Reichstag Fire, p.222.

[89] Kugler, p.100 cited in Tobias, The Reichstag Fire, p.222.

[90] Tobias, The Reichstag Fire, p.223.

which the government believed. Göring's testimony then degenerated into a session of accusation and counter-accusation between Dimitroff and Göring. This quarrel led to the fifth expulsion of Dimitroff from the proceedings and to Göring's famous threat of punishment to Dimitroff.[31] At least one foreign observer felt that Göring's warnings meant that no matter what the Court decided, Dimitroff's fate had already been decided.[32]

Ministerprasident Göring did not add any evidence of substance to the case against the defendants. Goring defended himself and the National Socialist government against foreign accusations and blatantly attempted to influence the decision of the Court. The Times said: "He has done his best or worst to vitiate in advance the verdict which he is seeking to dictate to the Court."[33]

Reichsminister fur Volksaufklarung und Propaganda (Reich Minister for Popular Enlightenment and Propaganda) Dr. Joseph Goebbels testified before the Court on November 8. In addition to arguing with Dimitroff and Torgler over the origins of the fire he also attempted to exonerate the government:

> Herr President, I have been at the greatest pains to contradict the accusations which are made against

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[31] Reed, The Burning of the Reichstag, pp.226-233; Tobias, The Reichstag Fire, pp.223-228.

[32] Neue Zürcher Zeitung (6 November 1933) cited in Tobias, The Reichstag Fire, p.228.

[33] The Times (14 December 1933), page 15.

> the German Government and the National Socialists with minute scrupulosity. That is the reason why I have gone to such lengths in describing all the circumstances surrounding the crime, and all the known facts. On behalf of the German Government I express regret that the lying accusations made in the Brown Book are still being circulated abroad and that the foreign press has done nothing to remedy this state of affairs I expect the foreign press to be decent enough to report the facts I have given, and to cease publishing vile slanders about a decent, diligent and honourable people.[94]

A court reporter from Le Temps noted: "Dr. Goebbels seems to have addressed himself to the foreign press.[...] The Minister of Propaganda is deceiving himself if he imagines that he has contributed anything new to the content of the trial."[95]

The German government's efforts to refute the accusations of the Brown Book culminated in Göring's and Goebbels' testimony in Court.[96] The reason for their testimony was questioned by Arthur Koestler, who stated in his memoirs: "It was a unique event in criminal history that a Court - and a Supreme Court to boot - should concentrate its efforts on refuting accusations by a third, extraneous, party."[97] But, Dr. Friedrich Grimm argued that their was a reason for the testimony: "Their propaganda...was so widely believed that any failure to discuss their lies, however stupid, would have been

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[94] Cited in Tobias, The Reichstag Fire, p.230.

[95] Cited in Tobias, The Reichstag Fire, p.231.

[96] Mommsen, "The Political Effects of the Reichstag Fire," p.137; Tobias, The Reichstag Fire, p.131.

[97] Koestler, pp.244-245.

considered an evasion."[98]

Part of what the government leaders were reacting against, and part of what the Court had to deal with, were the effects of the London Counter-Trial in September 1933. Many felt that the spectacle in London had also been an attempt to influence the Court.

The Manchester Guardian reported at the beginning of the trial: "The Leipzig Court has still a reputation to preserve. The Commission has provided evidence which that Court cannot ignore if it is still a great judicial body and has not become an instrument of Germany's dictators."[99] Germany's leaders were not impressed with the Commission's findings or its purpose. On October 14, 1933, Hitler reproached the British government and people for allowing such a spectacle to take place on British soil. He was outraged at the Counter-Trial as he felt that its only purpose was "to put to shame and dishonour the highest German Court".[100]

The September proceedings were not the end of the International Legal Commission of Inquiry in London. Part of article three of the Commission's original findings stated that if the Commission felt it necessary to meet again during the proceedings an attempt would be made to bring the members together

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[98] Sack, p.10; Tobias, The Reichstag Fire, p.131 (ellipsis in source).

[99] Manchester Guardian (21 September 1933), page 8.

[100] Baynes, pp.1096-1097.

once again.[101] In December the Commission met to discuss the applicability of the "Lex van der Lubbe". Its decision, publicly announced on December 13, stated that the retroactive application of the death penalty for cases of arson or high treason would violate *nulla poena sine lege*, a long-established judicial principle common around the world which was embodied in Article 2 of the German Penal Code.[102] They also expressed the assumption that Ernst Torgler would be convicted for high treason.[103]

The decision of the London group did not receive a favourable reaction in Leipzig. Dr. Werner was outraged at this attempt to interfere in the proceedings before the *Reichsgericht*. An editorial in The Times admitted: "Any nation would have resented an interference and a slight so obvious."[104] Another British observer later wrote of their effect: "The 'mock' trial in London has, incidentally, done more to rouse ill-feeling against Great Britain in this country than any other recent event."[105] Again, on 30 January 1934, Hitler

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[101] Manchester Guardian (21 September 1933), page 9.

[102] World Committee, The Reichstag Fire Trial, pp.243-244.

[103] Documents on British Foreign Policy, p.953.

[104] The Times (14 December 1933), page 15. Another commentator, C. de B. Murray, wrote an article condemning the decision of the group in London because of its assumptions and distrust of the Court in Leipzig. C. de B. Murray, "The Reichstag Trial," The Scottish Law Review, vol.XLIX, no.5[illegible] (October 1933): 307-309.

[105] Documents on British Foreign Policy, p.953.

chastised Britain for allowing such a judicial mockery to take place.[106]

In addition to unfavourable external commentary the IV. *Strafsenat* had to put up with criticism from within Germany about its conduct of the trial.

On November 1, the Völkischer Beobachter asked that the Court find some means of preventing the Communists, in particular Dimitroff, from insulting and verbally attacking National Socialist witnesses.[107] During the trial, Göring and Hitler both showed their dissatisfaction with the proceedings when Göring asserted

> "Mein Führer, it is an absolute disgrace the way these High Court judges are behaving. You would think we were on trial, not the Communists." Hitler's answer was revealing: "Mein lieber Goering," he said, "it is only a question of time. We shall soon have those old fellows talking our language. They are all ripe for retirement anyway, and we will put our own people in. But while der Alte [Hindenburg] is alive, there is not much we can do about it."[108]

The verdict the National Socialist government expected was common knowledge to spectators of the trial. An article in The New York Times stated that the Court faced a difficult task in coming to a final verdict. Nazi rulers, especially Göring, and the coordinated German press kept telling the judges to "Hang

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[106] Baynes, p.1166.

[107] Tobias, Der Reichstagsbrand, p.373.

[108] Ersnt ('Putzi') Hanfstaengl, Hitler. The Missing Years (London: Eyre & Spottiswoode Ltd., 1959), p.203.

these scoundrels!"[109]

Near the end of the trial Göring once again attempted to influence the Court in its decision. In an interview given to a German newspaper, the Berliner Nachtausgabe, on December 12, he stated:

> I hope that the Leipzig trial which has greatly disappointed the German people will soon come to an end. It has shown that it is impossible to adhere to abstract paragraphs when an infamous political crime is to be adjudged, such a course leads to an impossible position....The attack on the Reichstag...was a political attack upon the German people to bring about a Bolshevik revolution. For that the accused are responsible....It is deplorable that nine months after the deed this crime is still not expiated and that this long-winded trial is still going on.[110]

Göring's final attempt at interference was not appreciated by the Court. In his final address on December 16, Dr. Bünger vented his anger and frustration over internal and external interference to the audience:

> When I opened the proceedings nearly three months ago, I said it was the custom, not only of the German press, but of newspapers the world over, not to prejudge the issues which this Court has been called upon to decide....Unfortunately my remarks have not been fully heeded. The foreign press has not been alone in attempting to anticipate these proceedings

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[109] The New York Times (23 December 1933), page 1.

[110] Cited in World Committee, The Reichstag Fire Trial, p.243 (ellipses in source). This version of Göring's speech is basically the same as the account in The Times (13 December 1933), page 13. The original statement, entitled "Ein Tadelsvotum Görings," was carried in the Berliner Nachtausgabe and Neue Zürcher Zeitung of December 12, 1933. Tobias, Der Reichstagsbrand, p.418.

> in a manner which does no credit to its noble calling. I can only repeat once again, that the clash of opinions cannot influence this Court.[111]

With the completion of the final address, the IV. *Strafsenat* of the *Reichsgericht* left the courtroom to deliberate over the case. In one week they would return to pronounce the final verdict.

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[111] Cited in Tobias, The Reichstag Fire, p.253 (ellipsis in source).

Chapter 4
The *Reichsgericht*'s Verdict and the Reaction to It

On December 23, Dr. Bünger and the other four justices of the IV. *Strafsenat* reappeared in the courtroom to give their final decision (*Urteil*) on the *Reichstag* fire trial.[1] The presiding judge read out the judgement of the tribunal:

> Let the accused stand up!
> In the name of the Reich, I pronounce the following verdict:
>
> The accused Torgler, Dimitroff, Popoff and Taneff are acquitted.
> The accused van der Lubbe is condemned, for high treason in the overt act of insurrectionary arson and for attempted arson, to death and the permanent loss of civic rights.
> The costs of the trial devolve, in so far as sentence has been passed, on the condemned, and for the rest upon the Treasury of the Reich.
>
> In the name of the law.[2]

The Court acquitted the three Bulgarians and Torgler, not because they had been proven innocent, but because they had not been "adequately convicted" due to the lack of evidence. The judges felt that there were grounds for suspicion against Torgler, but they had not been completely proven as he could not be positively linked to van der Lubbe. Also, the charges

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[1] Parts of the final verdict are given in Sack, pp.325-342 and Kaul, pp.341-347.

[2] Cited in Sack, p.325; Kaul, p.342; Reed, The Burning of the Reichstag, p.330; World Committee, The Reichstag Fire Trial, p.245.

against Dimitroff, Popoff and Taneff were not proven by the evidence brought forward.[3]

The *Reichsgericht* ruled that Marinus van der Lubbe was guilty of high treason and insurrectionary arson (*aufrührerische Brandstiftung* -- arson with the intent of starting a riot[4]) according to §§81 and 307 of the *Strafgesetzbuch*. The punishment for those crimes as of 1 March 1933 was the death penalty as a result of the *Reichstag* Fire Decree of February 28. The retroactive capacity of the "Lex van der Lubbe" of March 29 made the death penalty the punishment for van der Lubbe's crimes as well. As a result, van der Lubbe was sentenced to death.[5]

The judges also concluded that van der Lubbe could not have started the fire in the *Reichstag* on his own. The Dutchman may have started some of the smaller fires, but the blaze in the Session Chamber was definitely the work of many individuals.[6] Ernst Torgler later agreed: "There must have been more than one person, in order to start such an immense fire."[7] In his

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[3] Sack, pp.328-335; Reed, The Burning of the Reichstag, pp.332-335; World Committee, The Reichstag Fire Trial, p.249.

[4] The Times (27 December 1933), page 9.

[5] Sack, p.342; Kaul, pp.343-344; Gruchmann, p.830. Van der Lubbe was found guilty of breaking the following sections of the *Strafgesetzbuch*: §§81 Nr.2, 82, 306 Nr.2 and 3, 307 Nr.2, 308, 43 and 73. Sack, p.342.

[6] Reed, Insanity Fair, p.133.

[7] Ernst Torgler, "The Story of the Reichstag Fire," East Europe, 20:4 (April 1971): p.35.

memoirs, Hans Bernd Gisevius asserted that although the judges claimed that there were many arsonists involved in the *Reichstag* fire the Court made no attempt to define who van der Lubbe's accomplices were.[8]

Gisevius was wrong. The Court did state whom they held responsible for the fire. The IV. *Strafsenat* believed that the *Reichstag* fire was the work of the *Kommunistische Partei Deutschlands*. In the verdict, the Court concluded that van der Lubbe was, in his views and his deeds, a Communist.[9] It was the opinion of the Court that van der Lubbe had been used as a tool by the Communists in their attempt to establish a dictatorship of the proletariat in Germany. Dr. Bunger cited numerous examples from 1932-33 of inflammatory Communist newspaper articles and pamphlets urging workers to strike, struggle, rise up, and create a Communist regime.[10]

The anti-Communist line used by the *Reichsgericht* was not something new to the Court. In a decision reached on January 7, 1933, this same IV. *Strafsenat* found:

> die Kommunistische Partei Deutschlands (KPD) sei mit allen Mitteln bestrebt, die bestehende Verfassung des Reichs und der Länder zu beseitigen und an ihrer Stelle auf dem Wege über die Diktatur des Proletariats eine Rateregierung nach russischem

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[8] Gisevius, p.36.

[9] Sack, p.335; Reed, The Burning of the Reichstag, p.335.

[10] Sack, pp.338-339. The quotes came from Rote Fahne and Echo des Ostens and from a few *Flugblatt* (pamphlets).

Muster zu errichten.[11]

Ingo Müller has argued that the *Reichsgericht* used this case as a precedent from 1933 in order to 'protect' the democratic German government and the Weimar constitution. Müller also wrote that the Court, based on its anti-Communist beliefs and precedents, continued to do this until 1935 when the German democratic system and constitution had been completely undermined by the National Socialist government.[12] Whether or not that opinion is correct, the IV. *Strafsenat* had shown that it believed in a Communist conspiracy against a democratic or National Socialist government. The Court maintained that the trial confirmed this.

The Court also maintained that the trial had proven that it was impossible for one person to have started the fire in the parliament building and that van der Lubbe was a Communist. Since, in the opinion of the Court, the *KPD* had a history of conspiring against the legitimate government in Germany it was one small step to link van der Lubbe with the German Communist Party. In the verdict Dr. Bünger stated:

> All things considered, it must be affirmed that the deed was an act of high treason undertaken by the German Communist Party. Torgler, Dimitroff, Popoff and Taneff cannot be regarded as convicted of complicity in the overt act. On the other hand, van

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[11] "Urteil des 4. Str.S. des RG v. 7.1.1933 - 13/14 J 640/31 / XII H.91/32" in Sammlung sämtlicher Erkenntnisse des Reichsgerichts, Bd. 4. Strafsenat 1933 cited in Kaul, p.81.

[12] Müller, p.53.

> der Lubbe fired the Reichstag in conscious co-operation with unknown accomplices... In doing so, he pursued the treasonable aims of the German Communist Party, which were, by inflaming the masses and provoking the general strike, to bring about a violent upheaval leading to the erection of the proletarian dictatorship.

The Court also maintained that since Torgler, Dimitroff, Popoff and Taneff declared throughout the trial that individual terrorism was not a method used by the German Communist Party the burning of the *Reichstag* was not an individual act but rather a prelude to a mass insurrection.[14]

The IV. *Strafsenat*'s anti-Communism was evident in its verdict against the defendants. This attitude was not confined to the *Reichsgericht* at this time. *Staatssekretar* von Bülow claimed on September 27 that the trial in Leipzig was the climax of "the [negative] excitement about Bolshevism in our country".[15] Before the final decision was read, it was believed that even if Torgler was acquitted in this case he would be involved in a new trial for high treason with other Communist leaders, including the leader of the German Communist Party, Ernst Thälmann.[16]

One section of the verdict showed the many aspects of the

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[13] Cited in Reed, The Burning of the Reichstag, pp.335-336 (ellipsis in source); The Times (27 December 1933), page 9; Time (magazine) (1 January 1934), page 13.

[14] World Committee, The Reichstag Fire Trial, p.251.

[15] Documents on German Foreign Policy, p.863.

[16] The Times (23 December 1933), page 10; Kaul, p.88.

Court's situation and their views. In it the judges defended the National Socialist government against what they felt was the major threat to Germany:

> On January 30th, 1933, the Reichspräsident expressed his confidence in Adolf Hitler, the leader of the National Socialist Party, by appointing him Chancellor...thus paving the path for the building of the Third Reich and for our political rebirth....A wave of confidence met our Führer Adolf Hitler and held out the promise that the new elections, set down for March 5th, would ensure the overwhelming success of the National Socialist Party....[Hence there was] not the slightest reason why the National Socialists should have burned the Reichstag and blamed the fire on others as a pre-election stunt. Every German realizes full well that the men to whom the German nation owes its salvation from Bolshevik anarchy and who are now leading Germany towards her rebirth and recuperation, would never have been capable of such criminal folly.[17]

Not only was the final decision a condemnation of Communism but it was also thought to be a precedent in law because of the death sentence given to van der Lubbe.

The *Reichstag* Fire Decree issued by the government on February 28, 1933, made the crimes of arson and high treason punishable by death. On March 29, with the issuance of the "Gesetz über Verhängung und Vollzug der Todesstrafe," or "Lex van der Lubbe", the death penalty also applied to those crimes if committed between January 31 and February 28, 1933.[18] In

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[17] Cited in Tobias, The Reichstag Fire, p.269 (ellipses in source). Also partly reprinted in Hubert Schorn, Der Richter im Dritten Reich. Geschichte und Dokumente (Frankfurt am Main: Verlag Vittorio Klostermann, 1959), pp.70-71.

[18] RGBl, 1933, Teil I, pp.83 and 141.

principle, a retroactive decree in this realm violated the legal axiom of *nulla poena sine lege* (no punishment without law) by providing the death sentence for a crime which, when it was committed, was only punishable by a prison term.[19]

From the government's standpoint the decree's retroactive force could not be disputed because of the March 24 passing of the Enabling Act in the *Reichstag*. That legislation gave the government the right to issue any law, even those which deviated from the Constitution of the *Reich*. The March 29 law deviated from the Weimar Constitution and the *Strafgesetzbuch*. Article 116 of the Constitution said: "An act can be punishable only if the penalty was fixed by law before the act was committed."[20] Article 2 of the German Penal Code was more explicit:

> 2. Punishment may not be imposed for an act unless such punishment is prescribed by statute prior to the commission of the act.
> In the event of any change in the statute between the time of commission of an act and the time of the rendition of the judgment, the most lenient statute shall apply.[21]

In its final decision the IV. *Strafsenat* was forced to decide whether or not the retroactive death penalty was legal

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[19] Ernst Fraenkel, The Dual State. A Contribution to the Theory of Dictatorship, trans. E.A. Shils (New York: Oxford University Press, 1941), p.109.

[20] Brunet, p.324.

[21] United States. War Department Pamphlet No.31-122, The Statutory Criminal Law of Germany (Washington, D.C.: United States Government Printing Office, 1946), p.3.

from a judicial and constitutional standpoint.[22] In reaching its decision, the Court stated: "There is no question that the Government was within its rights in giving this law [of March 29] a retroactive force."[23]

The judges ruled that "Lex van der Lubbe" did not break the axiom of *nulla poena sine lege*. They argued "no punishment without law" only meant that an action could not be defined as a crime at a later time. If an action, in this case arson, was punishable as a crime when it took place (which it was), the punishment could be increased even by retroactive legislation. "Lex van der Lubbe" retroactively increased only the punishment for existing crimes.[24]

The decision of the *Reichsgericht* was not completely unprecedented and, in fact, followed the common legal doctrine of the time in Germany.

A Berlin lawyer, Friedrich Rötter, using the Leipziger Kommentar zum Reichsstrafgesetzbuch of 1933 as a source, argued that the decision in the *Reichstag* fire trial was only the latest similar judgment in a line stretching back to 1922. Since that time the *Reichsgericht* contended that the Weimar Constitution of 1919 amended the *Strafgesetzbuch* of 1871. Under article two of the Penal Code, the actual penalty, or *Strafe*, of a crime had to be laid down by law before the crime

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[22] The New York Times (23 December 1933), page 1.

[23] Manchester Guardian (27 December 1933), page 13.

[24] Kaul, pp.344-347; Müller, p.34.

was committed. But, under the Weimar Constitution, only the fact that a penalty might be inflicted, or *Strafbarkeit*, was necessary for conviction. In the trial in 1933 the Court ruled that since the crime was a punishable offense at the time it was committed its penalty could later be increased by a retroactive decree.[25] Rotter also wrote van der Lubbe could only have been saved if the Court had ruled that the Constitution did not amend the *Strafgesetzbuch*.[26]

The verdict of the *Reichsgericht* was also strongly influenced by the doctrine of legal formalism or positivism.[27] The doctrine of legal positivism was quite strong in Germany from the mid-nineteenth century until after 1945.[28]

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[25] Friedrich Rötter, Might is Right (London: Quality Press Ltd., 1939), pp.273-274. Rötter also stated: "At the trial for the burning of the Reichstag the alteration of this single word [*Strafe*] cost van der Lubbe his life."

[26] Rötter, p.274. He stated that many legal experts held the view that the Penal Code was not amended by the Constitution.

[27] In the legal doctrines of the time there were two competing schools of legal thought: natural law and legal positivism. Proponents of natural law argue that law should be dictated by basic human rights, such as life, liberty and the pursuit of happiness. They maintained the state had the right to enact laws, but these could not take away 'natural' human rights. Proponents of legal positivism argue that it is the duty of the legal profession to uphold the law enacted by the legitimate holders of power in the society. They believe, as Thomas Hobbes stated: "Not rightness, but authority makes the law." Edgar Bodenheimer, "Significant Developments in German Legal Philosophy Since 1945," The American Journal of Comparative Law, vol.3 (1954): p.379; Lon L. Fuller, The Law In Quest of Itself (Chicago: The Foundation Press, 1940), pp.5-6.

[28] Bodenheimer, p.380; Dennis LeRoy Anderson, The Academy for German Law, 1933-1944 (New York: Garland Publishing, 1987), pp.37-38; Noakes and Pridham, p.272; Kramer, pp.600-

Michael Hughes wrote that the German legal system was based "on applying, not interpreting, a comprehensive and known legal code, rather than on seeking 'justice'".[29] In 1947 Dr. Kubuschok, defense counsel for *Staatssekretär* Schlegelberger in the Nürnberg Military Tribunal's "Justice Case", talked of the importance of positivism in the German legal system:

> [...]the positivism of law has played a far more important part in Germany since the end of the nineteenth century than has been the case in legal systems outside the continent. Only the written law [statutory law] and not general ideas on morals and rights constituted the directive for administration of law and justice.[30]

At least one observer of the events of 1933 was cynical of the usefulness of the applicability of legal positivism at this time:

> As for naked, absolute, calculable justice, valid for all cases and independent of human idiosyncrasies, surely the moment such justice is applied to the baffling manifestations of human error and confusion it must forfeit its absolute character and develop into a mischievous formula which easily becomes a tool in the hands of the juristic juggler?[31]

With the execution of Marinus van der Lubbe the *Reichstag* fire trial ended. On 10 January 1934 van der Lubbe was quietly

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601; Dahrendorf, pp.138-139; Koch, p.247.

[29] Hughes, p.77.

[30] The Justice Case, pp.108-109.

[31] Friedrich Sieburg, Germany: My Country, trans. Winifred Ray (London: Jonathan Cape Ltd., 1933), pp.143-144.

beheaded, three days before his twenty-fifth birthday.[32]

Like the trial, the verdict was anxiously anticipated by people all around the world. Reports of the trial had been included in all the major papers of Great Britain, France, and the United States. In Germany the situation was similar as shown by a German legal reporter who later wrote that because of an "overstrained concept of justice, judges and the courts have always played a mighty role in German life, and reports of court proceedings receive prominence in every German newspaper".[33] On December 22, a pro-National Socialist paper, Mannheim's Hakenkreuz Banner, pre-criticized the Court's decision when it wrote: "The German people have already passed judgement on communism and the formalistic judgement of the Supreme Court can therefore leave them indifferent."[34]

The verdict of the IV. *Strafsenat* provoked strong reactions in Germany and around the world. Domestic and foreign responses to the Court's final decision from 1933 to the present were both positive and negative.

Official German response to the verdict was immediate, cri-

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[32] Reed, The Burning of the Reichstag, p.351; Wheaton, p.230.

[33] Edith Roper and Clara Leiser, Skeleton of Justice (New York: E.P. Dutton & Co., Inc., 1941). Even though Roper was referring to trials a few years later it is most likely that her comment would be just as true in regards to the *Reichstag* fire trial.

[34] Cited in The New York Times (23 December 1933), p.8.

tical and contemptuous. The Völkischer Beobachter of December 24 reported: "Das Fehlurteil von Leipzig. Letzter Anstoß zur Uberwindung einer uberalterten Rechtsprechung--Das nationalsozialistische Deutschland wird die Folgerungen zu ziehen wissen."[35] The Nationalsozialistische Partei-Korrespondenz of the same day was equally critical:

> Das Urteil im Reichstagsbrandstifter-Prozeß, demzufolge Torgler und die drei bulgarischen Kommunisten aus formaljuristischen Gründen freigesprochen wurden, ist nach dem Rechtsempfinden des Volkes ein glattes Fehlurteil. Wenn das Urteil nach dem wahren Recht, das im neuen Deutschland wieder seine Geltung haben soll und im Volksempfinden seine Wurzel hat, gesprochen worden wäre, hätte es anders gelautet: dann wäre allerdings auch schon die ganze Prozeßanlage und die Prozeßführung, die vom Volke mit wachsendem Unwillen verfolgt worden ist, eine andere gewesen.[36]

The Völkischer Beobachter of December 27 reported the official statements and expanded on the subject of "Das Leipziger Fehlurteil".[37] The official National Socialist legal journal, Deutsches Recht: Zentralorgan des Bundes Nationalsozialistischer Deutscher Juristen (German Law: The Central Organ of the

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[35] Völkischer Beobachter (24 Dezember 1933), Norddeutsche Ausgabe, p.1. The Munich edition of the paper called it "Ein Fehlurteil" and was equally critical of the Court's decision. Volkischer Beobachter (24 Dezember 1933), Münchener Ausgabe, p.1.

[36] Cited in Tobias, Der Reichstagsbrand, p.457. Parts of Nazi Party's Correspondence response to the verdict were also printed in The Times (27 December 1933), page 10; The New York Times (24 December 1933), page 10; Time (magazine) (1 January 1934), page 13; Keesing's Contemporary Archives, p.1067; Gruchmann, p.957; Kolbe, p.237.

[37] Völkischer Beobachter (27 Dezember 1933), p.2.

League of National Socialist Jurists) of 1934, also called it a *Fehlurteil*.[38]

Some other German newspapers were not so critical. Instead, they tended to view the verdict positively stating that it showed the impartiality and integrity of German justice.[39] On 23 December 1933, the Berlin Börsen-Courier wrote:

> Das höchste deutsche Gericht hat gesprochen. Es hat...die Eigenschaften bewährt, die der Rechtsgedanke des neuen Deutschland vom "königlichen" Richter erwartet: unbeirrbaren Willen zum Recht, höchste, unvoreingenommene Sachlichkeit in der Ermittlung und Auswertung des Tatbestandes, völlige äußere und innere Unabhängigkeit.[40]

On December 27, the Berliner Tageblatt also praised the *Reichsgericht* for its sense of justice and judgement.[41]

Periodically, from 1933 on, the trial was mentioned in either a favourable or critical light in Germany.

National Socialist jurists praised the verdict for its effect on the doctrine of *nulla poena sine lege*. Hanns Kerrl

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[38] Koch, p.44; Werner Johe, Die gleichgeschaltete Justiz. Organisation des Rechtswesens und Politisierung der Rechtsprechung 1933-1945 dargestellt am Beispiel des Oberlandesgerichtsbezirks Hamburg (Frankfurt a.M.: Europäische Verlagsanstalt, 1967), p.109; Walter Wagner, Die deutsche Justiz und der Nationalsozialismus, Teil III: Der Volksgerichtshof im nationalsozialistischen Staat, (Stuttgart: Deutsche Verlags-Anstalt, 1974), p.868; Karl Dietrich Bracher, et.al., Die nationalsozialistische Machtergreifung, p.563.

[39] Documents on British Foreign Policy, p.953.

[40] Cited in Tobias, Der Reichstagsbrand, p.458 (ellipsis in source); also partly reprinted and translated in Manchester Guardian (27 December 1933), page 13.

[41] Kessing's Contemporary Archives, p.1067.

and Helmut Nicolai, both important Nazi jurists, felt that retroactive legislation and judicial agreement was necessary if the life of the nation was in jeopardy.[42] Another German jurist, W. Mannhardt, concurred and wrote that *ex post facto* legislation was needed if it seemed that a crime against the honour of the state was going to be inadequately punished.[43]

On the other side, Otto Kirchheimer wrote in 1935: "Only with the help of such murderous interpretations were the executions of political opponents possible."[44] Erich Kuttner agreed in 1934 when he wrote:

> ...entgegen der von him bestätigten Unschuld eben jener Angeklagten, in deren Personen die kommunistische Kollektivschuld erwiesen werden sollte, gleichwohl die Schuld der Kommunisten am Reichstagsbrand fortbehauptete. Eine Ungeheuerlichkeit! Eine Vergewaltigung jeder Logik und jedes vernüftigen Denkens! Nicht der Freispruch der vier Unschuldigen, sondern jene sophistische Konstruktion des Urteils, die trotz des Freispruchs das als erwiesen erachtet, was doch nur durch eine Verurteilung hätte erklärt

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[42] Kerrl, p.127; Helmut Nicolai in Juristische Wochenschrift, 62 Jahrg. (1933), p.2316 cited in W. Ward Fearnside, "Three Innovations of National Socialist Jurisprudence," Journal of Central European Affairs, vol.16 (1956-57): 147-148. Helmut Nicolai was, from 1933, *Regierungspräsident* in Magdeburg and later became *Ministerialdirektor* in the *Reichsministerium des Innern*. Hanns Kerrl was Prussian *Justizminister* in 1933. Hermann Weinkauff, Die deutsche Justiz und der Nationalsozialismus, Teil Ia: Die deutsche Justiz und der Nationalsozialismus. Ein Überblick (Stuttgart: Deutsche Verlags-Anstalt, 1968), p.56.

[43] W. Mannhardt, "Rückwirkende kraft von Strafgesetzen," Jurisitische Wochenschrift, 62 Jahrg. (1933): p.2636 cited in Fearnside, p.148.

[44] Statement reprinted in Otto Kirchheimer, "Staatsgefüge und Recht des Dritten Reiches," Kritische Justiz, 9 (1976): p.43 cited im Müller, p.34.

werden können, sie charakterisiert dieses Gericht und seine Abhängigkeit von den politischen Machthabern des Dritten Reiches.[45]

On 11 January 1934, *Amtsgerichtsrat* Hasper, in an article in Völkischer Beobachter on the recent *Fehlurteil*, asked: "Was lehrt der Leipziger Prozeß?"[46] In reaction to another court case, the Volkischer Beobachter of 27 January 1934 criticized the German justice system and said that this court showed as little understanding as the *Reichsgericht* in the *Reichstag* fire trial.[47] In 1942, Adolf Hitler was still upset at the outcome of the trial when, on May 10, he complained about its "lächerlichen Ergebnis", or absurd outcome.[48]

After 1945 some Germans commended the Court for its 1933 decision. Arnold Brecht wrote in his memoirs that "they had the courage - and courage was necessary - despite the propaganda and the terroristic demands of the men in power, to discharge the accused Communists".[49] Even Dr. Hans Frank, the National Socialist legal leader, wrote in his memoirs after

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[45] Erich Kuttner, Der Reichstagsbrand, (Karlsbad: Graphia, 1934), p.34 cited in Tobias, Der Reichstagsbrand, p.458.

[46] Völkischer Beobachter (11 Januar 1934), Norddeutsche Ausgabe, p.1.

[47] Völkischer Beobachter (27 Januar 1934), Norddeutsche Ausgabe, p.1; Grunberger, p.131.

[48] Picker, p.279.

[49] Brecht, pp.417-418.

the war that the Court's decision was an "objektives Urteil".[50]

Foreign reaction to the trial's outcome was, on the whole, positive. The attitude of the international press towards the proceedings had varied throughout the three months of the trial, just as Douglas Reed described it: "It swings, as rapidly as the pendulum of a clock, from deep distrust to thankful reassurance. For the world and its newspapers there were only two alternatives: a 'travesty of justice' or a 'triumph of justice'."[51]

The Neue Wiener Tagblatt called the verdict a "grossen moralischen Sieg". Two Swiss newspapers, the Basler Nachrichten and National-Zeitung applauded the Court's decision and wrote that this would give the world confidence in German justice and judicial thought.[52] London's Daily Telegraph said: "The honor of the court, and with it German justice, has been fully vindicated."[53] The Manchester Guardian gave the Court a fitting acknowledgment for its verdict:

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[50] Dr. Hans Frank, Im Angesicht des Galgens. Deutung Hitlers und seiner Zeit auf Grund eigener Erlebnisse und Erkenntnisse (München: Friedrich Alfred Beck Verlag, 1953), p.153.

[51] Reed, The Burning of the Reichstag, p.337.

[52] Cited in Tobias, "Stehen Sie auf, van der Lubbe," p.48.

[53] Cited in Sidney B. Fay, "The Reichstag Fire Verdict," Current History, A Monthly Magazine, vol.39 (February 1934): p.611. The British newspaper also wrote a message directed at the members of the London Counter-Trial: "This verdict should be a wholesome lesson to busybodies at least to suspend their affronts to foreign countries until the presumed miscarriage of justice has occurred."

> The Supreme Court has had the courage to perform its duty of considering the evidence on its merits. The chief judge[...] defends the witnesses whose evidence he rejects; he avows that he still has suspicions of Torgler. But the Court has acquitted the four men, and independence among officials in a country ruled by Terror is not so common or so easy that it can go without its praise.[54]

The Times was extravagant in its praise of the *Reichsgericht*, which it claimed had ruled with a sense of justice while under great political interference by certain members of the German leadership. The editor wrote: "By reaching the only verdict consonant with honour and justice the Court has struck a blow for humanity and preserved the high respect which the German judiciary has commanded hitherto."[55]

Other foreign observers also applauded the Court's final decision. Douglas Reed stated: "But the verdict at least, had done full duty to justice, as far as it affected these four men. The case against them had been torn to pieces. The Supreme Court had neglected nothing which might establish their innocence."[56] Arthur Garfield Hays, who later admitted that he was surprised that the trial was objective[57], also commended the Court for the fairness of its final judgement.[58]

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[54] Manchester Guardian (27 December 1933), page 8.

[55] The Times (27 December 1933), page 11.

[56] Reed, The Burning of the Reichstag, p.338. See also Fay, "The Reichstag Fire Verdict," p.611.

[57] Hays, p.357.

[58] Quoted in Fay, "The Reichstag Fire Verdict," p.611.

Even Justice Robert Jackson, in his opening speech of 21 November 1945 at the Nürnberg trials, admitted that "the German Supreme Court with commendable courage and independence acquitted the accused Communists".[59]

One reason given for the verdict by some foreign observers was the intense public interest in the proceedings inside and outside of Germany. Douglas Reed consistently took this line of explanation in his books. For example, in Fire and Bomb, he wrote: "The hastily-built structure of the trial, put together by men who underrated the difficulties of such a task, was not proof against the infra-red eyes of world publicity."[60]

At least one foreign spectator did not find the verdict particularly impartial. In the second Brown Book, foreign and emigré German Communists concluded "that the Court desired at all costs to furnish the German Government with a judicial basis and justification for all its misdeeds, all its acts of terror and oppression".[61] By 1938, the opinion of Douglas

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[59] Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945 - 1 October 1946, Volume 2, (Nuremberg: Secretariat of the Tribunal, 1947), p.110.

[60] Reed, Fire and Bomb, p.5. This argument was consistent throughout Reed's three books. If anything, his belief in the influence of the world press in the trial became stronger with each of his books. See also Reed, The Burning of the Reichstag, p.337, Insanity Fair, pp.136-137, and Fire and Bomb, pp.13-14. The Second Brown Book also agreed with Reed as it claimed that the Court was pressured by, what it called, "the pressure of world opinion". World Committee, The Reichstag Fire Trial, pp.245-246.

[61] World Committee, The Reichstag Fire Trial, pp.252-253.

Reed had also changed drastically. In his book, Insanity Fair, he wrote: "The Supreme Court of the German Reich made a sorry showing and I came away from it with a loathing for the spectacle of inhumanity and cruelty masquerading in the red caps and robes of justice."[62]

The views of historians on the verdict of the *Reichstag* fire trial can be divided into: the view that the Court came down with the right verdict in acquitting the four Communists and the belief that the punishment of van der Lubbe went against legal principles of the time.

Some historians argued that the *Reichsgericht* made a bold move in acquitting four of the five defendants.[63] There are two common arguments made to explain the Court's decision. One argument put forward is the thesis that the *Reichsgericht* in late 1933 had not yet been fully coordinated into the National Socialist system. Otto Kirchheimer claimed: "It was a trial carried through by a totalitarian regime in the process of

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[62] Reed, Insanity Fair, p.140. The gradual change in Reed's attitude towards the Court and the trial are obvious from looking at his three books dealing with the subject. The reason, or reasons, for this development on his part is not so clear. Possibly with the changing international situation of the late 1930s (and the war by 1939) Reed was writing in an anti-German, propagandist style as time went by. It is also possible that developments in Germany after 1933 led him to believe that he had been 'cheated' or deceived during the trial. As a result of his changing attitude, his book on the trial itself, The Burning of the Reichstag, written in 1933-34, has been used more extensively here because it was written at the time of the case itself.

[63] Ebenstein, p.4; Koch, p.44; Müller, pp.34-35.

consolidation and conducted before an old-line jurisdiction working in a totalitarian atmosphere to which it had not yet fully adjusted."[64] The other thesis asserts that the IV. *Strafsenat* had no choice but to acquit Torgler and the three Bulgarians.[65]

Both of these views ignore the fact that the judges of the IV. *Strafsenat* were aware of the *Gleichschaltung* and the possible effects of their final decision. The argument that the Court had no choice but to acquit Ernst Torgler does not take into account the domestic circumstances of the situation. The *Reichsgericht* would <u>not</u> have been punished by the German government if they had found Ernst Torgler guilty as charged. The Court was under intense pressure from the German government to convict the accused. On the other hand, because of the intense world publicity associated with the trial, the Court would have suffered a definite loss of foreign admiration and respect if they had found Torgler or the Bulgarians guilty.[66]

Many historians have also argued that the Court handed down an illegal death sentence to Marinus van der Lubbe. By deciding to sentence the Dutchman to death for a crime which was not punishable by death when committed the *Reichsgericht* has

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[64] Kirchheimer, p.104n. See Neil, p.185.

[65] Gisevius, p.35; Hofer and Graf, "The Reichstag Fire of 27 February 1933," p.21.

[66] Mommsen, "The Political Effects of the Reichstag Fire," p.137.

been accused of giving in to government pressure.[67] It is true that the Court gave in to government pressure during the trial (the best example is the testimony of Goring and Goebbels). But, from a legal point of view, the Court made its decision based on legal precedents which it maintained were valid in this case. This alleged 'illegality' of the death sentence given to van der Lubbe seems to originate from some historians' views of justice in National Socialist Germany rather than from purely legal arguments.

On the other hand, the Court did overlook at least one legal principle in its decision. Fritz Tobias claimed that the Court ignored the legal maxim, *in dubio pro reo* (the accused has the benefit of the doubt), in its verdict against van der Lubbe. The tribunal did this by sentencing him on the assumption that he acted in association with unknown accomplices -- an assumption which was not proven by the trial.'[68]

It has even been argued that the Court's dismissal of *nulla poena sine lege* in the trial was not a precedent in modern German law. H.W. Koch asserted that the legal maxim was first violated in 1922 with the passing of the Law for the Protection of the Republic. Koch argued that this law violated a whole range of civil rights and broke away from common legal

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[67] Neumann, p.454; Müller, pp.34-34; Otto Kirchheimer, "Criminal Law in National-Socialist Germany," Studies in Philosophy and Social Science, VIII (1939): p.451; Tobias, The Reichstag Fire, p.270. See also Fraenkel, p.109.

[68] Tobias, The Reichstag Fire, p.270; Tobias, Der Reichstagsbrand, p.470.

doctrine when the accused in the Walther Rathenau murder trial were not given the right of appeal after their conviction.[69] This may be true, but it also important to remember that Koch, as a conservative historian, has attempted to exonerate the conservative jurists of the National Socialist period.

The courts of post-war Germany have not been so kind to the verdict of the *Reichsgericht*. Numerous rehearings of the case against Marinus van der Lubbe have shown an interesting progression in German views on the Court's verdict.

On 6 August 1963, the *Oberlandesgericht* in Düsseldorf ruled that the decision of the IV. *Strafsenat* was not a deliberate miscarriage of justice and did not deviate from criminal law. But, the Court also argued that the IV. *Strafsenat*'s decision had been strongly influenced by National Socialist thinking.[70] In 1967 the *Landgericht* of West Berlin also presented a ruling dealing with the case against van der Lubbe. In a decision handed down on April 21 the Court posthumously commuted van der Lubbe's sentence to eight years for *menschengefährdenden Brandstiftung* and reinstated his civil rights.[71] In a 1980 rehearing of the case, the same court, the *Landgericht* of West Berlin, ruled that the 1933 decision was

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[69] Koch, p.16.

[70] H.W. Koch (Ed.), Aspects of the Third Reich (London: MacMillan Publishers Ltd., 1985), p.520, note 117.

[71] Dr. Robert M.W. Kempner, "Der Prozeß um den Reichstagsbrand," Recht und Politik, Band 1 (1986): p.15; Wheaton, p.475, note 13.

biased in favour of the National Socialist government.[72] On 22 December 1981, the *Bundesgerichtshof* (the Supreme Court of the German Federal Republic) ruled that since the *Reichsgericht* has been located in Leipzig the *BGH* could not rule on the van der Lubbe case. It argued that only the *Kammergericht* of Berlin could rule on this case. In a decision announced on 20 December 1982 the *Kammergericht* maintained that the 1933 verdict violated the legal principle of *in dubio pro reo* in its conviction of van der Lubbe.[73]

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[72] Kempner, p.16; Müller, p.35. Müller cites the printed decision in Strafverteidiger, Band 1 (1981): p.140ff. as his source.

[73] Kempner, p.16.

Conclusion

In 1879 The *Reichsgericht* had been created as the only national court in the entire German *Reich*. In every respect but one the Court was simply the highest court of revision in Germany. The only exception was the crime of treason where the *Reichsgericht* had jurisdiction over every other court in the *Reich*. During the Second *Reich* this privilege was not used very often as the Court tried very few cases dealing with *Hoch-* or *Landesverrat*.

During the Weimar Republic this situation changed dramatically. Although the *Reichsgericht* was basically unscathed by the November 1918 revolution and the events that followed the Court was unable to give the Weimar government its complete support. It has been shown that the Supreme Court was not as anti-Republican as the judicial system in general. Nevertheless, the Court was not always impartial in its treatment of left- and right-wing radicals.

In the early months of the National Socialist regime the judges of the *Reichsgericht*, like so many others, seems to have seen the new government as the protector of Germany against the Communist menace. The judges of the Supreme Court supported this "national" government but they were not National Socialists and were very concerned about protecting their own rights as an independent judiciary. The attempts by the

government to consolidate their hold on power, the *Gleichschaltung*, made this very difficult. The *Reichstag* fire trial made it impossible.

During the trial the judges of the IV. *Strafsenat* were not perfect. There was a double standard in place regarding the treatment of witnesses, the Court gave in to political pressure to allow government ministers to deliver harangues against Communism during the proceedings, and, in the end, the German Communist Party was still blamed for the fire. Nevertheless, the Court ruled that four of the five defendants were not guilty. This decision, especially the verdict in Torgler's case, was not popular in German official circles and the Court knew it. But he had not been proven guilty and the judges acquitted the Communist *Reichstag* deputy. The sentencing of van der Lubbe to death, condemned by many as going against basic principles of justice, was not entirely unprecedented.

In the end the conservative judges on the bench directed the trial according to their own historical antecedents and legal, social and political beliefs.

The National Socialist government went into the *Reichstag* fire trial with the hope that the *Reichsgericht* would give the regime the support it needed at that moment. Early on in the trial, National Socialist leaders made an attempt to appease, coerce and quietly intimidate the Court outside of the proceedings. This was done at the same time as the government

proclaimed the equality of law and justice in the new Germany.

From October 1 to 4, 1933, the annual *Deutsche Juristentag* was held, appropriately, in the city of Leipzig. Speeches were delivered by *Reichskanzler* Adolf Hitler and *Reichsjustizkommissar* Dr. Hans Frank. Dr. Frank announced at the opening: "The gulf between the people and the German jurists has been bridged by National-Socialism and now we will give the people justice hand in hand with the people."[1] Also on October 1, a new portico on the front of the *Reichsgericht* building was unveiled. It read: "German Law to the German People through National Socialism."[2] On October 3, Dr. Frank declared a new motto for Germany which was much the same as another, more famous, slogan: "Ein Volk, ein Reich, ein Recht."[3]

On the last two days of ceremonies the National Socialist leadership issued some warnings to the German judiciary. On October 3 Dr. Frank stated:

> Es war für alle ein wirklich grosser Anblick, als aus dem Portal des Reichsgerichts heraus die Richter des Reichsgerichts in ihren Roben traten. Das war für uns das Symbol, dass die Juristen künftig nicht mehr hinter verschlossenen Türen dem Volk gegenüber zu amtieren haben, sondern mitten im Volk für das Volk.[4]

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[1] Cited in Robert Dell, Germany Unmasked (London: Martin Hopkinson Ltd., 1934), p.97.

[2] Wheaton, p.376.

[3] Paul Meier-Benneckenstein und Arel Friedrichs (Hg.), Dokumente der deutschen Politik, Bd.1: Die nationalsozialistische Revolution 1933, 5. Auflage (Berlin: Junker und Dünnhaupt Verlag, 1939), p.398.

[4] Meier-Benneckenstein, p.397.

The government's judicial leader also repeated an old saying of Hitler's: 'Justice is what serves the interests of the German nation."[5] Hitler gave a warning or promise in his final speech on the 4th, when he said: "The totalitarian State will not tolerate any difference between law and morality. Only within the framework of a Weltanschauung [ideology] can and will a judiciary be independent."[6]

The disappointment of the government in the *Reichsgericht*'s verdict was obvious. The tone of National Socialists leaders began to show intolerance of German jurists. On 14 January 1934, Dr. Frank wrote in the Völkischer Beobachter:

> The judge is independent in his decision and subject only to the law dictated by the life of the nation. The formal laws must not be fetters for the judge but the guiding principle for the development of the national community. The judge must not act in contradiction to the law maker[...] National Socialism protects the independence of the judge on the basis of National Socialist Weltanschauung [ideology] and leadership of the nation, but it also demands of him the participation in that ideological and will-creating domain to which the Fuehrer and his decisions belong. National Socialism will not be able to tolerate jurisprudence which is not ideologically determined and which floats above us in timeless space and in that sense is independent. It must demand that the jurisprudence of the Third Reich also be part of the community of our nation.[7]

At least one of the judges of the IV. *Strafsenat* feared

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[5] Cited in Heiden, p.322.

[6] Domarus, p.364.

[7] Cited in Burdick, pp.420-421.

that the Court might suffer as a result of its final decision. On 13 February 1934 Dr. Ccenders wrote:

> In dem Prozeß gegen die Reichstagsbrandstifter habe ich als beisitzender Richter mitgewirkt...Der Auffassung der nationalsozialistischen Presse, daß es sich rein objektiv um ein Fehlurteil handelt, trete ich durchhaus bei...Das Fehlurteil in der Sache ist meiner Auffassung nach eine Folge des vom ersten Tage der Ermittlungen an unrichtig in Angriff genommenen Verfahrens...Aus der Kritik der nationalsozialistischen Presse (habe ich) die Auffassung gewonnen, daß das Vertrauen zu der erstinstanzlichen Judikatur des Reichsgerichts einen recht erheblichen Stoß erfahren hat.[8]

After this alleged *Fehlurteil* in the *Reichstag* fire trial the government began to take an even harder line toward the legal profession in Germany. The National Socialist theory of a Communist conspiracy against the government was so strongly believed by its members, Hitler included, that the Court's final decision came as an unpleasant shock.[9] Hubert Schorn wrote: "Der Prozeß wurde so zum Ärger des Regimes zu einem Fiasko. Das Urteil erregte auch den Unwillen der nationalsozialistischen Staatsführung."[10]

A parallel process of legal development was expanded in early 1934. This process, somewhat like Ernst Fraenkel's "dual state", involved the establishment of revolutionary judicial

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[8] *Deutsches Zentralarchiv* Potsdam, *Oberreichsanwalt, Personalia*, Bl.128 cited in Kaul, pp.111-112 (Ellipses in source).

[9] Mommsen, "The Political Effects of the Reichstag Fire," p.137.

[10] Schorn, p.68.

institutions as an alternative to the normal legal system. This procedure began in March 1933 with the creation of the *Sondergerichte* as another means of trying political cases.

On 23 March 1934, in a government cabinet meeting, a proposal for a revolutionary new court to be introduced into the legal system was announced. The minutes of the meeting read:

> Die Besprechung ergab Übereinstimmung dahin, daß die Aburteilung von Hoch- und Landesverratssachen einem besonderen Volksgerichtshof übertragen werden solle. Der Gerichtshof soll aus zwei rechtskundigen Richtern und drei Laienrichtern bestehen. Die letzteren sollen für einen langeren Zeitraum ernannt werden. Der Reichsminister der Justiz wird den entsprechend abgeänderten Gesetzentwurf vorlegen.[11]

On 24 April 1934 the proposal became reality with the law creating the *Volksgerichtshof*, or People's Court.[12] This revolutionary court was introduced solely to try cases of *Hochverrat* and *Landesverrat*. Each senate of the *VGH* (and there could be several) consisted of five members of which only two had to be professional, qualified judges. The Court was given jurisdiction over cases of treason and assault, or attempted assault, of the *Reichsprasident* or any other member of the *Reich* government. In addition, the *VGH* also had jurisdiction

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[11] Karl-Heinz Minuth (Hg.), Akten der Reichskanzlei: Regierung Hitler 1933-1938, Teil I: 1933/34, Band 2: 12. September 1933 bis 27. August 1934 (Boppard am Rhein: Harald Boldt Verlag, 1983), p.1221.

[12] The *Volksgerichtshof* was established in *Artikel* III ("Volksgerichtshof") of the "Gesetz zur Anderung von Vorschriften des Strafrechts und des Strafverfahrens. Vom 24. April 1934," RGBl, 1934, Teil I, pp.345-346.

in cases in which the accused was charged with a combination of treason and other crimes. The last paragraph of the law stated: "Gegen die Entscheidungen des Volksgerichtshofs ist kein Rechtsmittel zulassig."[13]

Although it was not stated in the outline of the new Court, the three lay judges appointed to each senate in the *VGH* were to be chosen from among the National Socialist movement. Popular choices were members of the *SA*, *SS*, and the Labour Service of the *Reich*.[14] It was obvious that this new, revolutionary tribunal was meant to be a more reliable alternative to the existing court system in political cases. The balance of the decision lay in the hands of National Socialist jurors, there was no appeal from the final decision, and the jurisdiction of the Court not only included treason, but also treason in combination with other offenses. If the legal definition of treason was expanded, the jurisdiction of the *VGH* would also be expanded[15]. This Court went far beyond the power and influence of the *Sondergerichte* created in March 1933 in its ability to undermine the traditional court system. There is no doubt that the *Volksgerichtshof* was revolutionary and was

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[13] "Volksgerichtshof," RGBl, 1934, Teil I, pp.345-346.

[14] Kramer, p.625.

[15] The legal definitions of *Hochverrat* and *Landesverrat* were broadened in *Artikel* 1 and 2 of the "Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens. Vom 24.April 1934," RGBl, 1934, Teil I, pp.341-345. These changes provided the death penalty for high treason and expanded the list of activities which were deemed treasonable.

"intended as an instrument of political domination by the Nazi government, an instrument of 'National-Socialist law' which flew in the face of all humanist liberal principles and traditions of justice".[16]

The National Socialists made no secret of the fact that the new court was meant to be a more reliable judicial forum for political cases. Wilhelm Weiss, an editor of the *Volkischer Beobachter*, wrote on 19 November 1934:

> For good reasons the National Socialist state, after the seizure of power, has created a special court for the trial of the most serious crimes that exist in political matters. Whoever is familiar with the sentencing policy of German courts especially before the NSDAP seizure of power can fully appreciate the necessity for such a court of law. One could object by saying that before 30 January 1933 high treason and Landesverrat were matters for the Reichsgericht in Leipzig. The trials which were pending or dealt with there could not lead to a satisfactory solution in the National Socialist sense, because the Reichsgericht in its work and tendency was dependent on the general political and spiritual basic attitude which dominated in the democratic state of Weimar. Any trial for treason in Leipzig was as a rule an affair which led to confrontations in parliament and produced a shameless agitation by the gutter press against all who made a modest attempt to protect the Reich at least from the most blatant acts of treason.[17]

The introduction of the *Volksgerichtshof* was of great significance to the *Reichsgericht*. The only crime which the Supreme Court held jurisdiction over, not as an appellate

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[16] Peter Hoffmann, The History of the German Resistance 1933-1945, trans. Richard Barry (Cambridge, Mass.: The MIT Press, 1977), p.524.

[17] Cited in Koch, In the Name of the Volk, p.45.

court but in the first hearing of the case, was the crime of treason. With the creation of the *VGH* that jurisdiction was removed. The *Reichsgericht* was left only as the highest court of revision in Germany. Werner Johe called it nothing more than a *Rechtsmittelgericht*.[18]

Many historians claim that the *Reichsgericht*'s verdict in the *Reichstag* fire trial was the direct cause of the creation of the *VGH*. William Sweet, an historian of the People's Court, claimed: "The Volksgericht was created as a direct result of Hitler's dissatisfaction with the Reichstag fire trial, in which he had hoped to prove the existence of a Communist conspiracy."[19] Unfortunately, neither Sweet nor any of the others give any solid evidence to back their assertion that the *VGH* was the direct product of the *Reichstag* fire trial.

Hans Frank seems to be the only primary source to give any confirmation to this theory. In 1945, while waiting for his war crimes trial at Nürnberg, he wrote:

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[18] Johe, p.110.

[19] William Sweet, "The Volksgerichtshof: 1934-45," Journal of Modern History, vol.46 (June 1974): p.315. Other historians and contemporary observers who agreed that the final decision in the *Reichstag* fire trial caused the creation of the new court include: Stephen H. Roberts, The House That Hitler Built, 7th ed. (London: Methuen Publishers, 1938), p.283; Justice Robert Jackson at the Nürnberg War Crimes Trial in Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945 - 1 October 1946, Volume I (Nuremberg: Secretariat of the Tribunal, 1947), p.179; Kirchheimer, Political Justice, p.104n; and Fritz Morstein Marx, Government in the Third Reich, 2nd ed. (New York: McGraw-Hill Book Company, 1937), pp.75-76.

> Diesem Argument [that a new type of judge was necessary] verdanke im Zusammenhang mit den objektiven Urteil des Reichsgerichts im Reichstagsbrandprozess, über das Hitler ärgerlich erstaunt war, der Volksgerichtshof als oberste Reichsgerichtsbehörde für Hoch- und Landesverrat, gleichrangig dem alten ehrwürdigen Reichsgericht, sein Entstehen".[20]

The causal argument presented by Sweet and others might carry more weight if the *VGH* had been a simple replacement for the *Reichsgericht*. But the People's Court was more than a substitute for the Supreme Court because of its radical break with the traditional and professional court system. It seems unlikely that this creation would have been the result of a single, although very important and disappointing, verdict from the *Reichgericht*.

What seems more plausible is the thesis that the introduction of an alternate court was accelerated by the ruling in the *Reichstag* fire trial. The Court's decision in the case showed to the leaders of National Socialist Germany the "weaknesses" of the liberal judicial system. After all, the idea of a 'people's tribunal' was not new to National Socialist thinking in 1933.

In Mein Kampf, Hitler proclaimed that after becoming leader of Germany he would create a *Nationalgerichtshof* to prosecute the "Novemberverrat".[21] In 1930, at the *Reichswehr* trial, Hitler also proclaimed that after the legal ascension to power

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[20] Frank, p.153. He basically repeats himself on p.159.

[21] Adolf Hitler, Mein Kampf, Bd.2, 9.Aufl. (München, 1933), p.610ff. cited in Gruchmann, pp.956-957.

by the National Socialists a *Staatsgerichtshof* would be introduced to punish those involved in the actions of November 1918.[22] National Socialists such as Otto Strasser discussed a future National Socialist abolition of the professional court system. He also wrote: "Instead there will be people's courts, where the sound instincts of the people can be trusted to observe the principles of German law, justice, and right until new legal forms have been elaborated."[23]

The legacy of the *Reichstag* fire trial did not end with the creation of the People's Court in 1934. On 28 June 1935, the government changed the legal maxim of *nulla poena sine lege* ("no punishment without law") to *nulla crimen sine poena* ("no crime without punishment").[24] National Socialist views on the topic were discussed at the XIth International Penal and Penitentiary Congress held in Berlin in August 1935. Dr.

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[22] Cited in Peter Bucher, Der Reichswehrprozeß. Der Hochverrat der Ulmer Reichswehroffiziere 1929/30 (Boppard a.R.: Harald Boldt Verlag, 1967), p.260. In the English translation of Ingo Müller's book Hitler's words are translated incorrectly in so far as *Staatsgerichtshof* is interpreted as "Supreme Court". Müller, p.20. German legal dictionaries usually give two definitions for *Staatsgerichtshof* - a high court of state and a constitutional court. None of the dictionaries consulted gave the Supreme Court as a translation.

[23] Otto Strasser, Germany Tomorrow, trans. Eden and Cedar Paul (London: Jonathan Cape Ltd., 1940), p.215. Although translated and published in 1940 it would seem that this was written much earlier.

[24] "Gesetz zur Änderung von Vorschriften des Strafverfahrens und des Gerichtsverfassungsgesetzes. Vom 28. Juni 1935," RGBl, 1935 Teil I, p.839. For a detailed analysis of the changes involved in the new law see Lawrence Preuss, "Punishment by Analogy in National Socialist Penal Law," Journal of Criminal Law and Criminology, vol.26 (1935-36): 847-856.

Roland Freisler, *Staatssekretär* in the *Reichsjustizministerium* (and later on, President of the People's Court), gave a speech on August 21 in which he discussed National Socialist views on, among other legal topics, *nulla poena sine lege*. In Freisler's opinion, the changes in definition which had been brought in by the government in June were necessary for the legal security of the nation.[25]

One last insult was thrust upon the *Reichsgericht* on June 1936 with the creation of the *Reichskriegsgericht*. A new law dealing with *Militargerichtsbarkeit* (military court jurisdiction) passed by the government on 12 May 1933 stated that the *Reichsgericht* still held jurisdiction over military treason cases in the first instance.[26] With the creation of the *Reichskriegsgericht* in June and the expansion of its jurisdiction in October 1936 the Supreme Court lost control over all cases of *Kriegsverrat* to the military court. This entailed all cases involving military treason against the *Reich* and the trading of military secrets to the enemy.[27]

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[25] Freisler's speech is printed in Sir Jan Simon van der Aa (ed.), Proceedings of the XIth International Penal and Penitentiary Congress Held in Berlin, August 1935 (Bern: Bureau of the International Penal and Penitentiary Commission, 1937), pp.414-435.

[26] Walter Wagner, "Braune Rechtsprechung. Politische Justiz im 'Dritten Reich'," Die politische Meinung, 6:67 (Dezember 1961): p.44.

[27] The switch in jurisdiction took place in "Bekanntmachung der Nuefassung der Militärgerichtsordnung und des Einführung zu ihr. Vom 29.September 1936," RGBl, 1936 Teil I, pp.751-754 and "Militärstrafgerichtsordnung (MStGO)," pp.755-810. The topic is also discussed in Albrecht Wagner, Die

In its handling of the *Reichstag* fire trial the *Reichsgericht* had proven itself unreliable to the new leaders of Germany. By 1936 the Court was nothing more than the highest court of revision in Germany. The only crime in which it had preferential jurisdiction, treason, had been taken out of its hands by the National Socialist government.

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deutsche Justiz und der Nationalsozialismus, Teil Ib: Die Umgestaltung der Gerichtsverfassung und des Verfahrens- und Richterrechts im nationalsozialistischen Staat (Stuttgart: Deutsche Verlags-Anstalt, 1968), pp.249-250.

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