

The Reichstag Fire Trial, 1933–2008

The Production of Law and History

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In the opening decade of the twentieth century the German national state united the great majority of the German speaking population of Europe, excluding only those in Switzerland and the Austro-Hungarian Empire, and was among the leading states of the world. It boasted technologically advanced industry, among the highest per capita GDP, and the second largest army and third largest navy in the world. Germany was at peace, save for minor military operations against disobedient natives in Southwest Africa. It was a state that was among world leaders in providing basic social insurance, yet held sacred private property and the rule of law, except only in strictly prescribed areas of national security. In the opening decade of the twentieth-first century the German national state unites the great majority of the German speaking population of Europe, excepting only those in Switzerland and Austria, its industry is technologically advanced and its per capita GDP high. Its military budget is the sixth largest in the world, and it is at peace, save for minor military operations against disobedient natives in Afghanistan. Despite cutbacks, few states in the world have better provision of basic social insurance, and Germany today prides itself on holding private property to be sacred and on its adherence to the rule of law, except for a few strictly prescribed areas of national security. In the fourth and fifth decades of the twentieth century the German national state committed crimes universally agreed to be the most horrendous in human history.

Causal explanations of the descent into the Nazi hell have been, of course, numerous. Some have emphasized ideas, as in the Isaiah Berlin thesis that traces a line of descent into Nazi barbarism starting with the rejection of enlightenment values in the German romantic nationalism of the early nineteenth century. Other explanations, which we prefer, emphasize the interests and actions of those who held the most power—the ruling class—in the society that produced the Third Reich. But

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what of the formidable German legal establishment, the Bar, the judiciary, and the globally esteemed jurists, those much honored theorists in their university chairs? While no sensible case can be made that gives any primary causal responsibility to the legal establishment, yet it is very clear that it (or if you prefer “the Law”) presented not the slightest obstacle. Nonetheless the German legal establishment was not irrelevant, it had a secondary but not unimportant role in the debacle. For the Nazis to lead the German nation into a war of aggression and into genocide required their *hegemony*, the tacit acceptance of the legitimacy of their acts—and of the dutiful observance to their demands—as the lawful rulers of the German state, even by many of those German citizens who disagreed with their policies. Resistance to the Nazis, however, required the quickest possible global recognition of their crimes and the threat they represented to all decent people in the entire world. For one moment in the early days of Nazi rule in Germany a public trial presented a focus in which the German courts provided the Nazis an opportunity to further their hegemony, and the potential to the global resistance of an opportunity to expose the Nazi crimes—the Reichstag Fire trial.

The Nazis Aim for Power in Defeated Germany: The Reichstag Fire

When the German Empire, a constitutional federal state dominated by the Kingdom of Prussia, went to war in the first days of August 1914, it did so with a near consensus of its citizenry that the cause of the war was the prior hostile mobilization of the immense army of the Russian Empire. The war was *defensive*, and whatever measures needed to preserve the nation from invasion by the tsarist hordes must immediately be taken, or so it was argued by almost every public voice from anti-Semites and Conservative Nationalists on the right to the majority of the Social Democrats on the left.

The Reichstag, the national parliament elected by universal manhood suffrage, voted not only the necessary funds (unanimously) but a series of war laws and decrees, in particular the first Enabling Act of August 4, 1914, that affected a range of basic rights by authorizing the government to impose “protective custody” and to curtail freedom of assembly, freedom of the press, and postal privacy.

With defeat came a regime headed by majority Social Democrats who had actively helped to pursue the war, and were cursed from the start by their complicity with extreme right-wing nationalists in the January 1919 murder of the left Socialist leaders Rosa Luxemburg and

Karl Liebknecht. This government was compelled to sign the Versailles treaty, including harshly punitive measures against Germany based upon the assertion of war guilt; a question nonetheless still very much open ninety years later.

The new regime's Weimar Constitution preserved federalism (police powers being entrusted to the states) including the leading role of Prussia, but replaced the Kaiser with an elected president, whose powers included the ability to declare a state of emergency and to rule by decree. While political party governments came and went, including some headed by Social Democrats, Weimar Germany continued in practice to be administered by the prior ruling strata of conservative nationalist owners of considerable wealth and, frequently, large landed estates, who almost without exception dominated the top ranks of the permanent civil service, the army, the judiciary, and large industry. The only position of real state power held by the Social Democrats was their control of the police in the dominant state of Prussia, albeit a control in practice used heavily against the Communist-led left workers movement. The Prussian police were the police of the capital Berlin, and constituted over 60 percent of all the police in Germany.

When the Great Depression hit Germany in 1929–30, government by parliamentary majority collapsed and a series of inconclusive elections followed. President von Hindenburg authorized the government of Chancellor Brüning to rule by decree, enforcing a series of harsh economic measures in a time of widespread distress.

The Nazis, a lineal descendent of the right-wing nationalists who had murdered Luxemburg and Liebknecht, and who had received a vote of 3 to 6 percent in the elections of the 1920s, now emerged as a major political force, winning nearly 20 percent of the vote in the June 1930 elections and approximately a third of the vote in the two 1932 Reichstag elections. In the summer of 1932 von Hindenburg appointed as chancellor von Papen, a minor right-wing politician. Von Papen on July 20, 1932, urged on by the Nazis in the Prussian legislature, seized control of the police power in Prussia from the Social Democrats as Reich Commissioner for Prussia under an emergency decree signed by von Hindenburg.

After two succeeding inconclusive elections and after von Papen was replaced as chancellor by Schleicher, the aged President von Hindenburg was persuaded by his son Oskar and by von Papen to make Hitler chancellor, on January 30, 1933. Hitler had persuaded von Hindenburg by insisting on only two positions in the cabinet for Nazis; Frick as inte-

rior minister and Goering—Nazi president of the Reichstag—as minister without portfolio, but as minister of the interior of Prussia, with control of the Prussian police.

The new cabinet obtained from the compliant President a decree dissolving the Reichstag, and calling new elections for March 5, 1933. Goering also obtained a decree that had been prepared by von Papen but never issued, giving the new ministry emergency powers to combat “acts of terrorism” by the Communists. This Decree for the Protection of the German People included the power to censor the press, ban public meetings, and impose “protective custody” for up to three months on suspicion of planned criminal activity, and was promulgated by President von Hindenburg on February 4.

Goering set to work to take full control of the Prussian interior ministry and police. The political division of the police was reorganized, and given the name Geheime Statspolizei, the Secret State Police or Gestapo, and placed under Goering’s direct control. As a clear sign of the new coalition in power, the new head of the Prussian police was Dr. Ludwig Grauert, previously business manager of the heavy industry employers association. Police chiefs and key officials were replaced throughout Prussia, primarily by Nazis. Goering gave a widely reported speech to police in Dortmund that made things as clear as could be: “A bullet fired from the barrel of a police pistol is my bullet. If you say that is murder, then I am the murderer....I know two sorts of law because I know two sorts of men: those who are with us and those who are against us.”

On February 22, fifty thousand Nazi SA men (Storm Troopers) throughout Prussia were enrolled as auxiliary police. On February 24 Goering’s police raided Communist headquarters, and announced (falsely) that seditious literature had been found calling for an armed revolution and attacks on public buildings; everything was ready.

The Reichstag building broke into flames on the night of February 27, 1933. Immediately mass arrests were carried out using carefully prepared lists of Communist leaders and Reichstag deputies, as well as various Social Democrats, leading left-wing intellectuals, and trade union leaders. In the first night some four thousand were seized, brought to SA barracks, beaten, and tortured. Goering announced that the Reichstag Fire was to have been the signal for an insurrection and terrorist acts throughout Germany. On February 28 the Decree for the Protection of People and State Against Communist Acts of Violence Endangering the State was promulgated over the signature of von

Hindenburg. The first article removed all fundamental rights specified in the Weimar constitution, specifically listing personal liberty, freedom of expression, association, and assembly, and the need for warrants for house searches. The second article gave the national government the right to remove all the state governments. Another article provided the death penalty for violation of the offenses set out in the decree, and for arson. Nonetheless the Nazis failed to gain a majority in the Reichstag in the March 5 elections; indeed, in their last vote the German people elected eighty-one Communist deputies. But at the first meeting of the newly elected Reichstag the Nazis achieved a majority when the eighty-one Communist deputies, many in detention since the Reichstag Fire, were expelled. On March 23 this Reichstag passed an Enabling Act, entitled Act for the Removal of Distress from People and Reich, that gave Hitler absolute power to rule.

The Reichstag Fire led to a dramatic trial, and to an equally consequential counter-trial. Media attention to the trial and the political currents around it—and its leading personalities—occupied world attention. This was *the* political trial of its time. In this article, we discuss the political setting of the fire, the trial and surrounding events, and the lessons that may be drawn from the changing historical accounts of the trial. We examine critically the different versions of key events.

Three Reichstag Fire Proceedings

There were three Reichstag “proceedings” of consequence. Under German law, the first judicial phase was a preliminary examination of evidence, with the object of compiling a dossier and bringing formal charges. This phase was under the control of Judge Paul Vogt, a loyal Nazi who ordered the potential defendants held in prison, most of the time in chains—contrary to German law as it then existed. This proceeding began in March 1933 and ended on August 31, 1933, when Vogt filed thirty-two volumes of transcripts and documents. Those charged were the Dutch anarchist Marinus van der Lubbe, who had been arrested at the fire scene, Ernst Torgler, leader of the Communist Party group in the Reichstag, and three Bulgarian Communists who were sojourning in Berlin—Georgi Dimitrov, Simon Popov, and Vassili Tanev.

The second proceeding was a series of hearings held in London by a Legal Commission of Inquiry into the Burning of the Reichstag. Their work was designed to focus attention on the events in Germany and to assemble evidence, including evidence likely to be excluded from the German proceeding such as that tending to exculpate the defendants or

implicate the Nazis. The commission reported on September 20, 1933, concluding that there was no evidence linking Torgler, Dimitrov, Popov, and Tanev to the fire, that van der Lubbe could not have acted alone, and that there was significant evidence that the Nazis had themselves set the Reichstag on fire. The commission's work was part of an international protest movement, focused not solely upon the pending and impending judicial proceedings in Germany, but also upon the National Socialist seizure of power using the fire as a pretext. The commission had the benefit of an extensive investigation conducted by the World Committee for the Relief of the Victims of German Fascism, which assembled physical evidence and found witnesses.

The third proceeding: on September 21, 1933, the criminal trial opened in Leipzig. On October 10 the proceedings moved to Berlin to observe the Reichstag premises and later returned to Leipzig. Presiding Judge Buenger pronounced the verdict on December 23.

In the pretrial, commission, and trial proceedings, the Nazis and the defendants sought to tell very different stories. Hitler, Goering, and Goebbels had announced the Nazis' theory on the night of the fire: Communists were guilty; van der Lubbe, who was arrested at the scene, was one of their agents. A decree promulgated on February 28, the day after the fire, enlarged the definition of treason to include many forms of dissent—including any claim that the Nazis had set the fire. Nazi officials declared that such measures were proved necessary by a thorough investigation that showed the guilt of unnamed "Communists." After the Second World War, Goering admitted that no such investigation had taken place, but that Hitler had insisted on the decree being issued.

The night of February 27, Ernst Torgler was arrested when he went voluntarily to the police station when he heard his name on the radio. The three Bulgarians were rounded up on March 9.

The Nazi officials now faced the problem of proving their claims. They decided to hold a public trial that would have some surface appearance, but only that, of fairness. On March 3, 1933, Goering told the Cabinet that the preliminary examination would soon begin. The examining magistrate was Dr. Braune, "who used to investigate charges against the National Socialist Party, and who has always been most ruthless with us. Even if he did his work objectively, he is hardly the right man to handle so important a case. Thus he might restrict his investigations to the criminal alone....He might even set Deputy Torgler free." Hitler concurred. Thus, Judge Vogt was chosen to replace Braune. To

prevent any future uncertainties about the political persuasion of judges and lawyers, the Nazi-controlled Reichstag set up "Special Courts" on March 21, 1933, to try offenses listed in the February 28 Reichstag Fire decree. On April 24, 1934, the Reichstag authorized "People's Courts" to replace the former trial courts in political cases. In the new judicial system, all of the judges would be loyal Nazis and defense counsel would show their loyalty to the regime by making speeches against their clients. Only one of these measures was applied retroactively to the Reichstag Fire defendants: a March 29 law authorized a death sentence for certain crimes committed between January 1 and February 28.

Vogt set to work with enthusiasm. He sent word to police officials all over Germany, asking for information on suspected Communist acts of sabotage and terrorism. He focused his attention on witnesses recruited by the police. He did not explore the contradictions and lacunae in the various forensic reports about the fire.

While Vogt did his work, antifascist activists in several countries began a counter-offensive. The World Committee for the Relief of the Victims of German Fascism was established with branches in the United States and several European countries. Communist Party activists had a great deal to do with organizing the committees, but the membership represented a cross-section of influential figures. On August 1, a book, the *Brown Book of the Hitler Terror and the Burning of the Reichstag* appeared under the committee's name. The *Brown Book* was translated into many languages and millions of copies were sold, including in major department stores in the United States. It contained, according to Arthur Koestler, "the first comprehensive report on the concentration camps...the persecution of Jews [and others], the repression of literature, and other aspects of the terror." The *Brown Book* contained an impressive array of evidence that Torgler, Dimitrov, Popov, and Tanev were innocent, and that the Nazis had set the fire.

The committee recruited a staff of investigators and forensic experts, who collected evidence in Germany and in Holland, where van der Lubbe had lived. After this preparatory work, the Commission of Inquiry held its proceedings in London in September 1933. The commission was chaired by renowned British barrister D. N. Pritt, K.C., a prominent member of the Labour Party, and included American lawyer and ACLU founder Arthur Garfield Hays, celebrated French advocate Vincent de Moro-Giafferri, former Italian prime minister Francesco Nitti, and Swedish senator Georg Branting. The commission proceedings were formal and fairly rigorous. It heard lengthy and detailed evi-

dence about the fire and the Nazi reaction to it. The commission, as a result of the reputation of its members and the care taken in its proceedings, achieved favorable attention in the global press. Its report even made its way—illegally—into Germany, and at times became the text against which the Nazis focused their efforts at trial. Torgler's lawyer, Dr. Sack, spent more than half of his closing speech criticizing in detail the commission's report before he began to deal with the case against his client.

Who Set the Reichstag on Fire?

We begin by examining the evidence. Then, we can examine the trial proceedings.

The night of the fire, German police arrested van der Lubbe, half clothed. He had removed his shirt to use it as kindling while setting one of the fires inside the Reichstag.

Many characterizations of van der Lubbe's role in the Reichstag Fire have begun by characterizing his political and social outlook and even in some cases his alleged sexual orientation. From these premises, often based on scant evidence, writers leap to a conclusion that van der Lubbe acted alone, or acted with Communists or Nazis depending on one's perspective. In 1933, writers of the left and right sprinkled their prose with this sort of conclusion-jumping.

The preferable, and more reliable, way to see van der Lubbe's role is to reason from the undisputed forensic evidence, introduced in evidence in London or at the German trial, and the contemporaneous reports of journalists and police officers at the scene. Then, one can evaluate the divergent views presented in the dozens of books and articles about the fire.

By the time police arrived and arrested van der Lubbe, about 9:30 p.m., on the 27th, the Reichstag was ablaze. Many separate fires were merging into one. Indeed, the fire was not put out until nearly midnight. A British newspaper journalist arrived about 9:45, even before Hitler, Goebbels, and Goering, and reported that a police officer said, "They've got one of them who did it, a man with nothing but his trousers on. He seems to have used his coat and shirt to start the fire. But there must be others still inside. They're looking for them there."

When Hitler, Goering, and Goebbels arrived, they quickly began to assert—without a particle of evidence—that the Communists must have set the fire, and to announce that they would immediately begin a meeting to decide on repressive measures.

According to the prosecution's trial evidence, van der Lubbe entered the Reichstag by breaking a window on the lower level. A witness named Floeter was passing on his bicycle and heard the sound of breaking glass. He stopped to look and saw someone on the first floor balcony with a burning object in his hand. He told a police officer, Buwert, what he had seen, and continued on his way. Another witness, Thaler, stopped because he also heard the sound of breaking glass. Thaler originally reported seeing two men inside the building.

Thus, the timeline of the fire begins at 9:03 or a little after, when the witnesses seem to agree that there was the sound of glass breaking and one or more people were inside the building setting fires. Another important person in this recital is House-Inspector Scranowitz, who rushed from his nearby apartment to the Reichstag, and actually confronted and arrested van der Lubbe about 9:25 or a little before. By that time, the Reichstag's main chambers were in flames.

Scranowitz later prepared a diagram that identified at least two dozen separate places of origin for the fires that were set and later merged into one or two large-scale blazes. The indictment alleged twenty-three separate fires, in different parts of the building, and on different floors. In order to reconcile the known time of the first blaze being set, at 9:03, and the later progress of the fires, the prosecution accepted that all these fires must have been set within about eleven to fourteen minutes.

Moreover, the prosecution forensic experts also agreed that an accelerant or accelerants were used to set the fires, although they disagreed on whether the material was liquid or solid. That night, when the alarm was given and officials began to arrive at the Reichstag, they found all exterior doors were locked, as they should have been.

There was never any plausible evidence against Dimitrov, Tanev, and Popov. Torgler, who was a Reichstag deputy, did come and go from the building on a regular basis, but he had a solid alibi for the time when the fire was set. No forensic evidence or credible witness statement linked him to the fire.

Van der Lubbe was caught at the scene. He had doubtless been involved. As we have noted, the *Brown Book* marshaled the evidence that the Nazis set the fire. Their research showed that there was an underground passage leading into the Reichstag. This passage had three entrances: the one in the Reichstag, one in the Reichstag president's—Goering's—residence, and one in what the contemporary record describes as an "engine house" or machinery room.

At the trial, Dimitrov attempted to inquire whether the underground passage had been investigated, using information that the commission had collected. He was initially ruled out of order. However, a prosecution witness named Adermann testified that he had heard noises from the passage during nights before the fire. The issue was then open for discussion. The court visited the site and heard evidence about the passage.

It turned out that at least one set of keys to the passage doors was kept by Inspector Scranowitz, the man who had arrested van der Lubbe at about 9:25. When the fire was discovered, someone on duty called Scranowitz, who did not answer his telephone. Scranowitz turned up at the fire scene about 9:18 and told an SS officer that he had heard people in the cellars of the Reichstag. The Commission of Inquiry concluded that the underground passage was the probable entry point for those who set the fire. Not surprisingly, the prosecution and the German court rejected this idea.

Late in the evening of February 27, Martin Sommerfeldt, who was Goering's press chief, appeared at the Reichstag and interviewed police and firefighters in order to prepare a press communiqué. He drafted a press communiqué reporting that the police had collected "about a hundredweight" of firelighters—about fifty kilograms—at the scene. Sommerfeldt met with Goering, who drafted a press release saying that the recovered incendiary material was so heavy that at least seven persons would have been necessary to carry it, and that the fires had to have been set by persons familiar with the Reichstag building. Goering's memo, which was issued to the press, said that at least ten persons must have been involved in setting the fire.

The most reliable studies of the fire focus on this forensic evidence, which tends powerfully to show that van der Lubbe could not have acted alone and that the probable method of entry into the Reichstag was the underground passage—the exterior doors having been found locked.

Elements of the left sprang to van der Lubbe's defense—at least against the charge of having been complicit with the Nazis. In 1933 and early 1934, an anarchist group called Comité mondiale contre la guerre et le fascisme (the World Committee Against War and Fascism) published a number of tracts defending van der Lubbe from charges made against him in the *Brown Book*. This group had adherents in France, the Netherlands, and Spain. Its main theme was that van der Lubbe was a faithful adherent of the working-class movement, and that his act was "perfectly legitimate...individual and consequential." It labeled the

Brown Book accusation that van der Lubbe was a tool of the Nazis “petty bourgeois and Stalinist.” This view of van der Lubbe has been carried forward into recent times.

Three Trials, Five Defendants

At trial, the court and prosecution divided the evidence into three parts. First, the court heard evidence about the five defendants’ backgrounds and activities before the fire. Second, the court—having moved the proceedings to Berlin—heard testimony about the fire itself and the events immediately surrounding it. The third phase was avowedly political, focusing on the defendants’ alleged propensities and on the Nazi officials’ denial that the Nazis had set the fire.

Arthur Garfield Hays attended most of the trial, and noted the differences between the U.S. trial procedure to which he was accustomed and what he saw in Germany. In the trial chamber, six judges sat in red robes with skullcaps, with Judge Buenger presiding. On the other side of this dais sat the prosecutors, also on a raised platform. On the right sat the defendants, inside a railed enclosure. Their counsel sat near them. Guards sat near the defendants.

German trial procedure at that time followed the continental, civil law, model. The preliminary examination, and the thirty-two volumes of reports it generated, were to be the principal basis of the trial. Lawyers did not make opening statements. Witness statements might be received based on the written preliminary examination record. Or, a witness might be called to testify on one point, then excused and recalled later when a different subject was being considered. The judges might halt a witness’s testimony to call a contradictory witness then and there. If more than one person claimed to have observed a relevant event, several witnesses might all be called at once, and questioned by the judges in a group until the judges felt some resolution had been reached. Judge Buenger dominated the witness questioning, based upon the preliminary examination report. From time to time, the prosecutor and the judges might confer as to where some item might be found in the record.

Continental procedure permits hearsay testimony: A witness may recount what somebody else told him or her, or what he or she overheard being said. The hearsay may be discounted, in preference to the witness’s personal knowledge, but it nonetheless comes in.

This procedure makes it difficult for a defense lawyer to seize the initiative and try to turn the proceedings to his or her advantage. As Hays wrote,

Compared to our system, the lawyers play a minor part in a criminal trial. The defendants play a much greater part. In Germany, after the judge makes his inquiry, lawyers for the defendant are asked if they want to put questions. Then the defendants themselves are given the opportunity. In this trial Dimitrov never failed to avail himself of this right. He told the court that he wanted neither “the honey nor the poison” of Teichert’s [his appointed counsel] defense. He intended to defend not only himself, but the Communist Party. “That’s what I’m here for.”

As a matter of evidence, Dimitrov, Popov, and Tanev had solid alibis, and the witnesses whose testimony put them in a position to have committed the crime were shown either to have been coached into making misleading statements or were criminals terrified of Nazi retribution, and incredible. Torgler, as a Reichstag deputy, had access to the building but was demonstrably nowhere near it when the fire was set.

Van der Lubbe’s counsel, Dr. Seuffert, could not play much of a role. His client had confessed under interrogation. Throughout the trial van der Lubbe sat slumped in his chair, Hays describing him as having “the look of an ox,” who “would seem to shrink into a green lump.” Dr. Seuffert would from time to time wipe the drool from his client’s face. The state’s efforts to tie van der Lubbe to the Communist movement were weak. He was said to have possessed a red membership card, but the membership cards of the German Communist Party were black, and of the Dutch party blue-black. National Socialist cards were red.

Van der Lubbe’s answers, when the court called him as a witness, were mostly monosyllabic and often incoherent; he agreed hesitantly to the leading questions put to him about his actions and his confession to the police, though at times he became noncommittal as though he could not remember what he had done and said.

There was one point, however, at which van der Lubbe came awake. Count Wolf von Helldorf, a Storm Trooper leader and Berlin police official, appeared as a witness on October 20, 1933. He had investigated the fire. The *Brown Book* had accused him of complicity in setting it. He was asked to look at the defendants to see if he recognized any of them, or they him. Van der Lubbe would not raise his head, even after Judge Buenger prompted him. Von Helldorf barked a command: “You, put your head up. Quick!” Van der Lubbe quickly obeyed. As the left press noted, it appeared that he had heard his master’s voice.

The Nazi leaders and the Bulgarian defendants agreed on one point: This was a political trial. Any effective defense had to acknowledge this fact and confront the reality of Nazi power and influence. Dimitrov’s

tactics, from the first witness until the last words of argument at the end, were based on knowing this truth. In all the histories of the trial, his performance stands out. Why do we say the trial was political? First, four of the defendants were chosen based on their membership in the Communist Party, and not on the basis of credible evidence. The Nazi theme, that “the Communists did it,” was a trial theme. Indeed, in acquitting Torgler, Dimitrov, Popov, and Tanev, Judge Buerger nonetheless “found” that the fire was part of a Communist plot. Second, in the trial proceedings the Nazis took up the *Brown Book* challenge. The prosecution aimed to discredit the *Brown Book* theory, to such an extent that the book was said to be the sixth defendant. The Nazis had decided to make their case not only to the court but to the German population and the foreign press. Leading Nazi figures came to the trial to express their views. Dimitrov did not “politicize” the trial. He showed up and dealt with what he found.

From the first trial day, Dimitrov set out to dominate the proceedings. He cross-examined almost every witness who mentioned his name or those of his compatriots. He usually began with “I ask the witness to which party he belongs.” The answer, more often than not, was “to the parties of the right.” Judge Buenger would ask the purpose of the question. Dimitrov would say some variation of “I want to know who paid for this witness.” Judge Buenger would often admonish, “This is an insult to the witness.” After a further exchange, the judge would cut off Dimitrov’s questioning.

When Dimitrov testified, he insisted on making a statement of his innocence, rather than beginning by responding to questions. He set out his defense: He had not been in Berlin, did not know Torgler and van der Lubbe, and was in Germany on behalf of the Bulgarian Communist Party. Under questioning, Dimitrov responded emphatically and always with a challenge to the unfairness of the proceedings. From time to time, Judge Buenger would reprimand him or exclude him from the court for a day or so. When Dimitrov claimed that a map of Berlin, allegedly found in his rooms, had been forged, the judge said, “I won’t permit you to insult the police.” When Dimitrov suggested that the Nazis had set the fire, the judge said: “Dimitrov...behave modestly and quietly. If you can’t do that, you won’t get very far here.” Dimitrov replied, “I feel compelled to speak. I don’t deny my Communist convictions. But because of that I am opposed to individual terror. During the investigation, the judge [Vogt] tried to make a terroristic adventurer out of me.” Judge Buenger told Dimitrov to raise that issue with his coun-

sel, to which the latter replied, "I have already said I do not recognize this counsel. I am my own counsel."

And indeed he was. The most celebrated events of the trial were appearances by Storm Troop leaders and police officials Heines and von Helldorf, as well as Goering and Goebbels. The chief prosecutor, Dr. Werner, explained that the *Brown Book* had claimed that Goering and Goebbels were instigators of the fire, and they should be "given the opportunity of clearing their names."

Goering was summoned to appear on November 4. Security around the courthouse was enhanced. Government officials were in attendance. At 10:30, after keeping the court waiting for an hour, Goering entered in his Storm Trooper uniform. All the Germans gave the Hitler salute. Dr. Buenger echoed Dr. Werner's sentiment that Goering and Goebbels should be permitted to rebut the *Brown Book* allegations.

Goering then spoke for three hours, with noisy support from the audience.

After Goering's statement, Dimitrov cross-examined. He peppered Goering with questions. He put questions designed to show that Goering's accusations of Communist complicity were made after a cursory and flawed investigation. Goering's anger mounted. He said he was "only concerned with the Communist Party of Germany and with the foreign Communist crooks who come here to set the Reichstag on fire." The audience cheered. Dimitrov replied, "Yes, of course, bravo, bravo, bravo! They have the right to fight against the Communist Party, but the Communist Party of Germany has the right to go underground and to fight against your government; and how we fight back is a matter of our respective forces and not a matter of law." Judge Buenger interjected: "Dimitrov, I will not have you making Communist propaganda here." To which Dimitrov replied that Goering was making National Socialist propaganda. The exchange continued:

GOERING: Look here, I will tell you what the German people know. They know you are behaving in a disgraceful fashion....I did not come here to be accused by you.

DIMITROV: You are a witness.

GOERING: In my eyes you are nothing but a scoundrel, a crook who belongs on the gallows.

DIMITROV: Very well, I am most satisfied.

At this point, Judge Buenger cut Dimitrov off, again accusing him of making propaganda, while not rebuking Goering at all. Dimitrov tried to put more questions, but the judge ordered him to sit down. Dimitrov

had one last shot: “You are greatly afraid of my questions, are you not, Herr Minister?” Goering’s anger rose. He replied, “You will be afraid when I catch you. You wait until I get you out of the power of this Court, you crook!” The judge, ever dutiful, said, “Dimitrov is expelled for three days. Out with him!”

The moment is without parallel, the witness credibly threatening to murder the accused. And the effect of Dimitrov’s cross-examination of Goering, in the court and around the world, was electrifying. The next day the Swiss conservative paper *Neue Zürcher Zeitung* described Goering’s “mad foolhardy rage” and concluded that “the whole trial has been rendered worthless at one blow.”

Goebbels’s appearance, four days later, was less dramatic but again saw Dimitrov in great form. Dimitrov focused on the inconsistency between the prosecution’s claim that the Communists had set the fire and Goebbels’s earlier accusation that the Social Democrats had also been involved. Judge Buenger had apparently learned something from Goering’s appearance, for he suggested at several points that Goebbels need not answer Dimitrov’s questions that were asked “for propaganda purposes.” Goebbels declined the judge’s suggestions. Torgler also questioned Goebbels, establishing that the German Communists had embraced strikes and political discourse rather than violence. In a final statement, Goebbels explained that he had come to court because “the foreign press has done nothing to remedy” the “lying accusations” of the *Brown Book*.

At the end of the trial, the judges gave a lengthy opinion analyzing the evidence. Van der Lubbe was convicted and sentenced to death, the others acquitted. The court concluded:

Even though...the defendants Torgler and the Bulgarians [Dimitrov, Tanev and Popov] could not be convicted as accessories, nonetheless no doubt exists as to the camp in which these accessories were to be found....The burning of the Reichstag was undoubtedly a political act. The enormity of the crime—that is to say, of the means—points to the importance and violence of the goal. This can only have been the seizure of power....The crime can only be the work of radical left-wing elements, who hoped to exploit it for the purpose of overthrowing the government and the constitution, and seizing power....The Communist party has proclaimed such treasonable goals as its program. It was the party of treason.

What Did This Trial Prove, and to Whom?

Every famous trial has several audiences. Each side, prosecution and defense, is intent on winning if possible. That means gaining the



Hermann Goering addresses Dimitrov.

assent of a judge or judges, or of jurors. But sometimes when the courtroom result seems foreordained, and sometimes even when it does not, parties understand that there is a wider audience that must be convinced, if possible, where justice is to be found.

The prosecutors who tried Aaron Burr for treason must have known that he would probably be acquitted, yet their proof and their arguments were designed to sully Burr's reputation beyond repair regardless of the trial's outcome. When John Brown was tried in 1859 for leading a slave revolt, murder, and treason against the State of Virginia, a guilty verdict and death sentence were inevitable and Brown knew it. He raised his voice against slavery and made his trial a symbol of abolitionist sentiment.

In the Reichstag Fire trial, the Communist defendants could see how the National Socialists had exploited the fire. The Nazis had gained a Reichstag majority by expelling the Communist deputies, as part of the spate of repressive measures taken just after the fire. The defendants had endured confinement in chains during Judge Vogt's preliminary examination. They were being tried in a "regular" court,

but before a judiciary that had for decades been moving to the right under various political influences and events. They could not be confident of acquittal even though there was no proof whatever of their guilt.

However, Dimitrov had the factual support of the investigative work that lay behind the *Brown Book*. He had his eloquence. He could anticipate being acquitted. He was in court every day, so he could seek to impose his personality and his views upon the proceedings. No other trial participant had—and seized—as many opportunities to speak as Dimitrov. As Arthur Garfield Hays reports, “Whenever he got to his feet, he would by the force of his personality place the court, the prosecutors, the German audience, and the Nazis on the defensive.” Hays reports that even Judge Buenger began to accord Dimitrov a kind of grudging respect. And the German radio, which had begun by broadcasting the trial, began not to air Dimitrov’s participation.

Regardless of his chances at a favorable judicial verdict, Dimitrov knew that the world press whose representatives were there, and the left movements who were following the trial, needed to hear his message. He stood in a lineage that had begun with the *Brown Book*, continued with the London Commission of Inquiry, and would be followed by publicity efforts that focused on his defense. He could seek, and expect, success with the audiences in court and out of court.

The Nazis also took a considered view of their audiences. By ensuring that Judge Vogt would conduct the preliminary examination, they maximized their chances of making their theory the centerpiece of the trial. Convicting the Bulgarians was always problematic, although Torgler’s access to the Reichstag gave them some grounds to think he would be convicted. But a prosecution verdict was never the principal object. Nonetheless, the Nazi press and even Hitler himself derided the verdict, and it set the stage for the changes in German criminal procedure that wiped away all vestiges of due process. The German populace heard a very different version of trial events than did those who read the international press. The crowd’s reaction to Goering and Goebbels was symptomatic. The Nazi political and propaganda machine was geared to make the entire Reichstag process—from the fire to the trial and beyond—an ingredient of its consolidation of power. For those property-owning, anticommunist Good Germans to whom the Nazis were distasteful, the Reichstag Fire and trial provided reassurance that the brutal measures so far taken were in some sense both necessary and “legal.” And the legitimacy thus gained contributed to

the ready obedience of the Good Germans to the Nazi orders that were to come. And every step of the way the German judiciary efficiently fulfilled its role and legitimated the Nazi regime, to the bitter end. Of the entire German judiciary, after the Jewish and (few) Social Democratic judges had been removed in 1933, only one judge resigned in protest during the entire course of the Third Reich.

The Variable History of the Reichstag Fire Trial

It has often been observed that the past is uncertain, since we do not yet know the descriptions of past events by future historians. The Reichstag Fire trial provides a clear instance. At the time the verdict was accepted outside Germany by those not unsympathetic to the Nazis, but for those who saw fascism for what it was, the results of the London proceedings and the guilt of the Nazis were taken for granted.

By the time of the Nuremberg tribunal of 1945–46, there was no longer any disagreement other than from Goering himself, who at Nuremberg continued to deny responsibility. The authoritative account became that of Hans Bernd Gisevius, who as a young lawyer was assigned to the newly formed Gestapo in 1933 as a protégé of Grauert, the industrialists' nominee as head of Goering's Prussian police. Gisevius during the war served in the German counter-intelligence, but became a double agent for the Allies. In the fall of 1933 the Gestapo assigned him to the Reichstag Fire trial as an "observer."

According to Gisevius, a ten-member SA detachment equipped with highly inflammable liquid had set fire to the Reichstag. The unit was commanded by Storm Leader Heini Gewehr and was under the direct orders of Karl Ernst, SA commander in Berlin. They entered the Reichstag by the underground tunnels leading from the residence of the Reichstag president, Goering. Gisevius and his Gestapo superior Nebe came to know the details through the threat by a member of the unit, Rall, to make a public statement; Rall was thereafter quickly murdered by the SA. Rall's account comported with the facts developed at the trial. Van der Lubbe, a dupe, had been in SA control for several days and brought by them to the Reichstag.

Gisevius, personally an extreme anticommunist, had been without doubt in a position to come to know what he alleged, and he became a leading Allied witness at the Nuremberg trials. Further confirmation came in the form of the Nuremberg trial deposition of Colonel-General Franz Halder, chief of the German General Staff from 1938 to 1942, pres-

ent at a dinner on Hitler's birthday in 1942 where Goering openly boasted of being responsible for the Reichstag Fire. Even in the changed circumstances of 1956, the height of the Cold War, Halder insisted in a letter published in the Bonn *Das Parlament* on what he had heard: "I was sitting practically next to Hitler, and Goering sat on his right hand.... Every word was clear and distinctly audible." The Gisevius account remained unchallenged, until Cold War events necessitated a West German attempt at exculpation of the Nazis.

The "denazification" of German administration began with the occupation of Germany in 1945, but came to an end in West Germany with the start of the Cold War in 1947-48. At first the process was turned over to the West German judiciary, but as the judiciary itself was almost completely composed of those who had served the Third Reich, "denazification" came swiftly to a halt. With the intense anticommunism of the early years of the Cold War, the time of the "Berlin blockade," and the Korean War, little attention was paid by the mainstream western press to the composition of the new West German government. Accusations that the new West German administration and armed forces were composed almost entirely of Nazi functionaries were dismissed as "communist propaganda."

Gradually in the years after the "thaw" that followed on the death of Stalin, the rise of Khrushchev, and the end of the Korean War, the truth of the allegations could no longer be denied. It was established beyond question that Hitler's loyal servants occupied key places from the top of the West German regime on down. West German Chancellor Adenauer's chief of staff, Hans Globke, had played a central role in the drafting and enforcement of the infamous Nuremburg Laws and the extermination of the German Jews. Of the 160 top officers in the West German army in 1961 all but one had been a colonel or general in Hitler's Wehrmacht. In West German university chairs in law there were professors who had written vicious articles on the "Jewish problem" in the years leading up to its "final solution." And the West German courts were filled with judges who had been Nazis or served them faithfully. Judges were discovered who had been convicted as war criminals in occupied countries. In one chamber of forty-nine judges, forty had been Nazis, some accused of murder. Some cases aroused intense international interest. One Dr. Hallbauer, a former Storm Trooper, had been a judge in Prague and had sentenced Czechs to death for listening to the BBC or trying to escape slave labor. When a Czech survivor of his "justice" discovered that Dr. Hallbauer was serving as a judge in Hamburg,

he brought an action seeking compensation for his injuries. The West German courts ruled that Dr. Hallbauer's sentences had been "juristically correct." In 1962 the West German justice ministry prosecuted the Association of Victims of Nazis as "anticonstitutional"; the three judges assigned to the trial had all been Nazis, and one a Storm Trooper.

The exposure of the omnipresence of those who had been Nazis in the West German state apparatus required a response. The facts of personal biography could not be denied; at most it was possible to obscure them. A major effort was made to exaggerate the minimal conservative opposition to the Nazis, and especially the belated July 1944 conspiracy among a handful of officers that led to an unsuccessful attempt on Hitler's life. But even with the utmost exaggeration, very few could be claimed to have had any connection, however remote, with these isolated affairs.

The great bulk of German opposition to the Nazis had been from leftists, and it was in the government of the communist *East German* state—the German Democratic Republic—that it was easy to find those who had fought the fascists arms in hand, and those who truly had been opponents of the Nazis. A more promising alternative was to exculpate the Nazis—who after all had been staunch anticommunists—and in particular the Nazi legal system. A further, and more material, concern was the presence of substantial claims from Jewish victims of the Nazis, demanding restitution of property they had lost (of course always in accordance with legal process of some sort) in the first years after Hitler came to power.

A solution was to assert that the German legal system had continued to function—of course unfortunately deprived of the services of its Jewish judges—with unimpaired validity, at least (as regards the Jewish claimants) until Chancellor Adenauer's chief of staff Globke's Nuremberg Laws came into effect, several years *after* the Nazis came to power. A revision of the history of the Reichstag Fire trial would well serve as the basis for this attempt to rehabilitate the Nazi legal system; after all most of the defendants were acquitted, and the court had exculpated the Nazis from having set fire to the Reichstag.

At the time, Rudolf Augstein's weekly *Der Spiegel*—modeled on *Time Magazine*—largely filled the function of the primary anticommunist right-wing press (parallel to today's Murdoch media) in West Germany. In 1960 a series of articles by an unknown Fritz Tobias appeared in *Der Spiegel*, and in 1963 were collected in a book swiftly translated into English entitled *The Reichstag Fire*, and much publicized in the United

States. Tobias attempted to disprove the conclusions of the London commission by alleging that van der Lubbe acted alone, that the Nazis were innocent, and that the defendants had received a fair trial. The greatest part of his effort was directed at showing that the materials before the London commission had been prepared by Communists (and were in some cases forged), and that the commission itself was a giant piece of Communist propaganda. Quoting extensively from “recantations of ex-Communists,” Tobias derided those who organized the commission and saw to the publication of its work, particularly the *Brown Book*. Tobias focused on Willi Muenzenberg, who was a principal organizer of the commission, and portrays him as scheming and unreliable. In his list of ex-Communists, Tobias prominently included Arthur Koestler, although he failed to note that Koestler’s later memoir—written when he was very much an “ex”—credits the *Brown Book* with exposing Nazi terror and regards it as a “certainty” that Nazi circles, probably a group of Storm Troopers, were the authors of the fire.

In addition to his (then effective) Cold War argument that anything alleged by a Communist is likely to be false, Tobias relied heavily on speculative—and contradictory—testimony that Hitler appeared to be surprised at the fire and could therefore not have been party to a plot. In portraying van der Lubbe as sole perpetrator, Tobias dismissed the forensic evidence of extensive fire damage from multiple points of origin. The testimony of the fire experts at the trial asserting the necessity of multiple arsonists with knowledge of the building’s layout (and even of Goering himself to that effect) is dismissed as “exaggerations” intended to make the fire seem more serious than it was. As for the Gisevius account, Tobias claims that Gisevius had not been at the Reichstag Fire trial as observer for the Gestapo, that Ernst had an alibi for the time of the outbreak of the Reichstag Fire, and that Rall had been shown not to be a member of Ernst’s SA brigade (unfortunately for those who would rely upon Tobias, it was later shown that each of these statements was false).

The hero for Tobias is Torgler’s appointed counsel Alfons Sack, a member of the National Socialist Party. After Torgler was acquitted, Sack’s career took a brief tumble and he was personally at some risk. However, he swiftly overcame any doubt as to his loyalty and in a 1935 book announced that in criminal trials in the New Germany judges, public prosecutors, and defense counsel should be “comrades on the legal front...[and] just as the new trial no longer represents a conflict between the interests of an individual and the state, now the legal

participants should regard their tasks no longer as opposed to one another.” Dr. Sack’s view reached its full development in the Nazi “People’s Courts” where the appointed defense counsels often joined in accusing those they represented. Trial observers differ on whether Sack was an effective defense counsel. Arthur Garfield Hays, the American lawyer who was a member of the commission and attended most of the trial, thought Sack’s performance very competent. He dismissed the idea that Sack should have taken up the theme that the Nazis planned the fire. In a book written in 1934 about the trial, Sack derided the evidence that the Nazis had set the fire. Other observers of political trials point out that given the Nazi leaders’ decision to confront the *Brown Book* allegations with the testimony of Goebbels, Goering, and others, no lawyer should have remained “neutral” in the face of such evidence. The Nazis had laid down the political challenge in their approach to the trial, and it was foolhardy not to engage them on the field of battle they had chosen. On this view, which we share, Sack’s performance left much to be desired. In Tobias’s view, Sack was a model of what a defense counsel should be.

Tobias made much of Arthur Garfield Hays’s statement that there was no “direct evidence” that the Nazis set the fire. Yet this is a distortion of what Hays believed. Direct evidence would have been testimony by an eyewitness who saw the incendiaries at work. Hays left no doubt, in his thorough review of the evidence that strong circumstantial evidence pointed to Nazi guilt. Indeed, when the chief trial prosecutor, Dr. Karl Werner, claimed that Hays had told a Swedish newspaper that the Nazis were not involved, Hays fired back a letter to Werner, saying, “There is no direct evidence that Lubbe had accomplices but if, as you claim, he did not act alone, then his associates must have been Nazis.” Tobias did not cite this letter, but rather said—falsely—that “Hays was one of the few to realize that van der Lubbe had fired the Reichstag by himself.”

Despite its harsh ideological bias and many failings, under Cold War circumstances the Tobias version became authoritative, at least in West German and U.S. establishment accounts. Certainly no graduate student aspiring to a career in the West German or U.S. academy would have dared challenge the Tobias account for an entire generation.

With the demolition of the German Democratic Republic and the annexation of East Germany into the Bundesrepublik, some of the Cold War ideological effort expended on the exculpation of the Nazi legal system lost its *raison d’être*, and it became possible for a new generation of lawyers and historians to look back more calmly upon its history. No

doubt it also helped that the last of the Nazi jurists would by then have retired from the bench and from chairs at the universities. Ingo Mueller, a German law professor and public official, wrote *Hitler's Justice: The Courts of the Third Reich*, which appeared in English translation in 1991. Mueller ruthlessly sets out the extent to which the existing German judiciary of 1933—excepting of course their Jewish colleagues, who quickly disappeared from the bench—adapted without difficulty to the Nazi regime. He also sets out the total failure of the “denazification” process as far as the West German courts were concerned, and the truth of the much disputed '60s allegations that the West German judiciary was dominated by those who had willingly served the Nazi regime, and in many cases been Nazis themselves. Mueller is undecided as to whether the Nazis set the Reichstag Fire, but concurs that it was in their interest to have done so. He notes the way in which the Nazi leadership exploited the situation and ridicules the presiding judge's unfounded rejection of the claim of Nazi complicity.

In *A History of Public Law in Germany 1914–45*, which appeared in English translation in 2004, Michael Stolleis completes the task of demonstrating that the professors of public law in the German universities—again excepting their Jewish colleagues who quickly disappeared—similarly worked smoothly and in many cases eagerly for the Nazi regime, and in almost all cases kept their positions under the West German regime.

As for the history of the Reichstag Fire itself, the decisive event was the 2001 publication of *Der Reichstagbrand—Wie Geschichte gemacht wird (The Reichstag Fire—How History is Created)* by historian Alexander Bahar and physicist and psychologist Wilfried Kugel. They reviewed official files that had previously been unavailable as well as those that had been the subject of earlier inquiry, and analyzed the forensic evidence. Their extensive discussion of the forensic evidence ends the matter; in the eleven to fourteen minutes that van der Lubbe had available according to the testimony at trial, it was impossible for him to have been to all—or even many of—the places where fires were set. Nor could van der Lubbe have carried from place to place the amount of accelerant used to set the fires. Henceforward anyone defending the Tobias thesis needs either reject the entire forensic testimony at trial or the laws of nature, or both.

As for the mysterious revisionist “historian” Tobias himself, he was neither lawyer nor historian and it seems he had never completed secondary education. He asserted his ideological neutrality with a questionable claim to prior membership in the Social Democratic Party, but it seems that he had served in the Nazi occupation forces in the

Netherlands, in Italy, and in White Russia as a member of the Geheime Feldpolizei, the Gestapo of the Wehrmacht. And, as previously mentioned, his “factual” disproof of the Gisevius account of how the Nazis set the fire was based on a series of untruths.

The full documentation now available includes the fact that Gisevius was, as he claimed, Gestapo observer at the trial. Bahar and Kugel uncovered records that conclusively confirm the Gisevius charge that Rall had sought in the days before his murder to set out the facts of the use of the tunnels from Goering’s residence to the Reichstag, the prior visit of the team to the building to run through the arson, the identity of the leader of the detachment (Gewehr, a name that never appears in the Tobias account), and the personal supervision of the Berlin SA commander Karl Ernst. Most of the ten members of the SA detachment that set the fire were murdered by the SS in the “night of the long knives”—the so-called Roehm putsch—in June 1934. Diels, the head of the Gestapo in 1933 to whom Gisevius reported, said in 1946 that Gewehr was the only member of the unit that fired the Reichstag to have survived. The newly available evidence establishes the record of Gewehr’s SA service in the unit alleged to be responsible for the fire (SA-Sturm 17), and his use of flammable agents for arson from 1931. The Bahar and Kugel book appears to be the definitive word on the Reichstag Fire.

Conclusion

For us, the exemplary role played by the two lawyers of the Anglo-American legal tradition in the London commission has stood the test of time. Despite the accusation against the London commission of “Communist propaganda” from the Nazis in the ’30s and Tobias in the ’60s, D. N. Pritt, K.C., and Arthur Garfield Hays would be acknowledged today in the legal community as among the leading U.S. and U.K. lawyers of the first half of the twentieth century. Nor today should there be any dispute as to the complicity of the entire community of German jurists (law teachers and judges)—excepting always their disappeared Jewish colleagues—in the horrors of the Nazi debacle. Today, facing a new regime of preventive detention and emergency “Patriot Act” abolition of fundamental rights, it is important not to think that “the Law” as such offers protection. We must offer such support as we can to those lawyers and jurists whose politics and decency have made them take a stand against our own emerging police state regimes.

In January 2008, the Federal Court of Justice of Germany finally overturned the death penalty verdict on Marinus van der Lubbe,

clearly incapable in his damaged state of defending himself at trial, as politically motivated and unjust. However welcome this recognition of fundamental fact, we must end by noting that the tenth of January 2009 marked the seventy-fifth anniversary of Marinus van der Lubbe's execution by beheading in a Leipzig prison yard, three days before his twenty-fifth birthday.



Marinus van der Lubbe during the trial.

Source Notes

Our most significant sources include: Arthur Garfield Hays, *City Lawyer* (New York: Simon and Schuster, 1942), we rely extensively on Hays's firsthand account of the trial proceedings and setting, often paraphrasing his apt descriptions; D. N. Pritt, *From Right to Left* (London: Lawrence and Wishart, 1965), a firsthand account of the procedures of the London Commission of Inquiry; Alexander Bahar and Wilfried Kugel, *Der Reichstagbrand—Wie Geschichte gemacht wird* (Berlin: Quintessenz Verlag, 2001), the most thorough work to date; *The Reichstag Fire Trial: The Second Brown Book of the Hitler Terror* (London: John Lane, The Bodley Head, 1934), an extensive summary of the trial by the same group that did the initial *Brown Book*; *Dimitroff's Letters from Prison*, trans. Torr and Davidson (London: Victor Gollancz, 1935), shows the development of Dimitrov's defense theory, in his own words; Ingo Mueller, *Hitler's Justice: The Courts of the Third Reich*, trans. Schneider (Cambridge: Harvard University Press, 1991), a good history of the German judicial system through the Nazi period; Michael Stolleis, *A History of Public Law in Germany 1914–1945*, trans. Dunlap (Oxford; New York: Oxford University Press: 2004), a thorough account of the political and professional biographies of teachers of public law in the German universities from 1914 to 1945. Among the writings we consulted were: Fritz Tobias, *The Reichstag Fire*, trans. Pomerans (New York: Putnam, 1964); Hans Bernd Gisevius, *To the Bitter End*, trans. Winston and Winston (Boston: Houghton Mifflin, 1947); T. H. Tetens, *The New Germany*

and *the Old Nazis* (New York: Random House, 1961), documentation of former Nazis in the West German government; Victor Grossman (Stephen Wechsler), *Crossing the River* (Amherst: Univ. of Massachusetts Press, 2003), memoir of a U.S. political refugee in East Germany, with a firsthand account of the process of documenting the presence of former Nazis in the West German government; Arthur Koestler, *The Invisible Writing* (Boston: Beacon Press, 1954), his second volume of autobiography, containing observations on the Reichstag Fire trial; William Shirer, *The Rise and Fall of the Third Reich* (New York: Simon and Schuster, 1960), credits the theory that the Nazis set the fire; William Klein, "The Reichstag Fire, 68 years on," <http://www.wsws.org/articles/2001/jul2001/reic-j05.shtml>, a review of the Bahar and Kugel book; Tony Patterson, "Historians find 'proof' that Nazis burnt Reichstag," <http://www.telegraph.co.uk/news/worldnews/europe/germany/1310995/Historians-find-proof-that-Nazis-burnt-Reichstag.html?mobile=true>, newspaper account of the reaction of *Der Spiegel* to the work of Bahar and Kugel and colleagues, admitting, *inter alia*, that former Nazis had been employed in preparing the "Tobias" articles. We are grateful to the Duke Law Library for help in finding materials and to doctoral candidate Shimrit Itay for research assistance. Above all we are indebted to doctoral candidate Fr. Annina Gagyiova for her translations of significant sections of Bahar and Kugel, *Der Reichstagbrand—Wie Geschichte gemacht wird*.