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BOOK REVIEW

THE UNITED STATES CONSTITUTION IN BERLIN

JUDGMENT IN BERLIN. By Herbert J. Stern.¹ New York. Universe Books. 1984. Pp. 384. \$15.95

*Reviewed by Maynard E. Pirsig*²

Judgment in Berlin is a fascinating and dramatic story about a criminal trial in the United States Court for Berlin, written by Herbert J. Stern, a federal district court judge in New Jersey, who presided at the trial. Not only is the story a human interest one about some otherwise ordinary individuals who sought to escape from a communist country to the freedom of the West, it also reveals that governments may resort to arbitrary action and abuses when the rights and liberties granted by the United States Constitution are absent.

The situation was a unique one. The trial was in the United States Court for Berlin, an American court created specially for the American occupied zone of Berlin. Jurisdiction is confined to this zone and does not extend to the zones of Berlin occupied by other Allied forces. Judge Stern was appointed judge of the Berlin Court by the United States State Department and served at the pleasure of the Department. Until the present trial, the court had never been used. It had no quarters and, to accomodate the trial, the old Tempelhof airport was converted into a courtroom.

The story begins with two friends, Hans Tiede and Ingrid Ruske, and Ingrid's twelve-year-old daughter, all residents of East Germany. They were unhappy with the conditions under which they were living. Permission, required by the East German government, to leave the country for West Germany had been repeatedly denied them. An earlier escape attempt had failed.³ Their later effort succeeded, but

1. Judge, United States District Court for the District of New Jersey. Judge Stern received his J.D. from the University of Chicago in 1961. He was the United States Attorney for the District of New Jersey from 1971-1974.

2. Professor, William Mitchell College of Law, St. Paul, Minnesota. Professor Pirsig is a former Associate Justice of the Minnesota Supreme Court and former Dean of the University of Minnesota Law School.

3. Horst Fischer, a resident of West Germany temporarily in East Germany and in love with Ingrid, obtained a false West German identity card for her. Her own East German card permitted her to enter Poland when presented to the East German border guard. She was to have presented her false card to the Polish guard on the

not in the manner they had planned. The plan was to obtain false West Germany identity cards which would permit the three to escape by boat from Poland to West Germany. Horst Fischer, a resident of West Germany who had fallen in love with Ingrid while temporarily in East Germany, would bring the cards to Poland where they would be used for the escape.

Tiede, Ingrid, and her daughter arrived in Poland and awaited the arrival of Fischer, but Fischer failed to appear. When Fischer had left West Germany for Poland with the false identity cards, he was apprehended and returned to and imprisoned in East Germany. The boat the three had intended to take sailed away. They dared not return to East Germany for the authorities there undoubtedly had found the false identity cards on Fischer with Ingrid's picture and they would immediately be arrested. They could not stay in Poland where they had no work. In desperation, they decided to hijack a plane from Gdansk, where they were stranded, and force the plane to West Berlin, a one-hour flight. They obtained a toy gun, which looked real, and boarded the plane without incident. With the gun, Tiede entered the pilot's cabin and directed the Polish pilots to land in the American zone of Berlin. On landing, Tiede, Ingrid, and her daughter were immediately taken into custody by the American authorities.

In 1978, preceding the incident, the United States and West Germany together with other countries signed international treaties which required the respective countries to either prosecute or extradite hijackers landing in their territories. The treaties left some unanswered problems. Who should prosecute, under what law, and by what procedures?

West Germany and the United States . . . had *demand*ed these treaties, which were aimed primarily at protecting their civil aviation against terrorists seeking sanctuary in Communist or Third World countries. . . . [I]f the 'free world' expected adversaries to prosecute hijackers, would it not have to prosecute a hijacker who escaped from behind the Iron Curtain?

There would have to be a prosecution. But by whom? Everyone wanted it, but no one wanted to be the one to prosecute. In the meantime, the three were held incommunicado. (P. 28).

After months of delay and indecision, the United States State Department decided that the United States would prosecute the case to save the West Germans "the embarrassment of having to prosecute two fugitives whom their constitution gave the right to defect" (p.

other side of the border for permission to enter West Germany. Unexpectedly, the two guards appeared together and she could present only her valid card. This left Ingrid and her daughter stranded in Poland unable to enter West Germany. The three then returned to East Germany.

31). Tiede and Ingrid would be tried before an American judge in the United States Court for Berlin pursuant to United States procedures. The crimes charged would be based on German substantive law. In addition to the appointment of Judge Stern, the United States State Department appointed two of its attorneys to prosecute the cases. Mr. Roger Adelman, an experienced prosecutor, took the leading part. Judge Stern designated Mr. Bernard Hellring of New Jersey as attorney for Ingrid and Mr. Judah Best of Washington, D.C. for Tiede. Both prosecution and defense attorneys were assisted by American associates and by local German attorneys appointed to aid in the interpretation of applicable substantive German law.

The case against Tiede appeared simple. The Polish pilots would testify that Tiede forced them to land in the American zone of Berlin under threat of using the gun. This would be confirmed by his own statements to the American authorities as he emerged from the plane.

The case against Ingrid was less clear. While she participated in securing the toy gun, knew that Tiede intended to use it to hijack an airplane to Berlin, and joined him in boarding the plane, she became hesitant and fearful while on the plane and urged Tiede, without success, to drop the attempt. She took no part in Tiede's forcing the pilots to land in the American zone.

The prosecuting authorities recognized the weakness of the case against her. During her confinement of several months, they enlisted the assistance of an experienced investigator, Lieutenant Colonel Arthur F. Goeller, Jr., to obtain a confession from her. His plan was to gain Ingrid's confidence and trust so that she would willingly give a full account of the hijacking and the preparations that led to it. He visited her frequently at her place of confinement, brought gifts, showed affection for her daughter, and generally purported to be her friend. For a time this brought no results, for Ingrid feared that information she might give would result in harm to her lover, Fischer, awaiting trial in East Germany. Goeller learned of her reluctance and assured her that Fischer was beyond help and could not be harmed by the information she could give. He also assured her that hijacking was "not such a bad thing because your intent at that time was you thought that you were going to be arrested by the East Germans" (p.38). With these assurances, she finally gave him a full account of the hijacking and the preparations for it.

Colonel Goeller then obtained her signature to a statement which released the United States government and its agents from all liability for her "voluntary" confinement. Thereafter, she and Tiede were charged with criminal offenses under German law arising out of the hijacking.

From the beginning, it was recognized by the judge and the prose-

cuting and defense lawyers that the central issue was the extent to which the Constitution of the United States applied. If it applied, the defendants had a right to a jury trial. In addition, Ingrid's involuntary statements to Colonel Goeller might be excluded. Without those statements there was no case against her.

To the surprise and dismay of Judge Stern, the prosecuting attorneys took what to him was an extreme position. According to the prosecution, the Constitution did not apply, Berlin was an occupied territory and it, its residents, and others there were governed solely by the victorious occupier, the United States. This position meant that the State Department determined what rights should be given effect, whether there should be any court established at all, who should be the judge, and how and what decisions the judge should render. According to the United States State Department, the Constitution and laws of the United States simply did not apply. What governed was what the State Department chose to recognize.

Not, the prosecution attorneys argued, that the Department had any intention of going to the extreme of denying someone a fair trial. But in this case, the Department preferred the trial to be to the judge rather than to a jury and by implication at least, the admissibility of Ingrid's confession need not be determined under principles applicable under the United States Constitution.⁴

Both Judge Stern and defense counsel were aware of the challenge this posed. If the judge rejected the prosecution's position, the Department, under the views it expressed, could discharge Judge Stern and replace him with one more willing to follow its views. It could refuse to implement the appointment of a jury if it so chose. Or it could dismiss the proceedings and send the defendants back to East Germany.

Notwithstanding the judge's strongly asserted disagreement with their views, and the vigorous arguments of defense counsel, the prosecuting attorneys persisted in adhering to their views. Yet, when faced with the prospect that the judge would order the defendants freed from further proceedings, the prosecution reluctantly retreated from its position.

After a trial by jury was ordered by the judge, a Russian delegation appeared. The delegation was concerned about the turn of events. Were the American authorities really serious about the prosecution?

4. Conceding the good intentions of the prosecution, the judge commented on the implications of the prosecution's position:

People could be dragged off the streets. They could be incarcerated. Houses of worship could be closed, newspapers could be shut down, and nobody could tell the Executive Branch of the United States Government to stop. Certainly not the courts. . . . For if the Executive Branch is not willing to accept the confines of the Constitution in all things, it may throw it off in all things. (P. 124).

Would not a jury of West Germans be certain to decide for the defendants? To deal with the situation, the State Department sought postponement of the trial, but the judge refused. The trial had already been too long delayed. The prosecuting attorneys then negotiated a deal with attorney Best that if Tiede would plead guilty, they would direct passage of a Berlin ordinance assuring Tiede of early release, regardless of what sentence the judge imposed. But Tiede hesitated to accept this plea because he believed himself innocent.

With the applicability of the United States Constitution settled, the court considered the admissibility of Ingrid's statements to Colonel Goeller. The Colonel's testimony was the principal evidence relied on by the prosecution. Under the skillful cross-examination of Mr. Hellring, and the frequent questioning by the judge, who became increasingly skeptical of the Colonel's testimony, the Colonel reluctantly admitted that Ingrid had indeed been held in involuntary detention rather than afforded "protective" custody from the East Germans, as initially claimed, and that he had given her improper assurances that led her into making the statements now sought to be used against her. Judge Stern excluded the statements as improperly induced and inadmissible under the United States Constitution. As a result, the prosecution, with no other evidence to support a conviction, dismissed the charges against her.

What remained were the criminal charges against Tiede. His defense was based principally on a German statute making it a justification or excuse if a crime was committed under pressure. He maintained that his imminent arrest in East Germany for attempting to leave without permission, which is not a crime under West German law, came within the terms of the statute and justified the hijacking.

Tiede was impressed with the fairness of the administration of justice in an American court because of the outcome in Ingrid's case. He resolved to insist on a trial of the charges against him. He would not plead guilty, whether it were a good bargain or not. He also asked, with the concurrence of his attorney, Mr. Best, that Mr. Hellring represent him as additional counsel. Mr. Hellring and his associate, Mr. Shapiro, agreed to serve without compensation.

At the trial, the Polish pilots testified under the watchful eye of a Polish prosecuting attorney who had accompanied them. The pilots gave a harrowing account of how they were terrified by Tiede's behavior during the hijacking. But under cross-examination by Mr. Hellring, a different picture emerged, consistent with what Tiede had related to defense counsel. The pilots admitted Tiede told them of his longing to see his children who lived in West Berlin and gave them cigarettes which they smoked together—behavior hardly consistent with their earlier testimony.

The defense produced two escapees from East Germany as witnesses to show the pressure Tiede had been under in East Germany and how difficult it was to secure permission to leave that country. These witnesses recounted their escapes, and how others whose attempts had failed were imprisoned or otherwise punished or shot attempting to escape over the Berlin wall. Ingrid testified in detail about Tiede's and her efforts, first to obtain permission to leave and, that failing, to escape. The defense concluded that Ingrid's testimony made it unnecessary to put Tiede on the stand.

The verdict was a surprise. The jury acquitted Tiede of three counts, including the charge of hijacking, but found him guilty of taking a hostage which carried a more severe penalty than the counts of which they acquitted him. As Judge Stern notes, "The verdict was obviously inconsistent. But juries are permitted to do that—to make compromise verdicts" (p. 350).⁵

The imposition of sentence remained. The prosecution recommended the minimum sentence of four years imprisonment required under German law. Taking into account his previous confinement and parole provisions, Tiede would be eligible for parole within a few months, a result identical with the attempted negotiated plea. A German law professor, however, advised the judge that another section of the law permitted a minimum sentence of six months, a period already served while in confinement pending the trial.

At this point, another problem confronted the judge. Some residents adjacent to a park in the American zone of Berlin had sought to bring suit to prevent the building of a housing project for the American army on the park. The residents first sued the Berlin city government in a German court for violating the necessary zoning procedures. Because the question affected the American occupation of Berlin, the suit could be entertained only with the consent of the United States, which was refused. The residents then brought suit in the Federal District Court for the District of Columbia, but that court held that this was a matter for the German courts and dismissed the case. Having learned of Judge Stern's ruling that the right to due process under the United States Constitution prevailed in the American zone, the attorney for the residents filed a petition with Judge Stern requesting an order that the residents' case be heard either in the Berlin or German courts. The residents claimed denial of due process, since they would otherwise be effectively excluded from access to any court.

The State Department was concerned about the Berlin residents'

5. The judge also noted that in arriving at its verdict, the jury was not told what the sentences on the different counts could be "because jurors are never permitted to know the penalties" (p. 351). May not this also account for the inconsistent verdict the jury rendered?

petition. Judge Stern received a letter from the American ambassador which stated with reference to the petition that "your appointment as a Judge of the United States Court for Berlin does not extend to this matter" (p. 353). The attorney for the government informed the judge that this meant that the judge must hold as directed by the government; the Berlin Court had no jurisdiction to decide whether the petition was within the court's jurisdiction, and that the judge's only alternative was to resign.

The judge received the letter while he was considering what sentence to impose on Tiede for the crime of which he had been convicted. Realizing that his status as judge of the Berlin court was about to be ended because of the letter presented, he directed that Tiede be brought before him for sentencing. The judge stated that in view of the position taken by the State Department on the rights of individuals in the American zone, he would not entrust Tiede to its care or rely on its assurances. He then sentenced Tiede to imprisonment for the time already served in confinement and released him as a free man.

The judge then turned to the residents' petition. The government agreed that the ambassador's letter in effect directed the judge on how he should decide. A contrary decision, according to the government attorneys, "would be a highly significant one and a very troublesome one to the United States, to its Allies, to the Berliners, and to the Federal Republic of Germany" (p. 371). If the judge did not accept the direction, his only alternative was to resign. The outraged judge did neither. "I know you can fire me here. That's your decision to make. . . . But I will not sit as a judge in this case and decide anything in this case while such a letter is in this court" (p. 372). With that, he adjourned court and left the bench—there would be no decision under orders.

The next morning he received a letter from the ambassador terminating his appointment as judge of the United States Court for Berlin.⁶ The result? There was no court, German or American, to which the petitioners could present their grievance.

A few observations about the book may be permitted. The judge's

6. Without a judge there could be no decision on the pending Berlin residents' petition. They again took their case to the Federal District Court for the District of Columbia, lost there, appealed to the court of appeals, and lost there. *Dostal v. Haig*, 652 F.2d 173 (D.C. Cir. 1981). The court of appeals held that military officials of the United States, such as the defendants, were immune from suit in foreign local courts. In addition, the petitioners presented no liberty or property interests required to strike down official action under the due process clause. *Id.* at 177. With respect to Judge Stern's position, the circuit court said, "We accept, *arguendo* his attractive position that the Bill of Rights is fully applicable to govern the conduct of U.S. judges and officials in Berlin, respecting friendly foreign nationals," but distinguished the case before it. *Id.* at 176.

account discloses his deep commitment to the fundamental principle that the independence of the judge is essential to the fair and impartial administration of justice. Because as a federal judge he had life tenure, he could not be removed from his position in the United States if the government objected to his conduct—his disposition of the Tiede and Ingrid cases. He also believes that the rights of an accused under the United States Constitution, such as the right to a jury trial and the right not to incriminate one's self, should be rigorously recognized and enforced by the presiding judge in the trial of a case.

One can hardly disagree with these basic principles. The reviewer also accepts the judge's position that these principles were equally applicable in the proceedings before him, in which he was acting as an American judge, appointed under American authority. He presided in an American court, the United States Court for Berlin, and the cases were presented principally by American lawyers, pursuant to procedures followed in American courts. The position of the State Department, as reflected in Judge Stern's account, that the Department as representative of the occupier is the determiner of the rights of the citizens of Berlin, and that the judges it appoints to preside there must decide as it directs, comports more with government run by dictators rather than with democracies governed by rule of law.

Judgment in Berlin also reflects Judge Stern's views on a judge's role in a trial. A judge does not take a passive position, leaving it to the lawyers trying the case to bring out the relevant facts and issues. Speaking of jury trials, Judge Stern observed:

[T]he judge does not sit to preside over travesties of justice. He is not to watch silently while wrong overwhelms right, simply because the wrong is better represented, or to sit passively when both sides are so badly served that in the end no one—juror or judge—can tell the right from the wrong. As long as he maintains a reasonable regard for the role of the jurors as the final judges of the facts, he may and, at times, he should ask questions to assist the fact-finding process. (P. 181).

Judge Stern believes this is even more true when the judge sits without a jury and is the final arbiter of facts as well as law.

There are some, among them trial lawyers, who would not agree with the principles espoused by Judge Stern. They would assert that some judges are not as competent or able to maintain an objective position in the trial of a case as assumed and exemplified by Judge Stern. They would maintain that judges, in the course of their judicial duties, unavoidably are faced with questions of social, economic, and political policy and that, in a democracy, they must in some manner be accountable for the policies pursued. That is the reason, they

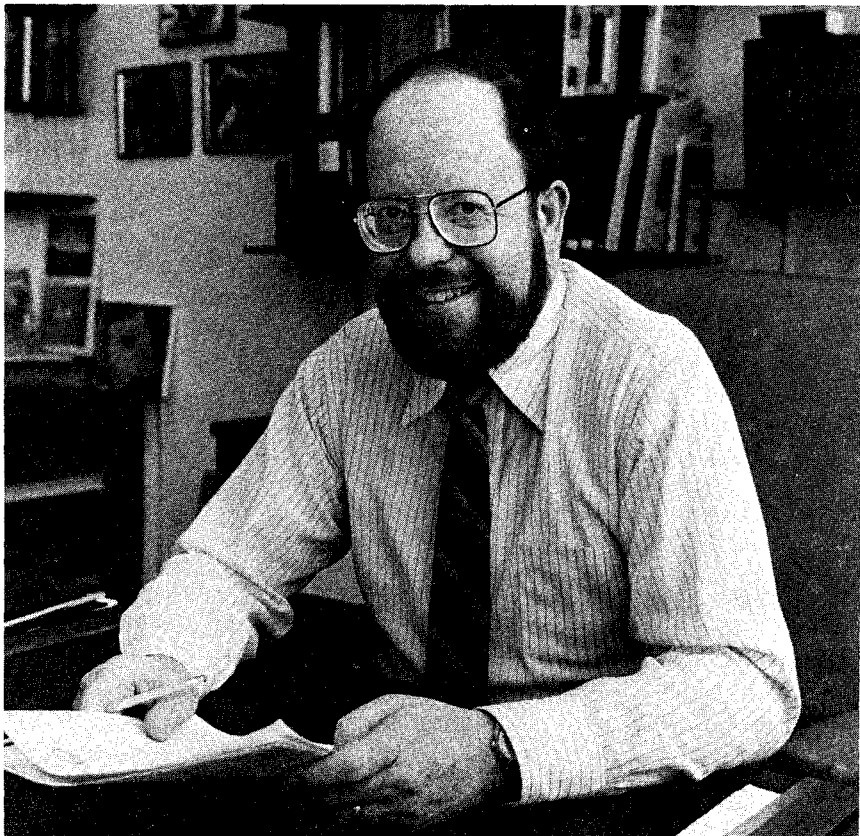
would say, why most states insist upon some public control through periodic election of judges. How that accountability can be reconciled with the necessary objectivity and independence of the judge is seldom explained.

An interesting facet of Tiede's trial was the use of the jury as the trier of fact. Jury trials are unknown in Germany and in civil law countries generally. Yet, here were twelve German jurors, unfamiliar with their role and responsibilities, who were asked to serve in a criminal trial against a defendant, an East German, who had sought refuge in their own country. The case was presented to them through interpreters by an adversary procedure quite unlike German procedures. One might well expect a bias in favor of Tiede and a verdict exonerating him from any crime. Yet their verdict indicates they sought to deal seriously with the issues of fact and law presented to them. It is true that the verdict rendered was unexpected and that the jury probably did not fully comprehend the consequences to Tiede of their verdict. But trial lawyers will confirm similar experiences with American juries.

One should note also the important role played by counsel. Judge Stern's description of the proceedings indicates the dominant role Mr. Hellring played in the defense of both Tiede and Ingrid. His quick perception of the issues and how they related to his clients' cases, his skillful cross-examination of witnesses such as Colonel Goeller and the Polish pilots, and his persuasive arguments and oratory in the course of the proceedings played a major part in the outcome of the cases.

Finally, the story as related by Judge Stern is more than a dry account of a trial. He has a lucid style and imbues the participants in the trial and the procedures followed with a realism that makes the book a pleasure to read. Where needed, he gives the background of the issues involved, a description of the personalities in the case, and an explanation of the applicable constitutional principles.

Something of the man himself is revealed in his closing lines: "Tiede left court as a free man. The man who set him free left Berlin the same way" (p.375).



DEAN MELVIN B. GOLDBERG

**In Recognition:
Dean Melvin B. Goldberg**

This issue of the William Mitchell Law Review is dedicated to Dean Mel Goldberg. Dean Goldberg has been a strong and energetic supporter of the law review both as a dean and throughout his tenure at William Mitchell. We make this dedication in thanks for his encouragement and support.

THE EDITORS OF THE
WILLIAM MITCHELL LAW REVIEW

Mel Goldberg has served the William Mitchell College of Law as a professor, associate dean, and most recently, acting dean. In each of those capacities, Mel has made significant contributions to the college. Mel has been an excellent colleague and teacher. During his first years of teaching, Mel and I taught the same first year sections. He taught contracts and I taught torts. The frequent discussions we had sharpened my understanding of both areas of law. In his teaching, Mel has been demanding both of his students and himself. I have always been impressed with the significant amount of time Mel spent preparing his classes.

Mel has been a concerned, hard-working administrator. He has been supportive of the students, staff, and faculty. He has worked hard to provide opportunities for faculty growth. He has been supportive of the needs of the faculty through working out teaching schedules, providing research assistance and general encouragement, and he has fostered significant scholarly activity by the faculty. His support of the William Mitchell Law Review has been an important factor in the continued growth of the law review.

Now that Mel is leaving his capacity as acting dean, we will be losing an excellent administrator, but regaining a full-time colleague and professor. The college's loss in one area is a gain in the other. Mel will continue to make significant contributions to the law and the legal profession.

MICHAEL K. STEENSON
Professor of Law
William Mitchell College of Law



THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT.

Front row, left to right: Judge Donald R. Ross, Judge Gerald W. Heaney, Chief Judge Donald P. Lay, Judge Myron R. Bright.

Second row, left to right: Judge George G. Fagg, Judge Richard S. Arnold, Judge Theodore McMillian, Judge John R. Gibson, Judge Pasco M. Bowman.

Not Pictured: Senior Judge Floyd R. Gibson, Senior Judge J. Smith Henley.

Westrich Photography, St. Louis, Mo.