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Book Review [Judgment in Berlin]

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BOOK REVIEW

JUDGMENT IN BERLIN. By Herbert J. Stern. New York, N.Y.: Universe. 1984. Pp. 384. Hardbound. \$15.95.

Reviewed by The Hon. Gerard J. Kettmann*

Judgment In Berlin is a fast-moving true story that proves the old adage that "truth is stranger than fiction." As events unfold through the pages, the title takes ominous implications that may shock some people and should concern all. What develops is a conflict between the legitimate interest of the state in honoring its international treaty commitments on the one hand, and the fundamental civil rights of individuals on the other.

The book is of many stories all beginning with the yearnings of two East Germans desperate to emigrate to the West. Their freedom to leave East Germany was denied by the communist government and was blocked by "The Wall of Tears." The Wall, erected on August 13, 1961, divides Berlin into "East" and "West." This very human and dramatic story is about their lives in East Germany, their futile efforts, legal and illegal, to leave East Germany, and the tragedy of the woman's West German lover caught in the East for aiding her escape to the West.

On August 30, 1978, the man, the woman and the woman's twelve-year-old daughter, fleeing from the communist secret police, hijacked a Polish airliner and caused it to land at Tempelhof Airport in the United States sector of West Berlin. Upon landing, the hijackers were welcomed with opened arms by the American authorities. The hijacking, however, soon became an international issue. Within hours, the communists reminded the western powers of their recent hijacking agreement to which both the United States and West Germany were signatories.¹ These treaties had been sought by the west-

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1. The hijacking came less than six weeks after leaders of the world's major non-communist countries, including President Carter, resolved . . . to take steps against international air piracy and to suspend air traffic to and from countries that fail to hand over hijackers and hijacked airplanes quickly. That agreement contained no clause dealing with hijackers fleeing

ern powers to protect their civil aviation from hijacking by terrorists to the East. But now the situation was reversed, for under the treaties the hijackers had to be prosecuted or extradited. The West Germans did not want the job; therefore, the United States reluctantly agreed to prosecute. Within two days after the plane landed, the State Department had appointed a prosecuting attorney.

Once it was established that the hijackers were to stand trial, it was necessary to have a court. The United States presence in West Berlin was, at this time, justified "by right of conquest." In 1955, the United States Court for Berlin had been created by High Commission Law No. 46. By this law, a judge is appointed by and serves at the pleasure of the United States Ambassador to West Germany. For nearly twenty-five years the court existed on paper only. There had never been a United States judge for Berlin. The German authorities routinely handled all criminal cases in German courts that sit throughout the City. Therefore, after the hijacking, it was also essential that a presiding judge be found. The State Department appointed one, but within forty-eight hours after his arrival on November 27, 1978, he resigned without explanation. Another filled the position temporarily until the Honorable Herbert J. Stern of the United States District Court for New Jersey was appointed. This book was written by Judge Stern.

During all this time, the three East Germans languished in confinement under "protective custody," without either charges, bail or a lawyer. They knew nothing of the court being established or of the four United States attorneys who stood ready to prosecute them. Because the crew of the Polish airliner had not observed that the woman participated in the hijacking, there was no evidence upon which to hold her. She received frequent friendly visits from the United States chief investigator who used intrigue in the hope that she would make an incriminating statement. She and her daughter were finally released on November 3, 1978, but were not permitted to leave West Berlin. The man was not released. Not until ninety-eight days after the hijacking incident was a formal accusation brought against him—followed by an accusation against the woman. Each was then provided with three defense attorneys.

Judge Stern soon learned what the prosecution's intent was. In early March, 1979, he was stunned by the State Department's position that the United States' authority in Berlin was derived from the

rights of conquest under the Law of War and not from the consent of the governed, that the United States Constitution did not apply, and that everyone in West Berlin was subject to the total discretion of the American occupiers. Consequently, Judge Stern was not an independent judicial officer, but an instrument of foreign policy who was to decide the guilt or innocence of the defendants according to instructions. The defendants had no rights except those the State Department gave them. In effect, the defendants had no greater protections than if they were to be tried by the communists behind "The Wall of Tears."

The defense attorneys argued that the United States Constitution applied and that the defendants were entitled to its protections. Under the separation of powers doctrine,² a United States court is separate and independent of the Executive Branch and cannot be directed. The attorneys demanded a trial by jury, a jury composed of West Berliners. Eventually, there was such a trial which is discussed in the book.

How Judge Stern handled these issues during the pre-trial proceedings and during the trial makes this a strikingly unique and powerful drama. For this is also the story of a judge who fought to maintain the independence of the judiciary and his own integrity under great pressure. How he presides over the trial, his inner thoughts, reflections, logic and methods of handling the issues and problems; his inability at first to fathom a major defense issue, and his self-doubts are all revealed to the reader. Additionally, this is a story about the trial attorneys, both prosecuting and defense; about their problems, concerns, methods and trial strategies. It should be fascinating reading to any reader; it should be that and more to legal scholars, lawyers and judges.

The story of the United States Court for Berlin, however, did not end with the trial of the hijackers. Another action was filed by East Berliners looking for a forum. The United States Army planned to construct a housing project in a West Berlin public park area. The residents objected. They filed suit in a German Court, but the suit was dismissed because the United States would not permit the German Court to exercise jurisdiction. The citizens filed another suit in a United States Court in Washington, D.C. This case was

2. The prosecution contended that this court's jurisdiction came by virtue of military conquest and those subject to its powers were not entitled to constitutional protections. *See id.* at 95.

The defense mocked this contention at the opening of the trial noting the absurdity of allowing the executive branch to determine the trial's outcome. *See id.* at 102-07.

also dismissed upon the motion of the United States for lack of jurisdiction because it involved an issue of German law.

The last hope of the Berliners was the United States Court for Berlin. They argued that the Americans cannot legally, under due process requirements, deprive the people of Berlin access to all courts.

The American answer was a letter to Judge Stern from the United States Ambassador: The Judge was *directed* not to exercise jurisdiction over the case. Judge Stern, however, refused to be so directed, stating: "As long as that letter pends before the Court, I can render no decision . . . I put aside your suggestion that I should simply decide in your favor without giving reasons."³ The letter was not withdrawn.

The following day Judge Stern's appointment as judge for the United States Court for Berlin was terminated. The Germans never had their day in court.

This book is a harsh indictment of the positions taken by the State Department, and justifiably so. It is difficult to conceive of any American lawyer raised and trained in the traditions of American Constitutional law advocating these positions. But, they were directed to do so. Therein lies the great danger.

The problems that confronted the State Department were obvious. How could it expect the communist bloc countries to prosecute or return hijackers from the West if hijackers from the East to the West were to be tried by a jury completely sympathetic with the hijackers' cause. The civil rights of the accused were important, but so was the protection of the world's civil aviation.

Justice Williams J. Brennan, Jr., said of this book: "It is *must* reading." I agree.

"Gesagt ist Gesagt."⁴

3. *Id.* at 372.

4. ". . . a German colloquial phrase meaning that this is an understanding which may never be broken." *Id.* at 138.