

use the Court for protection of the people against their strong nation, as John Marshall used it to protect a weak nation against the people. The effect of the over-all approach is to needle sharply any sanctimonious or reverent approach to the Court and its work, to puncture confident assumptions concerning it, and to portray the Court as a highly individualized and political aggregation of nine men seeking from their entrenched positions to ensure perpetuation of their own political ideas, often in competition with those of the people and their representatives. It is a stimulating and effective debunking study if by this time members of the Supreme Court and other critics have left enough "bunk" to make additional debunking worth while.

It is worth suggesting, however, that at this stage more needs to be done than continued debunking and deflation of one of the three major branches of our government. It is of course true that nine men remain nine men after appointment to the Court, and that nobody expects them to develop Siamese linkages. But if for national purposes we may expect even 160,000,000 people to achieve a kind of unity and subordination of individuality to common aims, we ought to be able to expect nine professionally trained, intellectually disciplined, and well paid and well protected government employees to adhere to an ideal of individual self-effacement to achieve common statement of high purpose in the realm of constitutional law. While assuming that the ideal will not always be attained, we may well insist on the maintenance of its idealized status with awareness that goals have their directional value whether or not we have fully arrived. Every institution needs from time to time the catharsis of caustic cleansing. The judiciary is no exception, but having reached in recent years the stage wherein even members of the Supreme Court provide verbal sand for the rougher scrubbing of their fellows, it seems time to turn back to the basic problem of the nature of appropriate judicial performance. It is here submitted that it is not enough to say that individual judges should be liberal and that they should have the courage of their individual convictions. It is submitted, as indicated above, that the justices are obligated to do for the American people a task of synthesizing political ideals at the constitutional level, which calls for the subordination of individuality and the merging of individual wisdom and capacities in institutionalized performance.

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Nuremberg: German Views of the War Trials. Edited by Wilbourn E. Benton and Georg Grimm. Dallas: Southern Methodist University Press, 1955. Pp. 232. \$4.00.

The decade since the opening of the trial before the International Military Tribunal in Nuremberg has produced a voluminous literature in the United

States on the legality, wisdom and value of that proceeding, pro and con. There have been enough writings in other countries republished in various journals here to make it apparent that the debate and discussion here was paralleled abroad. A translation and collection of such writings and speeches from any country can be a useful device by which to evaluate our own thinking, and a collection from Germany, which stood in a unique position at the trials, is of course doubly interesting.

The idea, however, is more intriguing than the execution it has been given by this volume. There is, or certainly should be, a distinction between the "German" view and the "defendants" view of the trials. Yet the first two items selected for republication—which occupy about a quarter of the book—are defense items reprinted from the record before the International Military Tribunal: a defense motion attacking the legality of the tribunal under international law; and a defense statement, of similar character, presented to the Tribunal by one of defense counsel for the defendant Alfred Jodl, Chief of the Operations Staff of the High Command of the German Armed Forces. Although both were indubitably authored by Germans, they were defense, rather than German, presentations. Four more of the items selected are authored by former defense counsel. Three of the remaining four papers are vigorous defenses of the validity and value of the trials.

Several of the pieces are of high quality. Von Otto Kranzbuhler, the highly competent defense counsel for Admiral Doenitz, undertakes to survey the validity, under pre-existing international law, of all of the thirteen Nuremberg judgments. Two other papers are likewise devoted to some or all of the twelve trials of lesser Nazis held at Nuremberg before courts presided over solely by American judges. The papers do not have the quality of Kranzbuhler, but they deal with a phase of Nuremberg which has been largely neglected. The relative inaccessibility of the text of the twelve subsequent judgments,¹ combined with both their sheer bulk and the overshadowing effect of the earlier judgment of the International Military Tribunal, has led to a failure to appreciate both the intrinsic importance of the decisions which these later tribunals reached, and the extent of the gloss which they have added to the judgment of the International Military Tribunal itself. Impressive, also, is the paper by Dr. Hans Ehard, Minister President of Bavaria, which has already been reprinted in this country in the *American Journal of International Law*.

None of the papers, even those by former defense counsel which are critical of the concepts of international law which were applied, criticizes the conduct of the proceedings. That some of the procedures were unfamiliar to German defense counsel is obvious; but lawyers of the ability of those who participated in the trials as defense counsel were able, with remarkable facility, to adapt

¹ They are available, together with abbreviated records of the proceedings in each case, in the 15 volume edition of *Trials of War Criminals*, published by the U.S. Government Printing Office.

themselves to, and to utilize, the procedures which were innovations in continental criminal practice. Dr. Dix, a German attorney, speaks of the "great—and for the defense frequently very favorable—significance before the Tribunal [of] the far-reaching powers of the prosecution and the defense in the interrogation of witnesses, which under Anglo-Saxon law rests almost totally in their hands."²

There is also abundant evidence that the trials were conducted with impartiality and a sense of justice—that they were *trials* in the real sense. "Nobody dares to doubt," says one attorney,³ that the International Military Tribunal "was guided by the search for truth and justice from the first to the last day of this tremendous trial." Or, as Dr. Ehard puts it, "Within the framework set by the Charter all participants were obviously endeavoring to be objective. Occasional deviations from this rule were stopped immediately by the President."⁴ There are, significantly, no complaints to the contrary.

But perhaps most importantly, the papers recognize the significance, for Germans and for non-Germans alike, of the fact that there have been judicial proceedings which have examined the evidence and stated the facts on what happened under Hitler. It is not only, as Dr. Ehard puts it that "A prosecution 'in court' of the criminally induced world catastrophe just could not be avoided unless recourse was to be had to considerably more far-reaching methods, methods of punishment more questionable for the development of law which necessarily would have entailed a higher degree of arbitrariness."⁵ It is also, as Dr. Ehard says earlier, that, "The indictment, the protocols of the proceedings and the judgment described the fateful course of National Socialism in Germany and in the world as objectively and impressively as hardly any German description could have done. . . . One would like to tell every German to read these documents, particularly those people who forgot too soon and would like to avert their eyes from the horrors of the near past."⁶ Or, as another author puts it "There scarcely exists a more effective means of extinguishing whatever Nazi ideas and efforts may still exist among the people than the reading of this Judgment."⁷

Comments such as these, from German sources, are more significant than disagreements with legal concepts. That the defense agrees that the trial, given its legal concepts, was fair, and that the judgments are true judgments is high tribute to both the judges and the prosecution.

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² P. 175.

⁵ P. 97.

³ P. 201.

⁶ P. 85.

⁴ P. 84.

⁷ P. 203.

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