

When National Interests Take Precedence Over the Rule of Law (Book Notes: Hitler's Prisons: Legal Terror in Nazi Germany Author: Nikolaus Wachsmann) by Austin Cline

Some members of the Bush administration, as well as conservative apologists for the administration, believe that the president's responsibilities in time of war and to protect the national interests mean that he can ignore laws and treaties. If he believes the protecting the nation requires violating a law, he has the authority to do so. Where does such reasoning lead? Hitler's Prisons: Legal Terror in Nazi Germany

In Hitler's Prisons: Legal Terror in Nazi Germany, Nikolaus Wachsmann writes about how Franz Gürtner, a nationalist and conservative who headed of the Reich Ministry of Justice, managed to get along with the Nazis despite not being a Nazi himself:

In penal policy, he saw much common ground with the Nazis. He shared the Nazis' hostility to all political movements on the left, including the moderate trade union movement and the Social Democrats, and also pushed for a hard line against 'professional criminals'. True, Gürtner's repeated defence of the authority of the legal system caused some conflict... But the rule of law was not sacrosanct for him.

Crucially, Gürtner accepted that vital national interests — as defined by Hitler as head of state — had precedence over the rule of law. Time and time again, Gürtner supported unlawful measures and even murders, because they had been declared by Hitler as crucial for the survival of the state.

One of the key advantages which a liberal democracy has over other political systems is the principle of the rule of law rather than the rule of men. This means that everyone is subject to the same laws and no one can evade their responsibility to follow the law, no matter what their position, heritage, financial resources, or motives. This principle isn't always followed perfectly, but it's a testament to how important it is that when people perceive that it has been breached, they react with great outrage.

That's what makes the efforts by some American lawyers and politicians to argue that the president can and should be above the law so disturbing. If successful, they would transform America into a society where we are ruled by men rather than laws because we would all be subject to the whims of the president and his officers rather than laws, courts, and juries.

A president who imagines himself to be above the law is a president who has forfeited the moral fitness to serve public office; those who argue that the president is above the law are apologists for dictatorship and illiberal, undemocratic government. They are the modern equivalents of Franz Gürtner, justifying the abuse of power and authority in the name of national security.

[L]ike Hitler, the top police officials were open about the fact that they did not see themselves as bound by legal norms. In a speech to the Academy of German Law in October, 1936, Himmler bluntly stated: 'Right from the start I took the view that it did not matter in the least if our actions were contrary to some clause in the law; in my work for the Führer and the nation, I do what my conscience and common sense tells me is right'.

Indeed, disregard of the letter of the law was seen as crucial to the defense of the national interest. The police styled itself the 'domestic army'. Just as the German army on the battlefield could not be subject to legal regulation, so too, it was claimed, the fight of the German police at home must not be constrained by the rule of law.

Once the chief executive is placed outside legal norms, it doesn't take long for lower officials to follow suit. Part of the legal arguments offered by American apologists for placing the president outside the law included the idea that other government officials should be immunized against criminal prosecution when executing the president's orders, even if those orders technically contradicted the laws passed by Congress.

American soldiers who violated the Geneva Conventions and laws against torture believed that they were serving the interests of their president and their nation. They did what their conscience, common sense, and immediate superiors told them was right — as directed by both implicit and explicit statements from others high up the chain of command. Their actions were wrong, but they were justified by some of the same ideas that were used by police and military officials in Nazi Germany.

We are also seeing today domestic surveillance which exceeds that which is permitted by the laws. Police, FBI, and National Security personnel believe that their responsibility to fight terrorism justifies ignoring the laws — indeed, it has been argued that laws which protect the rights of the accused and the innocent simply hamper police investigations and need to be curtailed. Defense of the national interests is thus used to justify eliminating the rule of law.

As Himmler explained to German army generals on 21 June 1944, he could not care less whether the actions were legal or not: 'what is necessary for Germany will be done, however horrifying it may be.' [...] The legal system, Hitler warned [in a speech to the Reichstag on 26 April 1942], must have only one thought: German victory. It was high time, he continued, that the legal system realised that it did not exist for its own sake, but for the nation.

When people stop caring whether their actions are legal or not, they also forfeit their right to act on behalf of the nation or the people in the first place. The law is the formalized process by which the people want society to be governed. In effect, then, those who seek to ignore the law are thereby ignoring the way the people want their representatives to act. They are placing their own desires, insights, and will over that of the public — and this means that they are seeking to impose their own personal rule over the rule of the people. This makes them anti-democratic to the core.

We shouldn't be surprised to find that this was the case with people like Hitler and Himmler. We should more surprised and concerned, though, to find such attitudes in the American government.