

# We've Seen Attacks on the Rule of Law Before and It Didn't End Well

By David Goldman

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I fear making analogies to 1933 Germany— analogies to *Nazism* are often unhelpful. Such comparisons are frequently mere ad hominem attacks for the sake of shock, often even bordering on demagoguery. On the other hand, should we avoid these analogies when the shoe fits?

We may be witnessing a frightening analogy today. One of the go-to methods of autocratic regimes is to sow distrust in the very institutions that underlie democratic societies. That distrust is particularly amplified and effective if the regimes can break these institutions from within. This is exactly what we are seeing with the Trump administration's attack on law firms and law firms' willing participation in or complacency in response.

No institutional construct is more important to the functioning of a democratic society than the Rule of Law. It is fundamental to a functioning democracy. And the system of justice that affirms the Rule of Law requires an active and independent legal profession.

The early years of National Socialism are relevant. The pre-1933 legal profession in Germany looks very familiar to us. The new Hitler government quickly eviscerated the profession by taking control of what had been a self-governing structure. Even more, this attack capitalized on the economic self-interest of lawyers by removing tens of thousands of lawyers—the Jewish lawyers—from the competitive marketplace.



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That history informs us today. The Trump administration, acting through executive order and the bully pulpit, seeks to undermine the independence of the legal profession by blacklisting some of America's greatest law firms and threatening others. The Trump administration's aim is clear: single out and punish those lawyers and law firms that it perceives to have opposed the President; and in so doing instill fear that restrains other law firms from speaking out.

As pernicious as the Trump administration's actions themselves are, the ethical failure of law firm leaders to speak out against this attack on the ethical foundation of lawyering is even more disappointing and damaging.

Our commitment to the Rule of Law starts with ethical lawyering. Yes, everyone is entitled to a lawyer and, yes, every lawyer must do her best

to represent her client. But, every lawyer must possess her own personal ethical constraints on whom *she* chooses to represent, on the projects that *she* chooses to become involved in and, indeed, even in the arguments which *she* is willing to deploy in service of her client. Individual lawyers and law firms must not be *morally neutral* in their choices and actions. That is a path to societal moral neutrality. We demand more from our professionals.

I do not suggest that it is unethical to represent unpopular clients or to take on matters that have distasteful implications. Just the opposite. American history is replete with examples of courageous attorneys representing individuals or causes that were widely unpopular. No one would contest either the rights of the unpopular to legal representation or of lawyers to represent them.

Instead, I do suggest that I, as a lawyer, am entitled to make these decisions, to establish my ethical constraints, free of governmental interference. That freedom is not only my right; it is my ethical duty as a professional.

Let us be clear. These executive orders and speeches from the bully pulpit that call out law firms because of whom they represent today or whom they represented in the past (or whom they may represent in the future) threaten the fundamental ethical underpinnings of lawyers and of the legal profession.

Which leads to the question: where is the push-back? Why isn't every lawyer in America standing up to these executive orders and pronouncements? Why aren't the leaders of the great law firms of America speaking out? Is it that they are so cowed by the potential reputational or economic risk associated with being on the wrong side of the Trump administration? Is it that they fear that they will lose clients or potential clients by speaking out? Is it that they are outraged privately but lack the moral compass or courage

to speak out publicly? Are they secretly hoping that others will speak out and they will enjoy the free-rider benefit? Is this simply a variation on the classic Prisoners' Dilemma where actors move in what they mistakenly believe is their own best short-term interest without acknowledging the greater and longer-term consequences?

Are those law firms and lawyers who fail to speak out complicit by their inaction? The reference to the early years of Nazism is apt. The attacks on the German legal profession were successful with the consequence that the revised system of "justice" became one of the cudgels of Nazi rule. There is no place for silent complicity today.

Paul Weiss, in explaining its choice to negotiate with the Trump administration, essentially blames the silence of other law firms. Ignoring the cowardice of that argument, it is proof of the consequence of silence: it is complicity.

Let us applaud the moral certainty, even moral courage, of those law firms that have aggressively defended the attacks, namely Perkins Coie and Covington & Burling (and the firms representing them), as well as those few other law firms that have spoken out. Let's urge similar clarity and courage from those who have to date remained silent. The consequences of the early 1930s teach us that timing matters. Speaking out before it is too late is critical. Waiting to speak out, hoping that others will do the hard work or that the threat will pass, is not ethical leadership.

Law firm leaders: now is the time to question *your* ethics. The issue at play here is *not* just your short-term financial success or profits per partner; it is your responsibility to speak and act for *your* profession and for *our* Rule of Law. That is ethical leadership.

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