

Carl Schmitt – 1934 – Seeking Order

Twenty-first century interest among American and European legal scholars to rehabilitate the juristic and political theories of the prominent Nazi spokesman Carl Schmitt deserve inspection of what Schmitt said and did. He was a German legal theorist, author and university professor, a Catholic in a majority Protestant nation, who lived through two world wars, from 1888 to 1985. Schmitt joined the National Socialist Party in 1933, over a decade after its founding when there were already about two million members. Jealousies within the Party directed towards latecomers made his protection by Herman Goering a welcome circumstance. By 1934 Schmitt was a spokesman for the legal theories of the Nazi Party.

Schmitt seems to have had two preoccupations, a successful professional career and the recognition that matched it, and a search for order in the political and legal realms. He put forward two concepts that remain of current interest: in politics there are friends and enemies, not merely competitors; and the need for “far-reaching discretionary executive power” in response to “states of exception.” These interests may sound quite reasonable. Even before modern politics there had been winners and losers in the control of societies and their wealth. And concerning the role of the executive, circumstances such as war, famine and pestilence, that is, emergencies, have a long history of establishing, and overturning, those who are in charge, who are sovereign. What makes Schmitt interesting in the twenty-first century are the frank and unambiguous actions that he enthusiastically advocated as consequences of these concepts.

Germany had been a single nation since only 1871. When founded it had an elected legislature, the *Reichstag*, although its role was limited and power resided in the monarch. Germany’s defeat in WWI had been total, expensive, and humiliating. A constitutional parliamentary republic was formed in 1918, signed in the city of Weimar. Its constitution attempted to be inclusive of democratic and socialist principles in its 181 articles, but the times were chaotic and it was not long before there were running street battles between Communists and Nazis. In its attempt to include representatives of all political parties, even those that wanted to dispense with a parliamentary government and replace it with a

dictatorship whether it was of the Right or of the Left, the Weimar republic stood on an unstable foundation.

The Weimar constitution contained an Article 48 which permitted its suspension by the president. This was expected to be rarely used and only in emergencies, but in this turmoil “was invoked 205 times before Adolf Hitler (in 1933) became chancellor.”ⁱ With his violent followers and broad support Hitler was the undisputed head of government, the centuries-long tradition of autocracy perhaps easing the acceptance of the concentration of political power. Those Weimar years were hard on all Germans, and Schmitt’s search for order appeared to him to be confounded by the failure of the parliamentary state.

Hitler’s chancellorship quickly turned Germany into a dictatorship. The National Socialist state was founded on singularities: one political party, one system of justice controlled by that party, and one specific person to whom loyalty was due, the Führer. Hitler did not merely personify the role of Führer, he did not merely occupy that title – he was the Führer.ⁱⁱ At the center of this there was one people (the *Volk*) - one set of opinions, one set of associations, one language; free expression was unnecessary, the Party’s carefully vetted opinions and its propaganda provided all needed information.

The Nazi dictatorship brought order, just what Schmitt wanted. In 1934 he left us with one spare, clear article that distills the consequences of his juristic philosophy. This was published in the *Deutsche Juristen-Zeitung*, the newspaper for jurists and the organ of the university lecturers of the Union of German National Socialist jurists.ⁱⁱⁱ The title of the article is *Der Führer schützt das Recht*, “The Führer Protects the Law.”^{iv} Schmitt was president of that union, editor-in-chief of that newspaper, and professor at the University of Berlin, so he spoke with authority.^v In the first sentence, Schmitt states that he will be discussing Hitler’s October 3rd, 1933, speech at the German Jurists’ Annual Convention in Leipzig. But prior to the article’s August publication was the weekend of June 30 to July 2, 1934, the three day long Night of the Long Knives^{vi}, Hitler’s murderous purge of undesirable, or competitive, elements of the Nazi Party as well as of other people who had disagreed with him. After that there was Hitler’s July 13, 1934, speech to the Reichstag wherein he justified his actions, which is the actual focus of Schmitt’s article. The premise that the Nazis followed was that Germany failed in the war because it had been “paralyzed by the logic of the liberal constitutional state”.^[1.2] The wartime German state, Hitler insisted, had “failed in

the fight against the poisoning of the German Volk and the undermining of German law and its sense of honor.”[I.3] He could have used the phrase “German exceptionalism.”

The first paragraph in Schmitt’s article wraps itself around a grand sentence that first, tells us that in his Leipzig speech Hitler differentiated between two kinds of law, one that was not divorced from morality and justice, the other an empty legality of false neutrality. After that, Hitler stated that the Weimar system had destroyed itself through this legal neutrality, and had handed itself over to its enemies. Schmitt concludes this paragraph with a direct quote from Hitler: “This must be a warning for us.”[I.1] This partitioning of the law raises questions, such as who decides which laws are “empty legalities” and what constitutes morality and justice. Schmitt clarifies this by going beyond mere admiration of the Führer and on into an apotheosis. “The Führer takes the teaching of German history seriously. This gives him the right and the power to found a new state and a new order.”[I.3] Schmitt proceeds to lay out his long-standing opinions of the true nature of political leadership, his search for order. “The Führer protects the law from the worst abuse when, in the moment of danger, by virtue of his leadership he immediately creates justice: [quoting Hitler] ‘In that hour I was responsible for the fate of the German nation and thereby became supreme judge of the German Volk.’”[II.1] In case there was any lack of clarity, Schmitt states, “The true Führer is always a judge as well. From his authority as Führer flows his authority as judge.”[II.1] This answers any questions about who decides matters of legality, justice and morality, and also endorses the perpetual extension of exceptional states.

Hitler was expansively sure of his position as Führer. In his July speech to the Reichstag he had criticized people who had been less than accepting of the National Socialist Party, saying, “[T]hey are filled not by a desire to help the *Volk*, but by the fervent hope that the government will fail in its work to rescue the *Volk*. Thus they are not willing to admit that an action is beneficial but are instead filled by the will to contest as a matter of principle and to extract from every success any potential weaknesses.”[MD.488]^{vii} In this, Hitler and Schmitt were in complete agreement – resistance is futile when anything less than obeisance is treated as disloyalty.

Schmitt continues, directly engaging Hitler’s explanation of the assassinations and arrests in that June 30 weekend. Schmitt says, “The highest law expresses itself at the moment of highest need, and what

appears is the highest degree of the judicially vengeful realization [*richterlich rächender Verwirklichung*] of this law.”[II.2] In Hitler’s view, the law, stemming from his unique role as Führer and expressed in the purge, was not by any means neutral – the Führer’s vengeance was the law’s vengeance. Order is preserved and the frightening shadows of ambiguity, compromise and contested elections are dispelled.

Schmitt continues a defense of Hitler’s purge and raises his admiration into a political hagiography of the Führer. “In a dictatorship [*Führerstaat*], the legislative, governmental [i.e., executive] and judiciary do not mistrust one another, as they would in a liberal constitutional state. ... The Führer determines the scope and content of his actions.”[III.2] A balanced government with branches that have certain powers reserved to them would be able to respond only to mundane matters; a *Führerstaat* would be much more efficient and effective in case of exceptional events. Germany was in no danger of having a balanced government, especially since the National Socialist Party had become the “one bearer of political will in our state.” Granting this singular role to the Nazi Party, “the leader of the Party has a judicial task, inner justice cannot be realized by anyone else ... and this Party includes its own internal law that is based on a sworn loyalty to the leader.” Schmitt returns to a theme he had already endorsed, stating that the crime of disloyalty that Hitler punished in those three days of the purge could be punished only by him, not any civil court, “The Führer, as political leader, has become the highest judge.”[IV.1] Schmitt’s search for order was realized through this loyalty to Führer, not to constitution; unsettling ambiguity was resolved by what in other circumstances would be *ukase*.

Schmitt wraps up his impassioned defense of Hitler’s purge with a root for the home team. “One must not take the events [of the purge] out of our political context and see them as purely legal matters. ... Such methods cannot do justice to a highly political process.” Speaking of the other European nations that criticized Hitler’s actions, Schmitt says, “They will find it a surprise that the German state of today has the strength and the will to distinguish friend from foe. They will promise us the praise and the applause of the whole world if we again, as we did in 1919, fall down and sacrifice our political existence to the idols of political liberalism. Those who understand the overwhelming background of our political situation will understand the admonitions and warnings of the Führer and prepare himself for the great spiritual struggle in which we have to protect our own righteous law [*gutes Recht*].”[V.1] Total war, mass murder, devastation.

Is there a place for Schmitt's fealty in the American constitutional republic? Carl Schmitt was a committed and outspoken believer in Hitler as law giver and judge. His loyalty was to a man, not to a constitution. He gladly exchanged his personal agency and responsibility for the reflected glories of obedience and recognition. Examples of the consequences of such choices abound: Aeschylus writing about Iphigenia; the Catholic Queen Mary and the Protestant Queen Elizabeth each sacrificing nearly three hundred heretics; the god-fearing Puritans in Salem executing twenty of their fellow Christians; the Bolsheviks under Lenin and Stalin; Mao and his Red Guard ... the foundation is the same. It is the repudiation of personal responsibility, the willing conflation of personal choice with loyalty to a political leader.

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Bibliographic Note:

I have used readily available bibliographic sources whenever possible. While Wikipedia is usually reliable, many Wikipedia articles are brief and omit contextual information. The translations from German are on the whole mine, informed by many books and articles of recent decades, except where explicitly noted. I have striven for readability and with attention to meaning, not for emulation of style.

ⁱ Wikipedia, The Weimar Constitution, https://en.wikipedia.org/wiki/Weimar_Constitution accessed 2025.02.18

ⁱⁱ Wikipedia, Early timeline of Nazism, https://en.wikipedia.org/wiki/Early_timeline_of_Nazism accessed 2025.02.18

ⁱⁱⁱ https://www.flechtsig.biz/DJZ34_CS.pdf accessed 2025.02.18

^{iv} Translations are indicated by double-quotes. The section of the Juristen-Zeitung article is shown in square brackets, including the paragraph number of each section.

^v Neoconservative Legal Theory: Carl Schmitt, Cambridge Forecast Group Blog, <https://cambridgeforecast.wordpress.com/2006/11/24/neoconservative-legal-theory-carl-schmitt/> accessed 2025.02.18

^{vi} Wikipedia, Night of the Long Knives, https://en.wikipedia.org/wiki/Night_of_the_Long_Knives accessed 2025.02.18

^{vii} Domarus, M., The Complete Hitler, A Digital Desktop Reference to His Speeches and Proclamations 1932-1945. Bolchazy-Carducci Pub., Wauconda IL USA. Internet Archive (https://archive.org/details/the-complete-hitler-speeches-and-proclamations-1932-1945_202409) Note shows the page number. Accessed 2025.02.21