

*From the Archives*

## **Carl Schmitt's Ultimate Emergency: The Night of the Long Knives**

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Though the ideas of Carl Schmitt about emergency powers have been the subject of considerable commentary<sup>1</sup> recently, the writers do not reference his culminating article on emergencies. That piece was a paean to Adolf Hitler's murder of scores of supposed adversaries in the "Night of the Long Knives" of June 30, 1934.<sup>2</sup> The article, "The Führer Protects Justice," represents the lengths to which Schmitt was willing to go in justifying the most drastic use of emergency powers. Some of Schmitt's other prose from the Nazi era can simply be excised from the corpus of his work, but this piece has to be considered as a part of his basic teaching.<sup>3</sup> As far as I can determine, unlike much of Schmitt's output, it has never been translated into English.<sup>4</sup> The purpose of this article is to provide such a translation with a description of its context.

The description is all the more necessary because Schmitt does not provide even a sketch of what took place on June 30th. A little more than a year into his rule as German

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<sup>1</sup>For recent examples, see Adrian Vermeule, "Our Schmittian Administrative Law," *Harvard Law Review* 122 (2009): 1095; Sanford Levinson and Jack Balkin, "Constitutional Dictatorship: Its Dangers and its Design," *Minnesota Law Review* 94 (2010): 1789.

<sup>2</sup>For descriptions of the events of June 1934, see Ian Kershaw, *Adolf Hitler: 1899–1936: Hubris* (New York: Norton, 1998), 512–22; Albert Seaton, *The German Army 1933–1945* (New York: Plume, 1982), 45–50.

<sup>3</sup>Much of Schmitt's pre-1933 work foreshadows this article. See Carl Schmitt, *Hüter der Verfassung* (1931), and the critique of it in Hans Kelsen, "Wer Soll der Hüter der Verfassung Sein?" *Die Justiz* (1930/31): 576. See, for example, Bernd Rüthers, *Carl Schmitt im Dritten Reich* (2nd ed. 1990), 75–80; Helmut Quaritsch, Intr., *Complexio Oppositorum über Carl Schmitt* 5, 20 (Helmut Quaritsch ed., 1986); Joseph Kaiser, *Konkreten Ordnungsdenken*, id. at 322.

<sup>4</sup>William E. Scheuerman, *Carl Schmitt: The End of Law* (Lanham, MD: Rowman and Littlefield, 1999), 114.

Chancellor, Hitler felt threatened from two directions. On the one hand there was restiveness among members of the SA (*Sturmabteilung*), the brown-shirted street fighters who had done so much to bring him to power. Some of them took seriously the idea that there was meaning to the words “socialist” and “workers” in the title of the National Socialist German Workers’ Party. They felt that their contributions had not been recognized or rewarded. Their head, Ernst Röhm, was a formidable fighter and potential troublemaker. He was intent upon gaining primacy in military matters vis-à-vis the army. On the other side, there was unease among the conservatives who had opened the way for Hitler’s appointment. Several of them were planning to meet with President Hindenburg to urge him to curb what they regarded as excesses in Hitler’s policies. Most disturbingly of all, the army leadership was considering forceful means to end the attempt by the SA to gain control over military matters,

It seems likely that subjectively Hitler took these threats seriously, though no evidence of any plot to seize power was ever presented. Witnesses describe him as highly excited to the point of foaming at the mouth. He flew to Munich and there confronted leaders of the SA in a resort hotel and had them imprisoned. One of Röhm’s chief deputies was caught in bed with another man, a matter that Hitler stressed in moralistic terms. Röhm was seized and given a chance to commit suicide; when he declined he was shot to death by SS (*Schutzstaffel*) officers. Elsewhere in Germany murder squads went into action. They killed General Kurt von Schleicher, Hitler’s immediate predecessor as Chancellor, together with his wife and an aide, General Bredow. Also on the list were Edgar Jung, secretary to Chancellor von Papen, who had drafted a critical article about Hitler’s excesses, and Erich Klausener, head of the Catholic Action movement. Schmitt had interacted with von Schleicher in various ways.<sup>5</sup> Hitler also settled scores with men who had incurred his displeasure along the way: Gregor Strasser, formerly an important Nazi organizer, and Gustav von Kahr, a figure in Bavarian politics in the 1920s. Hitler’s enemies on the left were spared as they were already stowed away in concentration camps. Some were killed by mistake, confused with a target having a similar name. No list of the assassinated was ever made public and the relevant files were destroyed. Hitler told the Reichstag that the number was 77; subsequent research indicates that the real number was twice or even three times as great.<sup>6</sup>

On July 13 Hitler spoke in the Reichstag to the German people, justifying his actions, and a statute was passed ratifying them. By and large the popular reaction in Germany seems to have been favorable. Many regarded the SA as uncouth rowdies that constituted a menace to the public peace and the killings of the rightists were largely ignored, even by their comrades in the army. Only one officer dared to attend von Schleicher’s funeral.

Schmitt’s article appeared on August 1, 1934, in a journal, the *Deutsche Juristenzeitung*, of which he was the editor. By that time the murders were over and Schmitt had no reason to fear that he would be added to the list. A few words about the translation: The first part of the article is devoted to asserting that the purge represented a type of firm defensive action that would have saved the imperial regime in 1918 if applied to the mutineers and

<sup>5</sup>For a detailed description of the Schleicher–Schmitt relationship see Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000), 170-75.

<sup>6</sup>Hermann Mau, Die “Zweite Revolution”—Der 30. Juni 1934, *Vierteljahrshefte für Zeitgeschichte* 119 (1953): 134.

socialists of that time. This is part of the “stab-in-the-back” myth propagated by rightists and Nazis. In fact, the Kaiser’s army leadership had failed to defeat the Allies and had asked the government to make peace. I have not translated some familiar German words such as “Führer,” “Reichstag,” and so on that have specifically German overtones. In general, I have translated “Recht” as “justice” rather than “law.” Citations remain in the German form. Schmitt is widely praised for his trenchant writing style. I did not find that quality in this article. Several reasons may explain that deficiency. It was written in considerable haste between the purge and the ratifying legislation and the publication date. Schmitt also felt impelled to track the Führer’s cruder prose. Schmitt’s analysis is ambiguous, for at times it seems to be treating the event as an example of the appropriate use of emergency powers but at others seems to say that law is quite irrelevant in the Führer’s state.

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## THE FÜHRER PROTECTS JUSTICE

On Adolf Hitler’s Reichstag Speech of 13 July 1934

By Councilor Professor Dr. Carl Schmitt, Berlin

### I.

At the German Lawyers Day in Leipzig on 3 Oct. 1933 the Führer spoke about the state and justice. He pointed to the contrast between a substantive law not separated from decency and justice and the empty legality of an unreal neutrality and developed the inner contradictions of the Weimar system which through this neutral legalism destroyed itself and delivered itself up to its own enemies. To that he appended the sentence “That must be a warning to us.”

In his Reichstag speech aimed at the whole German folk on 13 July 1934 Hitler reminded us of another historical warning. The strong German state founded by Bismarck collapsed during the World War because it in the decisive moment did not have the strength “to make use of its articles of war.” Crippled by the patterns of thinking of a liberal rule-of-law state, a civil bureaucracy without political instincts did not find the courage to handle mutineers and enemies of the state according to the justice they deserved. One who today reads in volume 310 of the Reichstag Document Collection the report of the public plenary session of 9 Oct. 1917 will be shaken and understand the Führer’s warning. The report of the then national government that leaders of the mutinying sailors had negotiated with the members of parliament of the Independent Socialist Party was answered by the German Reichstag in high indignation to the effect that one could not curtail a party’s constitutional right to conduct propaganda in the army and that conclusive proof of high treason was lacking. Well, those conclusive proofs were spat in our face a year later by the Independent Socialists. In unparalleled courage and amid fearful sacrifices the German folk held its own for four years against the whole world. But its political leadership failed in a sad way in the struggle against the poisoning of the people and the undermining of German justice and sense of honor. Right to this day we are paying for the hesitation and paralysis of the German governments of the World War.

All of the moral outrage over the shame of such a collapse has been concentrated in the Führer and has become in him a driving force of a political deed. All the experiences and warnings of the history of German misfortune are alive in him. Most people fear the hardness of such warnings and prefer to flee into an evasive and compromising superficiality. But the Führer takes seriously the teaching of German history. That gives him the right and the power to found a new state and a new order.

## II.

The Führer protects justice against the worst abuse when he in the moment of danger by force of his leadership status as highest judicial authority creates justice directly. "In this hour I was responsible for the fate of the German nation and thereby the highest judicial authority of the German people." The real Führer is always a judge. Out of Führerdom flows judgeship. One who wants to separate the two from each other or puts them in opposition to each other would have the judge be either the leader of the opposition or the tool of the opposition and is trying to unhinge the state with the help of the judiciary. That is an often-used method of destroying not just the state but also the law. It was characteristic of the blindness about justice of the liberal way of thinking about law that it sought to make out of criminal law a great liberating charter, the "Magna Carta of the criminal" (F. von Liszt). Constitutional law then must in the same manner become the Magna Carta of traitors. Justice is changed thereby into a business of assigning responsibility and the criminal has a vested right to have it function in a predictable and calculable way. The state and the folk, however, are totally bound to a supposedly complete legality. For the extreme case of emergency perhaps spurious emergency exits will be recognized under the table, steps which are recognized by some liberal legal scholars depending on the status of offenses, but are denied by others in the name of the rule-of-law state and regarded as not legally existent. With this sort of jurisprudence, the word of the Führer that he acted as the "supreme judicial authority of the people" is incomprehensible. It can reinterpret the judicial act of the Führer only as a measure of the state of siege retroactively legalized and requiring indemnity. A fundamental clause of our current constitutional law, the principle of the primacy of political leadership, is twisted into a legally empty phrase and the gratitude which the Reichstag has expressed to the Führer in the name of the German folk into an indemnity or even an acquittal.

In truth the Führer's action was true judging. It is not subject to law but is in itself the highest justice. It was not the action of a republican dictator who creates a *fait accompli* in a space free of laws while the law for a moment closes its eyes in order that, on the basis of those new facts, the fiction of a legality free of gaps may again take its place. The judicial quality of the Führer comes from the same source of justice from which all the justice of every folk derives. In the greatest emergency the highest justice justifies itself and there appears the highest degree of avenging judicial realization of its law. All law comes out of the people's right to life. Every state statute, every judicial judgment contains justice only insofar as it flows from this source. What is left is not justice, but rather a positivistic weaving together of compulsory norms which a clever criminal scorns.

## III.

In a sharp juxtaposition the Führer has emphasized the difference between his government and his state vis-à-vis the state and governments of the Weimar system. "I did not want to deliver the young Reich to the fate of the old one." "On the 30th of June 1933 a new government was not created for the umpteenth time but a new system replaced an old and sick epoch." If the Führer with such words demands the liquidation of a sad section of German history that has juridical consequences for our legal thinking, for legal practice and the interpretations of laws. We will have to test anew past methods and ways of thinking, the old prevailing legal opinions and the decisions of the highest courts in all branches of the law. We may not blindly cling to the legal concepts, arguments and precedents that an old and sick period brought forth. Many a sentence in the reasons for the opinions of our courts is to be sure to be understood as coming from a justified resistance to the corruption of the then system; but that too would now, if carried forward without thought, mean the opposite, and would make the judiciary the enemy of the state of today. If the Reichsgericht in June 1932 (RGSt.66, 386) saw the meaning of judicial independence in "protecting the citizen in his legally recognized rights against the possible arbitrariness of a hostile government" that was spoken from a liberal-individualistic position. "The judiciary plunged into a frontal position not only against the head of state and the government but also against the administrative organs collectively."<sup>7</sup> That can be understood as of that period. Today, however, we are subject to the duty to put into effect the new meaning of all public law institutions, including the judiciary, with the greatest decisiveness.

At the end of the 18th century old Häberlin connected the issue of state emergency law with the question of line-drawing between matters of justice and matters of state and taught that if there is danger or great damage to the state the government can declare all judicial matters to be matters of state. In the 19th century Dufour, one of the fathers of French administrative law, defined each government action withdrawn from judicial scrutiny (acte de gouvernement) that its purpose was the defense of society, indeed defense against internal and external, public or hidden, present or future enemies. Whatever one may think of such declarations they point to a legally important special quality of the political "act of state" which gained recognition even in liberal rule of law states. However, in a Führer state in which legislation, government and justice do not check each other mistrustfully,<sup>8</sup> as they do in a liberal rule of law state, that which otherwise would be an "act of state" must to an incomparably higher degree qualify as an act through which the Führer has maintained his highest leadership and judgeship.

The Führer himself specified the content and scope of his action. That since the night of Sunday July 1 the state of "normal justice" has been restored has been made certain by his speech. The Law Concerning Measures of State Emergency of 3 July 1934 (RGBl I. P. 529)

<sup>7</sup>Compare the just published work by H. Henkel, *The Independence of the Judge in Its New Meaning* (Hamburg 1934), 101.

<sup>8</sup>Cf. the article by E. R. Huber, "The Unity of State Power," *infra* p. 950 in the same issue of *Deutsch Juristenzeitung*.

characterizes in the form of a government statute the scope in time and subject matter of the Führer's direct actions. "Special Actions" falling within or without the time span of the three days not in any way connected with the Führer's actions and not authorized by him are all the worse injustices the higher and purer the Führer's justice is. According to the declarations of Prussian Governor Göring of July 12 and Reich Minister of Justice Gürtner of July 20, 1934<sup>9</sup> a specially strict criminal law proceeding against such impermissible special actions is called for. That distinguishing between authorized and unauthorized action in case of doubt is not a matter for courts can be understood according to the above remarks about the special quality of acts of government and Führer action.

#### IV.

Within the scope of those three days there particularly stand out those judge-like actions of the Führer through which he as leader of the movement avenged the disloyalty of its subordinate leaders towards him as the highest political leader. The Führer of the movement as such has a judicial task whose internal justice cannot be realized by any other person. The Führer expressly emphasized in his Reichstag speech that in our state there is only one bearer of political will, the National Socialist Party. To a community in which the state, the movement and the Folk are arranged belongs also the law of those state-bearing life and community organizations which in a special way are based on the sworn loyalty to the Führer. On the fulfillment of that task by the Party there depends today nothing less than the fate of the political unity of the German folk. "This mighty task in which the whole danger of politics accumulates cannot be taken up by any other unit, least of all a civil court of the Party or the SA carrying out a trial. Here it stands entirely on its own footing."<sup>10</sup> Here the political leader as a result of the special quality of the crime in a specific way became the supreme judge.

#### V.

Over and over the Führer reminds us of the collapse of the year 1918. Our present situation is characterized by that. He who would rightly pass judgment on the serious proceedings of the 30th of June cannot take the events of that day and the two following days out of the context of our overall political situation and following the sort of specific criminal procedure methods isolate and encapsulate them to the point that the political substance has been thrown out and a "purely juridical situation" or "non-situation" remains. With such methods one cannot do justice to any procedure of high politics. It is, however, part of the poisoning of the people in the past decades and is a long practiced trick of anti German propaganda to stress precisely this isolating procedure as the only one suitable for "rule-of-law-state." In the fall

<sup>9</sup>Völkischer Beobachter of 13 July and of 22/23 July 1934, and *Deutsche Justiz*, 925. See also the survey, *infra* p. 983.

<sup>10</sup>"State, Movement, People" (Hamburg, 1933), 22.

of 1917 all the German members of parliament confused in their legal thinking and indeed capitalists as well as communists, clericals as well as atheists, demanded that one deliver the political fate of Germany to such procedural fictions and distortions and a spiritually helpless bureaucracy did not take in the political sense of those “juristic” demands. In the face of the action of Adolf Hitler many enemies of Germany will come up with similar demands. They will find it incredible that the present German state has the power and the will to distinguish between friend and foe. They will promise us the praise and applause of the whole world if we again, as then in the year 1919, collapse and sacrifice our political existence to the idols of liberalism. Whoever sees the powerful background of our political overall situation will understand the warnings and admonitions of the Führer and arm themselves for the great spiritual battle in which we defend our good justice.