

‘Might Makes Right’: Gonzales Follows Hitler’s Carl Schmitt

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U.S. Attorney General Alberto Gonzales, who was the chief legal advisor to President Bush during the enactment of the “emergency measures” after the attacks of Sept. 11, 2001, released a 42-page document on Jan. 19, in which he justified with “legalistic” arguments the spying on American citizens carried out by the Bush Administration. Gonzales argued that in his capacity as Commander-in-Chief, in times of crisis, the President has “extraordinary authority which supersedes the influence and regulatory authority of the Congress.” This is the same argument which Nazi “Crown Jurist” Carl Schmitt used to justify Hitler’s grab of absolute power.

According to Gonzales’s interpretation, “the President would even have the potential, on the appropriate occasion, to also use military means,” to which category belongs the full technical arsenal of communications-monitoring of the citizenry (by telephone, e-mail, and so on) by the National Security Agency (NSA).

This legal opinion, which has been imposed by the authority of Vice President Cheney and his legal advisor David Addington, gives the President unprecedented authority. Cheney defended the spying policy of the NSA in a Jan. 19, 2006 speech before the Manhattan Institute of Policy Research with these words: “These measures, carried out under authorization by the NSA, enable us to uncover and avert possible terrorist attacks on the population in time. . . . These actions are within the President’s authority and responsibility under the Constitution and laws; and these actions are vital to our security.”

Similarly, Cheney, on Dec. 20, 2005, onboard *Air Force Two*, had defended unlimited power for the head of state (what the Nazis called the *Führerprinzip*). Cheney said: “. . . [A] lot of the things around Watergate and Vietnam, both, in the ’70s served to erode the authority, I think, the President needs to be effective especially in a national security area. . . . I do believe that, especially in the day and age we live in, the nature of the threats we face—it was true during the Cold War, as well as I think what is true now—the President of the United States needs to have his constitutional powers unimpaired, if you will, in terms of the conduct of national security policy.

. . . Either we’re serious about fighting the war on terror, or we’re not. . . . The President and I believe very deeply that there’s a hell of a threat, that it’s there for anybody who wants to look at it. And that our obligation and responsibility, given our job, is to do everything in our power to defeat the terrorists. And that’s exactly what we’re doing.”

. . . Exactly Like Hitler’s ‘Crown Jurist’

The attempt to grant dictatorial powers to the U.S. President, stands in opposition to the spirit of the American Constitution of “checks and balances.” This is the concept of equal authority for the three houses of government—the Executive (the Presidency), the legislature (Congress), and the judiciary (Supreme Court), which represent the sovereign, the people. These attacks on the Constitution have their precedent in the legal doctrine of Carl Schmitt. The Spanish daily paper *El Pais* reached this conclusion in an article published Jan. 26 under the title “The Sulphurous Carl Schmitt,” in which the daily warned (with reference to the imminent decision on the confirmation of Samuel Alito as an Associate Justice to the Supreme Court) of the danger of a new American doctrine of “Presidential dictatorship.”

Schmitt was a great admirer of Mussolini, who, after the latter’s march on Rome in 1922, had given a speech on the “Myth of the Nation.” “The theory of the myth,” commented Schmitt, in effusive admiration for Il Duce, “is the strongest expression of the fact that the relative rationality of parliamentary thinking has lost its credibility.” Mussolini’s fascism was seen by Schmitt as an example of an authoritarian state. The same Schmitt, during the Weimar period, under Chancellors Papen and Schleicher, became a sought-after expert on government emergencies. The first time he gained broad publicity was during what’s known as the Prussian coup.

During the trial *Prussia vs. the Reich*, in October 1932, Schmitt represented the government (the Reich) before the state court in Leipzig. The case was brought after Chancellor Papen, under the impression that the Prussian government officials were underestimating the danger of the political left, dismissed the ministers of the Social Democratic Prussian state, and replaced them with commissars of the Reich. On July 20, 1932, Chancellor Papen decided on an action, “that showed all the features of a coup,” as Dirk Blasius wrote in his 2001 book, *Carl Schmitt—Prussian Counsellor of State*



Mussolini-admirer Carl Schmitt (center) gained broad publicity, for the first time, in Germany in 1932, before Hitler became Chancellor, for legally defending then-Chancellor Papen's coup against the German Social Democratic state of Prussia. Under Hitler, Schmitt rose to become the "juridical authority on state emergencies," which meant justifying all of Hitler's actions, including the murder, in 1934, of former Chancellor Kurt von Schleicher, (left), and Nazi stormtrooper leader Ernst Röhm (right), who were killed along with many other on the Night of the Long Knives.

in Hitler's Government. Papen's order to relieve the Prussian state government of its office was issued on the basis of Article 48, Sections 1 and 2 of the Reich's Constitution. "For the restoration of public security and order in the region of the Prussian state," the Prussian state government was relieved of its office, Blasius wrote, and the Chancellor was empowered "to entrust commissars of the Reich with the management of the Prussian ministries."

At the same time, a decree "on the military emergency situation in Greater Berlin and the Province of Brandenburg," went into effect, which declared the encroachment admissible in basic law, and put the whole police force under the Reich's Defense Minister as the "holder of total executive power," according to Blasius.

In his radio address, Chancellor von Papen said that a constitutional front had arisen which had arrayed the anti-state forces of communism in a united front against the rising movement of the NSDAP [the German National Socialist Workers Party—known as the Nazis]. Through this equating of forces hostile to the state, he said, the political struggle over the basis for the state was in extreme danger.

The Prussian government under Minister President Braun raised a complaint against the German Reich on July 20, 1932, at the Leipzig state court. Papen named Carl Schmitt as the trial plenipotentiary for the Reich. The trial *Prussia vs. the Reich*, which began on Oct. 10 and ended on Oct. 28, 1932,

was a highly political affair.

It was with the Prussian coup that Schmitt smoothed the way of the Nazis to power. Under Hitler, Schmitt then rose to become the "juridical authority on state emergencies." Thus, Schmitt became the most influential legal interpreter of National Socialist supremacy. On May 1, 1933, Schmitt joined the NSDAP. And in the Summer of the same year, he joined the Society of German National Socialist Jurists, which had been founded in 1928, a branch of the NSDAP which dissolved into the National Socialist Lawyers Society at a national convention of jurists in 1936. Hans Frank, the Reich Law Leader, appointed Schmitt to the leadership board of the Society in 1933; named him Reich's group leader of the university professors group; assigned him to become editor of the *Deutsche Juristenzeitung*, (the German Lawyers' Journal) from Jan. 1, 1934 on; and in 1935, made him the leader of the "scientific branch" of the National Socialist Lawyers Association.

The Society of German National Socialist Lawyers was for Schmitt "a kind of powerhouse," according to Blasius. No decision in the legal realm escaped him; there was hardly any panel in which he was not involved. Schmitt was also a member of the Führer's Council, which was called into being in June of 1933, through Hans Frank; and in the Academy for German Law, Schmitt presided as the chairman over the committee for state and administrative law. On the basis of

his abundance of positions, Schmitt could exercise decisive influence over policy, and he sought through lectures, newspaper articles, and scientific treatises to influence the professional and public perceptions of the actual operations of National Socialism.

Readers may recall here the function of the current U.S. association of judges and state legal professors, the Federalist Society, which was founded in 1982, and from whose circles a great number of Supreme Court justices, legal advisors, and attorneys general have come, who are now forcing through the concept of a “unitary executive” role for the President. This became very clear during the confirmation hearings on the appointment of Judge Alito to the Supreme Court. With Alito’s confirmation, there would be a majority of five of the nine Supreme Court Justices from the Federalist Society “school of thought,” as Sen. Dianne Feinstein (D-Calif.) remarked.

On July 11, 1933, Schmitt was named a member of the Prussian state council. On Oct. 10, work began on a common constitutional law. His ideas on this were presented on Oct. 3, 1933, in a speech Schmitt gave on the occasion of the national convention of German jurists in Leipzig, before the government and legal elite. Proceeding from three elements, “State, Movement, People,” he spoke about the renewal of state and administrative law, and presented himself as the strong-man of the Third Reich. “We know, leadership is not to command, leadership is not dictatorship, leadership is something which is based on the ‘being of the same type’¹ between the leader and his followership,” he declared. At another point he said: “We know the worth of general normative declarations, but also the true worth of the concrete command of a true leader. We don’t get confused by sophistical antitheses between politics and law, and law and power, that the will of the leader is the law: It is to follow the will of a leader, as Heraclitus has told us, even a law (*Nomos*).”

The ‘Röhm Putsch’

How strong Schmitt’s influence was, became overwhelmingly clear with his after-the-fact justifications of the Hitler’s murderous actions of June 30, 1934 (known as the Night of the Long Knives), as “measures” taken out of “state self-defense” by “Führer Hitler.” These “measures”—later justified because of an alleged putsch under the leaders of Nazi SA leader Ernst Röhm—sacrificed dozens of people, among them the Schleicher couple, Major General von Bredow, and also many church representatives.

For Hitler the SA (Sturm-Abteilung), which had grown from a membership of 70,000 in 1930 to 4.5 million in summer 1934, had become something like a state within a state. With a bloody knockout-punch, he sought the “security of

total power.” In the cabinet meeting of July 3, 1934, the law for the measure of “state self-defense” was enacted, whose sole article proclaimed: “The attacks on June 30 for the suppression of those who committed high treason, and the measures carried out on July 1 and 2, 1934 are justified for the self-defense of the state.”

One simply asserted that with these “measures,” the country would be protected from a civil war. Then Hitler gave his Reichstag speech on July 13, 1934, and Carl Schmitt defended the “Führerprinzip” in an exuberant article with the title “The Führer Protects the Law,” which was published on Aug. 1, 1934 in the *Deutsche Juristenzeitung* which he edited.

In this article, under the subhead “On the Reichstag Speech of Adolf Hitler of July 13, 1934,” Schmitt referred to a part of Hitler’s speech, in which it says: “In this hour, I was responsible for the fate of the German nation, and as such [I became] the supreme judge of the German people. . . .” To this citation from the Führer’s speech, Schmitt appended a concise summary: “The true Leader is always also judge. From the realm of the Leader, flows the realm of the Law.” As “the supreme judge of the people,” Schmitt wrote, the Führer has carried out a “judicial act,” which “should not be given new meaning in a subsequent legalistic and indemnifying measure such as declaring a state of siege.”

The arguments of U.S. Attorney General Gonzales, especially in his legal opinions for President Bush from Aug. 1, 2002 on the justification of torture, show a hair-raising parallel to Schmitt’s formulation: that one should not give these decisions new meaning “subsequently in indemnifying measures.” Exemption here means subsequent parliamentary consent to unjust acts by the President.

Schmitt stressed resolutely, that these were measures of “state self-defense.” Similarly, he called attention to lessons from German history. Hitler recalled the collapse of the strong Reich which had been founded by Bismarck, which had not found the strength, during World War I, to make use of its articles of war. In the concluding part of Schmitt’s infamous presentation, he wrote: “The Führer again remembers the collapse of 1918. It is from there that our situation today was determined.” The situation in June 1934 is determined “by the judgment of the Führer over life and death.” Schmitt commented on the murderous action thus: “That the limitation on authorized and unauthorized conduct in case of any doubt can not be an affair of the courts, but should be understood after the previous indications of the peculiarity of the government action and the conduct of the leadership.”

In the last paragraph of his article, Schmitt presented “Leadership and ‘being of the same type’ as the basic conception of national socialist law. . . . Without the foundation of ‘being of the same type,’ the national socialist state cannot endure, and its legal life would be unthinkable; it would, with all its institutions, be once again delivered over to its—soon excessively critical, soon obsequiously assimilating—liberal or Marxist enemies,” he said.

1. This phrase approximates the meaning of the untranslatable term *Artgleichheit*, which was a Nazi reference to the racial solidarity of the “pure” Aryan people.