

# Carl Schmitt Revival Designed To Justify Emergency Rule

by Barbara Boyd

In her warning on the danger of a fascist turn in the United States (see article this issue), Helga Zepp-LaRouche writes, "The decision . . . by the U.S. Supreme Court is a bad omen. Especially dangerous, is the policy of Justice Antonin Scalia, which stands in the tradition of Carl Schmitt—the 'legal' apologist of the Nazi dictatorship."

Lyndon LaRouche recently wrote that U.S. Supreme Court Associate Justice Antonin Scalia's avowed doctrine of literal textualism, which banishes the general welfare clause, and other governing concepts, from the U.S. Constitution, if continued under present conditions of financial collapse, "leads, quickly, either to a self-doomed fascist dictatorship, or, a rapid descent of society directly into chaos." Scalia's "political and legal outlook is identical, in all crucially relevant points of comparison, to the legal dogmas used to bring Hitler to power during a roughly comparable period of grave financial crisis in Germany. . . . [He] expresses the same explicitly Romantic dogmas of the pro-fascist conservative revolution of G.W.F. Hegel, Friedrich Nietzsche, et al., in keeping with the model precedent of the so-called 'Crown Jurist' of Nazi Germany, Carl Schmitt." The same can be said of Bush's Attorney General Designee, and Scalia disciple, John Ashcroft. LaRouche stresses that Americans need to know the history which concluded the Weimar Republic and installed Hitler, in order not to repeat it. The incoming Administration of George W. Bush is headed in exactly the same direction

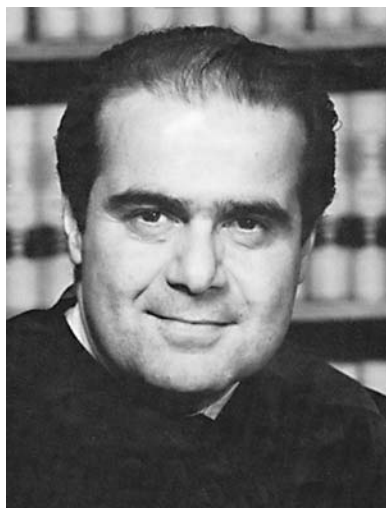
as the Nazi government that his grandfather, Prescott Bush, together with Morgan and British interests, brought to power.

The Nazis' "Crown Jurist," Carl Schmitt, drew on a variety of reactionary resources, including Roman law, Napolean, Rousseau, Kant, Hegel, Hobbes, and the Spanish counter-revolutionary Donoso Cortes, to forge a synthetic theory of law which subverted the Weimar Republic's Constitution and rationalized Hitler's legal ascension to power. As the world Depression hit Germany in 1929, Schmitt was brought directly into government, successively advising the Brüning and Von Papen administrations on implementing austerity through rule by emergency decree. As will be shown here, Schmitt's legal analysis of commissarial and sovereign dictatorship, based on Article 48 of the Weimar Constitution, first formulated in 1922, provided the legal basis for Hitler's assumption of power, through the declaration of emergency and suspension of rights of Feb. 28, 1933. Schmitt then authored the authoritative article justifying the enabling laws of March 24, 1933, which transformed Germany, legally, in Schmitt's analysis, from a commissarial to a sovereign dictatorship.

At the urging of the philosopher Martin Heidegger, Schmitt joined the Nazi Party. Heidegger and Schmitt stood in line on May 1, 1933 to join, having previously agreed to do so together. Schmitt proceeded to develop a Nazi theory of law, including the removal of "man" from the German civil code. Arrested for prosecution at Nuremberg, he was detained for 18 months, but never prosecuted. When he was released, he retired to his place of birth, Plettenburg, and referred to his home as San Casciano, the place in Italy where Machiavelli lived while in exile, after losing favor with the Medici family. Schmitt campaigned endlessly, until his death in 1985, to redeem his reputation, portraying himself as an academic victim of events, a man of ideas only, who supported the boorish Hitler because there were no other options.

## Schmitt's Campaign Against The Weimar Constitution

Born in 1899 to a Catholic working class family, Schmitt studied jurisprudence at Berlin, Munich, and Strasbourg, where he took his law degree in 1910. A self-proclaimed "Neo-Kantian" in his youth, Schmitt attacked positivism, utilitarianism, and philosophical liberalism. Like Romantic conservative moralists today, Schmitt thought he accurately depicted the world around him by declaring it bereft of "soul."



*U.S. Supreme Court Associate Justice Antonin Scalia, whose statements in the recent Presidential election raise the question: At Nuremberg, would Scalia have been on the bench, or in the dock?*



Carl Schmitt (inset), the legal apologist for the Nazis' seizure of power, who was arrested for prosecution at Nuremberg, but never prosecuted, and Hjalmar Schacht, the Nazis Economics Minister whose policies led to the extermination camps, in the dock at Nuremberg. Schmitt later tried to portray himself as a mere academic, but his arguments "legally" justified the Nazis' emergency rule.

His was an "inartistic, materialistic, relativistic, and capitalistic age," which elevated "function" as some grand means to a "useless and senseless goal." Right had been transformed into power, faith into calculation, truth into a general recognition of accuracy, beauty into good taste. In place of good and evil, there was a sublime distinction between usefulness and destructiveness. Schmitt attacked the dominant positivist theory of law as a sterile and proceduralist closed system of norms, which was morally neutral and incapable of inspiring fidelity or sacrifice in the population. No one would die for positivism.

In World War I, Schmitt served under the general staff, administering martial law. From this time forward, Schmitt was fascinated by concepts of crisis management, the "state of exception" or "state of emergency." According to Schmitt, how the state acted in the face of "concrete danger" or the "concrete situation," rather than any moral purpose, determined its legitimacy. Schmitt viewed the spread of the Russian Revolution as the greatest peril facing Germany. Plunging into simultaneous studies of Italian Fascism and Leninism, he emerged as a Mussolini devotee, claiming that Il Duce had effectively united the church, an authoritarian state, and a free economy, and created a powerful mythos to motivate the population. This view was shared by the British, including Winston Churchill. Schmitt was also convinced that a closed system of positive laws and existing democratic

norms, were powerless in the face of charismatic political movements and the irrational myths employed by the Bolsheviks to achieve popular success. Democratic "norms" failed in conditions of social upheaval precisely because such moments represented non-linear discontinuities and "original" moments.

Beginning with his book *Political Romanticism* in 1919, and continuing with major books and speeches every year until the demise of the Weimar Republic in 1933, Schmitt launched an unrelenting polemical assault on the Weimar Republic and its Constitution. In his books *Political Romanticism*, *The Crisis of Parliamentary Democracy*, and *Political Theology*, Schmitt attacked the liberalism, protection of individual rights, and pluralism of the German Republic as "Romantic." His attacks echo those of the conservative revolution and populists in the United States today. Parliamentary legitimacy rested on the idea that "endless discussion" could generate truth, Schmitt argued, yet the Weimar Parliament had long ago ceased to represent the people. Instead, it represented powerful interest groups and partisan political formations which were incapable of decisive action, particularly when the very existence of the state was the issue. Schmitt famously commented that a Social Democrat, when asked, "Christ or Barrabas?" would immediately seek consultation and then convene a commission to study the matter. The liberal and Romantic regime had replaced the objectivity of God with

the subjectivity of the individual, and partisanship and interest groups made decisive governmental action impossible.

In *The Concept of the Political* and *The Dictator*, Schmitt presented his response to liberal democracy and legal positivism. According to Schmitt, the existence of the state presupposes the existence of the political, and the political consists primarily of the relationship between the friend and the foe. Look around you, Schmitt instructs a Germany devoured by war, total economic breakdown, and social crisis, and see whether any other relationship empirically and objectively defines the state's legitimacy, its ability to exist. The most basic definition of the sovereign, Schmitt adds, is the individual who is able to define the exceptional situation, and to define the foe in the exceptional situation.

### **Weimar's Article 48**

In proposing solutions to the Weimar Republic's political paralysis, Schmitt focussed on Article 48 of the Weimar Constitution, which allowed for temporary rule by decree and suspension of rights in emergency situations. Schmitt, taking a page from Roman law and Napoleon III, argued that Article 48 established a commissarial, or temporary dictatorship, without abrogating the Constitution, and, under crisis conditions, was the only means to govern. The job of the temporary dictatorship was to save the existing Constitution, and therefore, rule by the President, under Article 48, did not establish a sovereign or long-term dictatorship. In his campaign to legitimize his theory of Presidential powers under Article 48, Schmitt won the endorsements of Social Democratic Party (SPD) member Hugo Preuss, the author of the Weimar Constitution, and Max Weber, a celebrated racist sociologist who originated the idea of incorporating Article 48 into the Weimar Constitution.

When the Depression hit full force in 1929, Schmitt, then a law professor in Berlin, was asked by Chancellor Heinrich Brüning to advise the government concerning maintenance of the constitution under the brutal austerity regime he proposed to implement, in response to the economic crisis, over the opposition of a fractured Parliament. In a July 28, 1930 opinion for the government, Schmitt argued that because an economic emergency existed, Article 48 allowed the President to issue decrees with the force of law—in effect, to legislate, without regard to Parliament. As a result of Brüning's brutal measures against the German population on behalf of the banks, Nazi representation in the Parliament rose from 12 seats to 107, in the elections of Sept. 14, 1930. Brüning was dismissed, and replaced in the Chancellorship by the intellectually vacant and radically conservative Von Papen.

When Von Papen declared martial law and took over the government of Prussia from the SPD, Schmitt defended the Reich before the German Supreme Court, and strongly supported Von Papen's imposition of harsher economic austerity measures. These measures emphasized wage cuts and reductions in unemployment benefits. Job creation was to be promoted, not through government intervention, but by tax relief

for business. In a speech to a group of industrialists in support of Von Papen's program, Schmitt developed the twin themes, "strong state" and "free economy," arguing that only an authoritarian state could assure the success of a pure free-market economy. While acknowledging that crisis management had not improved the economic situation, Schmitt nevertheless argued for the continued vitality and employment of Article 48, stating that it was the only means to oppose those advocating a "legal functionalism" which stays neutral with respect to truth and values.

### **The Nazis' 'Crown Jurist'**

As *EIR* has documented, Hitler was appointed Chancellor of Germany on Jan. 30, 1933, as a result of the direct support of George W. Bush's grandfather, the Morgan interests, and the British.<sup>1</sup> The last chance for avoiding this result collapsed with the failure of sufficient forces to support Gen. Kurt von Schleicher's efforts to implement an economic recovery. On Feb. 27, 1933, the Nazis, under Hermann Göring's sponsorship, staged the Reichstag fire, and on Feb. 28, Hitler suspended basic constitutional rights, and accused the Communists of sabotage, imprisoning at least 4,000 alleged Communists and banning them from Parliament.

On March 23, the Reichstag passed enabling legislation by a vote of 444 to 94, which stated that henceforth, the Executive, as well as the Reichstag, could pass laws. The "Act to Relieve the Distress of the People and the Reich," effectively legislated Schmitt's 1930 legal opinion authorizing Presidential rule, and installed Hitler's sovereign dictatorship. In an article in the *Deutsche Juristen Zeitung* of March 25, 1933, Schmitt defended the enabling legislation, claiming that the Executive prerogative now included the power to pass new constitutional laws and declare the Weimar Constitution a dead letter. Schmitt found the new law to be the expression of a "triumphant national revolution," equating it with the German Revolution of 1918. According to Schmitt, "The present government wants to be the expression of a unified national political will, which seeks to put an end to the methods of the plural-party state, methods which were destructive of the state and the constitution."

During his service to the Nazis, Schmitt reported directly to Göring and Hans Frank. From his position as a Professor of Law at the University of Berlin, Schmitt supervised a project to conform all German law to Nazi theory. The overall Reich now consisted of three elements, according to Schmitt: state, movement, and people. The state represented the administrative apparatus; the movement represented the political leadership which acted on behalf of the people; and the people, or civil society, lived free of governmental interference, under the shadow and protection of the higher political order. To the extent that orders of the Führer needed democratic legitimacy, they could be voted upon in referenda or plebi-

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1. Anton Chaitkin, "Dubya's Grandpa and Great-Grandpa Helped Put Adolf Hitler into Power," *EIR*, Aug. 25, 2000.

scites by the people.

Schmitt's description was altered by the Nazis in only one respect. They found his frank admission that the people were to play a completely passive role, politically unacceptable, and substituted the populist myth that the people represented the "vitality" of the Reich. Hitler did, in fact, submit various measures to the population for votes. According to Schmitt, the Weimar Republic lacked "charismatic leadership," without which the state becomes a directionless "bureaucratic regime."

### 'Carl Schmitt Abolishes Man'

In revising the criminal code, Schmitt declared that previous law had served only to empower criminals against the population, and he levelled a scathing critique at the German Supreme Court for failing to impose the death sentence on those prosecuted for the Reichstag fire, because the law making arson punishable by death had only been passed after the fire. Henceforth, retroactive laws must be available to judges,

Schmitt argued, who should be allowed to reach the right result, without the hindrance of abstract and irrelevant precedents. Judges could employ "concrete order thinking" in this process. Schmitt's revision of the civil code declared that the "legal concept of man conceals and falsifies the differences between the citizen of the Reich, a foreigner, a Jew, and so on. . . . Seeing equal as equal, and, above all, unequal as unequal, and emphasizing the differences among men of different races, nations, and occupational estates in the sense of God-given realities, those are the goals of National Socialist academic jurists."

The émigré press, which included many of Schmitt's former students, led its coverage of these statements with the headline, "Carl Schmitt Abolishes Man."

Finally, Schmitt justified Hitler's aggression against other nations of Europe by claiming that Germany was creating a *Grossraum*, a sphere of influence, just as the United States had done with the Monroe Doctrine. This formulation, Hitler employed directly in defending his actions.

## Schmitt: If Man Were Not Evil, My Ideas Would Be Evil

Since the fall of the Berlin Wall, Carl Schmitt has been the subject of a huge revival in the United States, Russia, Europe, and Ibero-America. This revival, corresponding to similar recent revivals of Martin Heidegger and Friedrich Nietzsche, is indicative of an effort by the British-American-Commonwealth cabal to popularize totalitarian dictatorship as a solution to social collapse. Such dictatorships represent the only possible means for administering the strict austerity regimes they envision. The Schmitt revival has resulted in translations of Schmitt's key tracts against the Weimar Republic into several languages; conferences on Schmitt at Columbia University, Cardozo Law School, Tel Aviv University, and other locations; and more than 2,500 secondary publications on Schmitt.

The Schmitt revival does not mean that the Nazi "Crown Jurist" was previously an unknown or obscure figure in the United States. Samuel Huntington's "Crisis of Democracy" and "Clash of Civilizations" theses, as well as Henry Kissinger's studies of Bismarck, borrowed heavily from Schmitt, without attribution. Mont Pelerin Society founder Friedrich von Hayek studied Schmitt extensively, and criticized him, while appropriating central concepts. Leo Strauss, considered to be the philosophical father of the neo-conservative movement in the United States, is a Schmitt devotee. The Frankfurt School ideologues, particularly Hannah Arendt, Herbert Marcuse, and Walter Ben-

jamin, plagiarized freely from Schmitt. The Frankfurt School's legal theorists, Otto Kirchheimer and Franz Neumann, both students of Schmitt in Germany, spent academic careers formulating abstract critiques of Schmitt while insisting that he was a major, original legal theorist. When the Pinochet dictatorship was imposed in Chile, it was imposed by students of Schmitt who followed, precisely, Schmitt's playbook for "legal" imposition of dictatorship.

### The Hobbesian Influence

Schmitt claims Thomas Hobbes as the central influence for his existential theory of the state and his theory of justice, theories in which truth and morality play absolutely no role. Schmitt transformed Hobbes's individual "war of each against all," into wars of identified groups, including states against other states, claiming that the "Westphalian" order of Europe had been completely broken by World War I. For Hobbes, like U.S. Supreme Court Associate Justice Antonin Scalia, truth and justice are "private" values relegated to "civil society," and should not be the subject of government policy.

Hobbes and John Locke have long been the philosophers of choice in justifying the positivist expressions of legal Darwinism embraced by Scalia, Supreme Court Chief Justice William Rehnquist, and Bush Attorney General Designee John Ashcroft, today. Like Hobbes, Schmitt's estimate of man is that he is evil and "dangerous." Schmitt states, "If man were not evil, then my ideas would be evil." At the point that conflict and war end, Schmitt declared, "the political," i.e., the state, also will end.