
Profile: Carl Schmitt

Dick Cheney's Éminence Grise

by Barbara Boyd

Lyndon LaRouche is not the only Constitutional scholar to remark that President Bush's claim of absolute Presidential power, trumping any mere law or statute, and Cheney's Air Force II ramblings, come straight out of Carl Schmitt. Sanford V. Levinson, who holds dual professorships in law and government at the University of Texas, and is an eminent Constitutional scholar, wrote in the Summer 2004 issue of *Daedalus* that, "although some analysts have suggested that the Bush Administration has operated under the guidance of the ideas of German emigré Leo Strauss, it seems far more plausible to suggest that the true *éminence grise* of the administration, particularly with regard to issues surrounding the possible propriety of torture, is Schmitt."

In a similar vein, Scott Horton, chairman of the International Law Committee of the New York City Bar Association and adjunct Professor at Columbia University published a note on "Balkanization" on Nov. 7, titled "The Return of Carl Schmitt." In discussing Justice Department lawyer John Yoo's advice that the Executive Branch was not bound by the Geneva Conventions and similar international instruments in its conduct of the war in Iraq, Horton writes, "Yoo's public arguments and statements suggest the strong influence of one thinker: Carl Schmitt."

According to Schmitt, Horton notes, "the norms of international law respecting armed conflict . . . are 'unrealistic' as applied to modern ideological warfare against an enemy not constrained by notions of a nation-state, adopting terrorist methods and fighting with irregular formations that hardly equate to traditional armies. For Schmitt, the key to successful prosecution of warfare against such a foe is demonization. The enemy must be seen as absolute. He must be stripped of all legal rights of whatever nature. The Executive must be free to use whatever tools he can find to fight and vanquish this foe. And conversely, the power to prosecute the war must be vested without reservation in the Executive—in the words of Reich Ministerial Director Franz Schlegelberger (eerily echoed in a brief submission by Bush Administration Solicitor General Paul D. Clement) 'in time of war the Executive is constituted the sole leader, the sole legislator, sole judge.' I take the liberty of substituting Yoo's word, Executive; for Schmitt or Schlegelberger, the word would, of course, have been *Führer*."

Who Was Carl Schmitt?

Born in 1899 to a Catholic working class family, Carl Schmitt studied jurisprudence at Berlin, Munich, and Strasbourg, and then served under the German general staff in World War I administering martial law. Following this formative experience, Schmitt formed his central political idea: that how the state acts in the face of "concrete danger" or the "concrete situation," rather than any moral purpose, determines its legitimacy. The sovereign or legitimate dictator is the person who decides the "state of exception" in order to preserve order and protect the constitution. Committed to the world view of G.W.F. Hegel and Thomas Hobbes, in which man is "fallen" and "evil," Schmitt argues that all politics reduces itself to the relationship of "friend and foe."

In the Schmitt corpus, democracies based on "norms," legal rules, and the separation of powers are powerless when confronted by charismatic and powerful religious or political threats to their existence, such as the Bolsheviks. The existence of "exceptional situations" such as states of emergency, refute the very foundation of liberal political systems which are premised on pre-established laws and norms purportedly applicable to all possible situations. Schmitt mocked the idea that rational, endless legislative debate and discussion could generate the truth, noting that a social democrat when asked, "Christ or Barrabas?" would immediately seek consultation and then convene a commission to study the matter. The enlightened public sphere, the "city on the hill" in our American discourse, had disappeared in post-World War I Germany. For Schmitt, it had been superseded by the advent of mass markets, myth-making, and propaganda machinery, self-interested partisan assertion, and civilizational chaos and moral collapse.

From 1921 through 1933, as a law professor producing polemical tracts which were closely read, studied, and promoted by the synarchist banking crowd which sponsored Europe's fascist experiment, and then as a counselor in the governments of Brüning and von Papen, Schmitt relentlessly attacked and undermined the Weimar Constitution.

As early as 1922, Schmitt argued in *Political Theology* that the true sovereign is the individual or group who makes decisions in the exceptional situation. This individual or group, not the Constitution, is the sovereign. The most guidance a Constitution can provide is the stipulation of who can act in such a situation.

In *The Concept of the Political*, published in 1927, Schmitt asserted that the state's very identity and existence proceeds from the more fundamental or basic relationship between "friend and enemy," and that sovereignty is determined by the individual or entity who is able to define and protect society against the foe under conditions of existential threat. Rather than resort to norms, Schmitt stipulates, the sovereign resorts to the law of the battlefield or "concrete decisionism."

Throughout a long career, which continued until his death

in 1985, Schmitt remained devoted to the Italian form of fascism under Mussolini which, Schmitt claimed, united the church, an authoritarian state, a free economy, and a powerful mythos which motivated the population.

The Transition to Constitutional ‘Dictatorship’

Schmitt’s principal weapon in deconstructing the German Constitution, however, was its Article 48 provision which allowed for the creation of a state of emergency and Presidential rule by executive order. In *The Guardian of the Constitution*, published in 1931, Schmitt argued that Article 48 conferred an unlimited authority in the German President to suspend the Constitution during a state of emergency, as long as he restored the Constitution when the emergency ended. Under Article 48, the President had inherent dictatorial powers as “protector of the Constitution,” including the power to legislate, free from the need of parliamentary authorization. Since the President alone represents all of the people, resort to direct plebiscites would resolve any doubts about democratic legitimacy under Presidential rule.

After Brüning’s fall in 1932, Germany was governed by a Presidential dictatorship with Schmitt as its legal advisor. When the Nazis staged the Reichstag Fire on Feb. 27, 1933, of course, the stage had already been set for a relatively unremarkable legal transition from Schmitt’s “commersarial” or temporary dictatorship to Schmitt’s idea of a sovereign or permanent dictatorship.

On Feb. 28, 1933, Hitler utilized Article 48 to suspend the rights of his opponents, labelling them as terrorists. A frightened Parliament, believing that Germany was under attack by the Bolshevik hordes then passed enabling legislation legitimizing the dictatorship on March 23. In an article in the *Deutsche Juristen Zeitung* of March 25, 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. The new law was, Schmitt wrote, the expression of a “triumphant national revolution.” According to Schmitt, “the present government wants to be the expression of a unified national political will which seeks to put to an end the methods of the plural party state which were destructive of the state and the Constitution.”

When Hitler slaughtered his political opponents in the “Night of the Long Knives,” including Kurt von Schleicher, whom Schmitt had once declared a friend, Schmitt wrote in the *Deutsche Juristen Zeitung* in 1934 that, “The *Führer* protects the law against the worst abuse when he, in the hour of danger, by virtue of his leadership, produces immediate justice. The true leader is, at the same time, always a judge.”

In a propaganda piece published in Germany in 1936, and later in France, Schmitt characterized every government in post-World War I Europe as suppressing the constitutional distinction between legislative and executive powers because they needed to keep legislative powers “in harmony with the constant changes in the political, economic, and financial situ-

ation.” The only unique thing about the Hitler Reich was that this process had reached its logical conclusion in Germany. In 1933, Germans had fully dispensed with conventional notions of the “separation of powers” by instituting a system of genuine “governmental legislation.” It would be wrong, Schmitt said, to characterize this evolution as a “dictatorship.” Rather, it represented the triumph of an older constitutional legality, one rooted in the thinking of Aristotle and Thomas Aquinas.

During his service to the Nazis, Schmitt reported to Herman Göring and Hans Frank, supervising a project to purge German universities of any Jewish influences, and to conform all German law to Nazi theory. Schmitt justified Hitler’s aggression against other nations of Europe by claiming that Germany was creating a *Grossraum*, a sphere of influence, like the United States did with the Monroe Doctrine. When Schmitt fell out of favor with the SS, he travelled to Spain, Portugal, and Italy, under synarchist sponsorship providing lectures on how to continually legitimize the fascist governments of those nations. He refused de-Nazification after his arrest at the end of the war, arguing that he took no part in the actual administration of genocide but only provided “ideas,” or “a diagnosis.”

The U.S. Carl Schmitt Revival

The close relationship between Carl Schmitt and Leo Strauss, and the explosive revival of Schmitt’s works in the United States, funded by the same foundations which sponsor the Federalist Society in the 1980s and 1990s (see following article) suggest that Dick Cheney’s advocacy of the *Führerprinzip* is not a matter of coincidence. Schmitt helped Strauss obtain a Rockefeller Foundation grant to come to the United States. Strauss and Schmitt collaborated on Schmitt’s book, *The Concept of the Political* and on Strauss’s book on Hobbes. Strauss’s fawning letters to Schmitt continued long after the Nazis’ ascent to power.

New York University Professor George Schwab produced two books on Schmitt in the 1970s, working with Schmitt himself to cleanse and minimize Schmitt’s Nazi past for a U.S. audience. Schwab was a protégé of foreign policy “realist” Hans Morgenthau, also of the University of Chicago, and Schmitt’s works proved useful in the 1970s dirty work of George Shultz and Henry Kissinger in overthrowing the Allende government in Chile, and establishing a bankers’ dictatorship run through the University of Chicago and Gen. Augusto Pinochet. Jaime Guzman, an open and proud follower of Carl Schmitt, is widely recognized as the individual who provided popular legal legitimization for Chile’s “constitutional coup,” utilizing, Guzman states, the theories provided by Carl Schmitt. José Piñeras, the leader of Chile’s social security reform, who toured the U.S. on behalf of George Bush’s Social Security reform proposals, declares on the Internet that he was, “the closest friend” of Guzman.

In the late 1970s, a German Straussian, Heinrich Meier of

the Siemens Stiftung, also began working on a major reformulation of Schmitt for purposes of the emerging Conservative Revolution. Concentrating on Schmitt's postwar diaries, his early work with Leo Strauss, and Schmitt's resurrection of the Spanish philosopher Donoso Cortes for purposes of legitimizing Franco, Meier recast Schmitt as the theoretician of permanent religious warfare or world civil war on behalf of the God of revealed religion, a theory which has chilling resemblance to the worldview expressed by George W. Bush.

In the 1980s and 1990s Schmitt became a staple on reading lists of U.S. colleges and universities in political science and philosophy, a revival which produced English translations of most of Schmitt's works, and reams of "scholarly" articles, conferences, and presentations. Funding for this project centered in the Lynde and Harry Bradley Foundation and other neo-conservative foundations. Michael Joyce, who chaired the Bradley Foundation during this period, is a Straussian who started his career with Irving Kristol and the Institute for Educational Affairs—the same Foundation that provided seed funding for the Federalist Society. The English translations of both Meier books on Schmitt were published by the University of Chicago Press under grants from the Bradley Foundation, facilitated by Hillel Fradkin. Fradkin, a Straussian, taught on the Committee on Social Thought at the University of Chicago, was vice president of the Bradley Foundation from 1988-1998, a program officer at the Olin Foundation, heads a Straussian think tank in Israel called the Shalem Center, and recently replaced Iran-Contra's Elliott Abrams as the head of the Ethics and Public Policy Center in Washington, D.C.

Fascist 'Feddies' March Through the Institutions

by Jeffrey Steinberg

The same right-wing tax-exempt foundations that are behind the Carl Schmitt revival of the past 20 years, have also bankrolled a "Schmittlerian" "march through the judicial institutions" via the misnomered Federalist Society. Founded in 1982, at the University of Chicago and Yale University law schools, the Federalist Society has promoted the dismantling of all regulatory protection of the General Welfare, while advocating the most draconian police-state excesses, typified by the Patriot Acts and the "torture memos." These have been authored by a team of Federalist Society members and allies inside the Department of Justice Office of Legal Counsel and the White House Office of the General Counsel—under the sponsorship of Vice President Dick Cheney and Cheney's current chief of staff and general counsel, David Addington.

The Federalist Society's *modus operandi*: To hijack the curriculum at major American law schools on behalf of patently anti-American "Conservative Revolution" fascist dogmas, and place a carefully screened and indoctrinated group of ambitious right-wing attorneys in key posts in the Executive Branch, and in Federal regulatory agencies, to overturn the U.S. Constitution. Federalist Society members and fellow-travellers now dominate the Office of the White House General Counsel and the Justice Department's Office of Legal Counsel, and hold a large and growing number of Federal Court judgeships, including on the U.S. Supreme Court. Federalist Society board member C. Boyden Gray, who was White House General Counsel under President George H.W. Bush, employed Federalist Society founder Lee Liberman Otis to head up judicial screening at the Bush 41 White House; she boasted, according to Lawrence Walsh, that not one judicial appointment was made by Bush of a non-Federalist Society member.

When then-First Lady Hillary Clinton denounced a "vast right-wing conspiracy" behind the impeachment of President Bill Clinton, she was, knowingly or not, shining a spotlight on the Federalist Society. Federalist Society booster Judge David Sentelle, Jr. headed the judicial committee that selected Federalist Society member Kenneth Starr to head the White-water probe. Starr selected Federalist Society member Brett Kavanaugh as one of his deputies (Kavanaugh has been a White House Associate Counsel since the Bush 43 inauguration in January 2001). Federalist Society Board of Visitors Co-Chairman Sen. Orrin Hatch (R-Utah) chaired the Senate Judiciary Committee at the time of the Clinton impeachment trial. His son, Brent Hatch, is the Treasurer of the Federalist Society board of directors. Federalist Society Washington, D.C. chapter President Theodore Olson, the recently retired Solicitor General of the United States, ran the "Get Clinton salon" that drew together right-wing media pundits, lawyers, and foundation executives, to drive the propaganda barrage against the Presidency.

For the most part, the Federalist Society has gone out of its way to hide its Schmittlerian roots. To read the Society's glossy literature, one would get the false impression that they are revivalists of the James Madison Federalist tradition. The group's Fiscal Year 2003 Annual Report claimed, "The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities."

Then the Big Lie concludes: "This entails reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also re-