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Joseph Bendersky

The Expendable Kronjurist: Carl Schmitt and National Socialism, 1933-36

In 1932 Carl Schmitt, one of Germany's most renowned constitutional theorists and conservative writers, published *Legalität und Legitimität*. The book pointed to the danger that national socialists or communists might take power by legal means and destroy the Weimar constitution. Yet by the spring of 1933, Schmitt had joined the NSDAP; he helped to institutionalize *Gleichschaltung*, and for the next few years seemed to be the movement's tame legal philosopher, the Third Reich's *Kronjurist*. His change of direction and the vacillating nazi attitude towards him have long been a subject of speculation. For many years the prevailing interpretations presented Schmitt as an intellectual underminer of the Weimar Republic, who saw his hopes and expectations fulfilled in the *Machtergreifung*, so that his embracement of nazism could be viewed as a natural transition.¹ More recent studies, however, have revived the question by showing that, before 1933, Schmitt had actually opposed national socialism.²

Fortunately, several sources of information have now shed further light on the controversy. These include the Schmitt file compiled by the *Sicherheitsdienst*, selected documents from Schmitt's unpublished personal papers, and his own comments on the subject.³ This evidence shows how a man who had argued that the Reichspräsident was the legal defender of the constitution⁴ could so rapidly transfer his allegiance to the usurpers; the compromises he made as well as his difficulties under the new regime are clearly

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documented. It now appears that no single factor, neither opportunism nor faith in the nazi ideology, suffices to explain his metamorphosis. Instead, the reasons for his collaboration lie in a labyrinth of personal involvements, closely intertwined with his basic political philosophy.

During the Weimar period, Carl Schmitt had become nationally recognized as a professor of public and constitutional law.⁵ Before accepting the Hugo Preuss chair at the *Handelshochschule* in Berlin, he had been a professor at Greifswald and Bonn. A prolific writer, Schmitt had also distinguished himself as a political publicist who enthusiastically joined in the debate about the crisis of parliamentary government, and who came to the forefront as a harsh critic of what he called the excessive pluralism of the Weimar regime.⁶ But although he was undoubtedly a conservative thinker with many reservations about Weimar, he must be considered a rational republican rather than a reactionary or a prophet of national revolution. A consistent precept of his political philosophy was obedience to and preservation of existing political and legal order. Throughout this period his main concern was lest the internal political divisions of the existing party system should paralyse the government and open the way for the extremists of right and left. Even during the most stable period of the Weimar Republic Schmitt confessed that he had 'an almost continual fear' for the way in which 'the German right and left' pursued their politics.⁷

To counteract these destabilizing forces and prevent the destruction of the Weimar constitution, Schmitt had, as early as 1924, urged the extensive use of presidential emergency powers in times of crisis.⁸ Believing that the authority of the Reichspräsident could compensate for the weakness of the Weimar party system, he actively participated in Schleicher's scheme to solve the political crisis of 1929-33 by instituting the presidential system. As the intimate constitutional and political adviser to the coterie around Schleicher, especially the General's aides, Colonels Erich Marcks and Eugen Ott, he acquired a reputation as *Kronjurist* of the central government.⁹ In this capacity he supported Schleicher's attempts to stabilize the political situation and prevent the national socialist acquisition of power. Schmitt was convinced that both objectives could be achieved under existing constitutional authority granted to the Reichspräsident by Article 48 of the Constitution. After 1929 he reconciled himself to the fact that constitutional revisions were

necessary, but feared that tampering with the constitution before a settlement of the political crisis might lead to civil war.¹⁰ He envisaged the eventual rise of an effective authoritarian government, centred around the Reichspresident, which could crush both extreme right and left.

Before January 1933, mutual suspicion had arisen between Schmitt and the national socialists, who knew of his efforts to assist Schleicher in blocking their seizure of power.¹¹ Consequently, he felt deep disappointment on Hitler's appointment as Chancellor: 'I was out of the race, insofar as I was ever really in the race as a behind-the-scenes adviser'.¹² During the first weeks of the new regime, however, like many conservatives, he doubted whether the nazis would succeed in abrogating the Weimar constitution and in instituting a completely new political and legal order. In early February he still hoped that Schleicher and the army would do everything possible to end the nazi adventure.¹³

Nevertheless the passage of the Enabling Act of 24 March produced a decisive change in Schmitt's attitude. He saw that Hitler, now empowered to make unconstitutional laws, had acquired virtually absolute dictatorship. The Enabling Act was the last suicidal stroke of the Weimar Republic. Schmitt immediately wrote an article tearing away the veil of constitutionality from the true implications of the Act, which he conceded represented 'the victory of the National Revolution', as decisive as the revolution of 1918. Later that year, he described the Enabling Act as the 'provisional constitution of the German Revolution', the genesis of a new political and legal order.¹⁴

From that point Schmitt adopted a conciliatory attitude towards the nazis. His previous reservations on immediate constitutional revision now seemed unimportant; he accepted the reform as a major goal of the new government. Similarly, his fears of civil war vanished, since the nazis now controlled the government, had acquired a pseudo-legal mandate after the March elections and were sufficiently powerful under the Enabling Act to eliminate their opposition and institute wide-ranging reforms. Whatever his distrust and disapproval, Schmitt had to adjust himself to the fact that national socialism had become the dominant force in German politics.

At first it appeared most unlikely that Schmitt would have any role in the Hitler regime, given his association with the Schleicher clique, his previous opposition to the national socialists and lack of contact with the party. He was an outsider with far fewer

possibilities of exerting influence than under the presidential system. Despite these obstacles, he was gradually brought into the service of the Third Reich, whose leaders, concerned with consolidating power, displayed an uncharacteristic tolerance by temporarily overlooking their opponent's past in order to attract such prestigious support for their cause. This led Schmitt eventually to believe that he might direct constitutional developments into a traditional conservative framework.

Schmitt's transition was made easier by his association with such men as Papen and Johannes Popitz, whose positions within the Nazi government tended to reinforce the illusion of continued conservative influence. As a legal adviser to the presidential government, he had argued Papen's case before the Supreme Court in the historic 1932 trial 'Prussia v. Reich' and they had again met on 16 February 1933 to discuss Prelate Kaas's public challenge to Schmitt's interpretation of Article 48.¹⁵ From 1929 onward, Schmitt had also established a personal and political relationship with Popitz, then a State Secretary in the Finance Ministry, and now Finance Minister in Goering's Prussian cabinet.¹⁶

When, on 31 March, Hitler decided to institutionalize *Gleichschaltung* by the 'Second Law for the Coordination of the Reich with the *Länder*', the *Reichsstatthaltergesetz*,¹⁷ Papen called Schmitt to a meeting on 1 April, along with Popitz and Wilhelm Frick, to draft the details. Schmitt had always considered obedience to the legally constituted authority as a fundamental political precept¹⁸ and, just as he had transferred his allegiance in 1919 from the Second Reich to the Weimar Republic, he now felt bound to obey the newly constituted legal authority. Whether the recent actions of the Hitler government against the *Länder* were legally justifiable under the Weimar constitution seemed irrelevant, since he firmly believed that the Enabling Act had inaugurated a new legal order. Furthermore, by empowering the Chancellor to appoint commissars to oversee *Länder* governments, the *Reichsstatthaltergesetz* destroyed the possibility of state resistance to the Reich. Schmitt had always advocated a strong central government unhampered by federalism and the domestic strife characteristic of late Weimar.¹⁹

The centralization of power was only the beginning of the far-reaching changes Schmitt expected as a natural consequence of the Enabling Act. He viewed his participation in the Papen commission as an opportunity to reassert himself in political affairs and to

take an active part in establishing a theoretical and legal framework for the new constitutional order he was sure would follow. Unfounded rumours had circulated as early as 1932 concerning Schmitt's preparation of a new constitution.²⁰ And now he deluded himself into believing that he and his fellow conservatives could lay the foundations for a traditional authoritarian German state.

At this point Schmitt continued to maintain his independence from the NSDAP. It appeared that he might attempt to follow the path he had pursued throughout the Weimar Republic, remaining aloof from direct party activity while serving as a behind-the-scenes adviser to the conservative clique within the government. Obviously, nationalism, anti-liberalism, strong leadership and the replacement of the pluralistic Weimar *Parteienstaat* by a powerful, centrally controlled state made the new regime acceptable to him. Nevertheless, he had previously harboured such ideas while still displaying a typical conservative aversion to national socialism.

Unfortunately, the luxury of intellectual and political autonomy soon proved untenable, as Schmitt succumbed to fear and the mounting dynamism of the nazi movement. Always a cautious realist, his sharp instinct for self-preservation took control as he witnessed the nazi purge of German universities. 'The Law for the Restoration of a Professional Civil Service' had removed the constitutional rights of civil servants, including professional tenure. Schmitt knew that his own position was not immune from such measures, particularly in view of his former opposition to national socialism. Other well-known professors of law, such as Radbruch, Bonn, Cohn, Heller, Kantorowicz, and Kelsen from Schmitt's own faculty at Cologne, faced dismissal; before the purges ended, over eleven per cent of Germany's professors would lose their chairs. A further anxiety was presented by the large nazi student groups who waged a noisy campaign of disruption and boycotts against Jewish, liberal, socialist and non-cooperative professors.

At the same time, rapid submissions within the universities and even some enthusiasm for the new regime accompanied the coercion, boycotts and reprisals. Early in March hundreds of professors, with hundreds still to follow, displayed their public support for the nazis. By the end of April even the professorial association, the University League, had come to terms with the regime. Two of Schmitt's most promising law students, Ernst Rudolf Huber and Ernst Forsthoff, had already benefited from the university purges, replacing Professor Schücking in Kiel and Hermann Heller in

Frankfurt. Literally hundreds of thousands of Germans flocked to join the party, motivated by opportunism, fear and sincere enthusiasm. Reinforcing this trend were the pro-nazi pronouncements of reputable intellectuals such as Martin Heidegger, who wrote to Schmitt on 22 April 1933, inviting his collaboration.²¹

In this perplexing atmosphere Schmitt faced a difficult choice. Since the Enabling Act he had pondered and discussed with friends the course of action he should take personally and as a professor of law.²² Emigration at this stage in his life would have caused as much uncertainty and hardship as the loss of his academic position. By 1932 he had reached the apex of his career and not many Germans with so much to lose willingly left their posts. To stay uncommitted within Germany involved the risk of dismissal with no defence against his incriminating political past; complicity appeared to be the safest option and one which, he believed, held open the possibility of future work in constitutional matters.

On 1 May, Carl Schmitt joined the Nazi party. His party number, 2,098,860, showed that since January almost a million Germans had entered the NSDAP before him.²³ It was a public affirmation of loyalty to a regime he felt would tolerate nothing less than total allegiance, and an act by which he hoped to assure his personal and professional welfare. The Hobbesian relationship of protection and obedience was an integral part of Schmitt's political philosophy. Thus, he later explained, when the Weimar system could no longer protect him he felt justified in transferring his obedience to the new regime so long as it granted him this protection.²⁴ Shortly thereafter he tied himself still closer to the policies of his new protectors by declaring the one-party state to be the state of the twentieth century and *Gleichschaltung* a step towards achieving the unity of the German people.²⁵ It seemed that the Nazis had openly accepted him into the fold, especially after the Cologne party organ, *Westdeutscher Beobachter*, published a long article lauding Schmitt as 'the most renowned national constitutionalist in Germany'.²⁶ The reconciliation appeared complete when Goering appointed Schmitt Prussian State Councillor in early July.

Goering had reorganized the Prussian State Council in an attempt to establish it as an advisory Upper House which, though having no legislative power, would serve as a link between the government and other parts of society. Councillors like Schmitt and Popitz, however, hoped that they could develop this institution as a conservative counterweight to absolute party control, inten-

ding that the Council should serve as an arena for dealing with actual administrative problems.²⁷ His office also offered Schmitt the first opportunity to promote his theoretical formulations on law and politics in the Third Reich, since up till now he had had no contact with inner circles of the party.

In the months that followed Schmitt adopted the structures of the Prussian State Council as his model for the constitutional basis of the Third Reich. Where the Council was divided into three main areas, state secretaries, party members and representatives from the churches, economy, sciences, art, and so on, his plan for the Third Reich consisted of the state (the bureaucracy and army), the party and the people.²⁸ Schmitt saw the state as the 'static political part' endowed with administrative authority; the party would become the politically dynamic element leading the nation; and the people would constitute the apolitical sphere of public life. He described each group as '... different, but not separate, united but not merged', for it would be the function of the party to penetrate, lead and unite the state and the people.²⁹ The pivot was Hitler's status as both head of state and party leader under the 'Law for the Securing of the Unity of Party and State', of 1 December 1933. Schmitt assumed that once Hitler and the party had made political decisions, the state bureaucracies and the army would be allowed to fulfil their traditional roles without continual interference by the party;³⁰ an assumption which revealed his traditional conservative preferences and reluctance to surrender the German state apparatus entirely to the national socialists.

With the office of Prussian State Councillor and his association with Goering, who enjoyed playing patron to artists and intellectuals, Schmitt soon moved into other areas of Third Reich law. Nazi legal theoreticians had so far paid him little attention. Although he had received perhaps more publicity in legal journals than any other constitutionalist throughout the Weimar Republic, particularly during the crisis of 1932, the nazi *Deutsches Recht* never mentioned his name. Now Schmitt appeared to attain some distinction in nazi legal institutions, accepting membership of the recently organized Academy of German Law, serving on many of its committees, and delivering lectures at its major conferences.³¹ In November 1933, he became director of the University Teachers Group of the National Socialist League of German Jurists, and in June 1934 Hans Frank appointed him editor of the leading law journal, *Deutsche Juristen-Zeitung*. It appeared that Schmitt was

advancing towards establishing himself as *Kronjurist*, and his affiliation with the national socialist power structure enhanced the prestige he had acquired since 1932. He had recently been offered, for example, the chair of constitutional law at Heidelberg, and in July 1933 he received a similar offer from Munich. The faculty and students of Cologne urged Schmitt to refuse these appointments, the students declaring that he should remain their 'intellectual leader'.³² In October 1933 he accepted the chair of public law at the University of Berlin.

Of course, much of this attention was the result of the nazi university purges, which made it exceptionally difficult to fill vacancies with professors of any standing. Even his former adversaries, however, had the impression that he had acquired some influence with the nazis. After congratulating Schmitt on his appointment to the Prussian State Council, Arnold Brecht, who had opposed him in the trial 'Prussia v. Reich', wrote to him: 'The Ministry of State, in which there is now no one who knows me, is threatening me with temporary retirement by applying Section 4 of the Professional Civil Service Law. Could you as an old opponent say a word for me in this matter?''³³

Subsequent events showed that neither this outward appearance of official influence, nor Schmitt's own expectations regarding his future role in nazi legal affairs, ever corresponded to his true position. Apart from his association with Goering and Hans Frank, the nazi upper echelons were closed to him,³⁴ a fact borne out by the SS and Academy of German Law files. Goering patronized him as a prominent jurist and member of the Prussian State Council, in the same way that he patronized certain artists. Schmitt's plans for the Council were quite illusory since the party never intended to grant it any real significance, and it soon became merely a showpiece for Goering.

Within the nazi legal organizations, Schmitt fared little better, since his standing among party jurists rested mostly on Frank's recognition of his talents. In these circles, such well-established national socialists as Frank, Reinhard Höhn and Werner Best dominated the scene.³⁵ Frank was indeed obliged to defend Schmitt against party members who saw him as an opportunist of dubious ideological sincerity and political reliability.³⁶ His status as a 'March violet', a late-comer to the cause, aroused suspicion and envy among the party's 'old fighters'. The nazis had their own plans for institutionalizing their ideology, and resented interference

by theorizing intellectuals, particularly if they threatened to overshadow the second-rate ideas of established party members.³⁷

In the early stages of consolidating power, the party willingly accepted the support of such a public figure to enhance its credibility at home and abroad. He could scarcely be allowed, however, to occupy a central position, even among theorists. Schmitt would always remain a figurehead, whose reputation and ideas were used or disregarded depending upon the needs of the moment, and whose talents were at the disposal of the party.

Signs of the disparity between Schmitt's view of his future role and the actual significance the party attached to him were discernible as early as 1934. When the press office of the German Legal Front requested an article for *Deutsches Recht* on the first anniversary of Hitler's chancellorship, Schmitt politely declined on the ground of numerous previous commitments. The press office insistently demanded the article, since his work within the party could not take second place to any other obligations.³⁸ The article was duly published on 25 January, indicating Schmitt's precarious status and the hollowness of his titles. By the time he had fully realized all the implications, his life and work were inextricably associated with the nazi regime.

Nevertheless, he continued his prodigious work under the double illusion that he could at least exert some influence in legal affairs and at the same time remove suspicions about his loyalty. Between 1933 and 1936 he published five books and over thirty-five articles supporting the Third Reich. Yet probably his most important publication of this period, *Über die drei Arten des Rechtswissenschaftlichen Denkens*, demonstrates that as late as 1934 he was still attempting to find a place within national socialism for his traditional conservative views on German society and politics.

As a conservative, Schmitt deemed it essential that, in addition to the party, certain traditional institutions, the 'concrete orders' such as the family, church, army and state bureaucracy should serve as the basis for the new order of society.³⁹ Although he saw the party as a unifier of the 'concrete orders', Schmitt failed to realise that his recognition of Hitler as absolute sovereign meant the possibility of increasing intervention by the state in private life, in institutions and at every point of society. Guarantees of stability were worthless, and it was a strange naivety in him to imagine that interference would be limited to times of crisis.

The 'Night of the Long Knives' of 30 June 1934 stressed the incongruity between Schmitt's conservative sympathies and his acknowledgment of Hitler's sovereignty. At first, Schmitt believed the SA purges to be a manoeuvre to preserve the army as a 'concrete order' instead of allowing it to be merged. He had always maintained close contact with officers and considered the army as a central pillar of the German state, hoping that it would play a greater role in the Third Reich.⁴⁰ Moreover, the 'Blood Purge' annihilated the radical left wing of the NSDAP, feared by so many conservatives. However, he was alarmed by extension of the purges to conservative circles.

In the pre-purge months the SA-army controversy had been complicated by the public expression of discontent among conservatives. Papen, backed by Edgar Jung and the Catholic Action Group, had sought Hindenburg's intervention against recent trends of the regime. Discontent came to a head in Papen's speech at the University of Marburg, criticizing party excesses. At the same time, Schleicher had returned to the political scene and his criticisms conjured up rumours of a putsch. During the purges, Schleicher, his associate General von Bredow, Edgar Jung and two of Papen's aides were murdered, while Papen found himself under house arrest. Particularly shocked by the killing of Schleicher, Schmitt feared for his own life: a conservative Catholic who had worked closely with Schleicher and was still in contact with Schleicher's former aide, Colonel Erich Marcks, he was no unlikely target. The actions against conservatives soon ended, but Schmitt believes even now that only the intervention of Goering had saved him.⁴¹

After considering the possible alternatives of emigration, withdrawal from public life, or further attempts to entrench himself within the Third Reich, Schmitt chose the last course. Even had he managed to emigrate, his reputation was too closely connected with the NSDAP to enable him to build a satisfactory future abroad. By compromising himself for the sake of protection, self-aggrandisement and public attention, he had set himself up as the enemy of the emigrés. Indeed, shortly after joining the party, he had stated that the exiled intellectuals who criticized Germany had never belonged to the German nation.⁴² More significantly, despite his precarious position, Schmitt still profited by the Third Reich. His status as Prussian State Councillor, professor in Berlin, and director of the NS University Teachers Group played upon his vanity and sense of importance. Having survived the recent purges, and

believing himself to be under Goering's protection, he was reluctant to tamper with his apparent achievements within the new system.

It was at this point that Schmitt surrendered to the regime. Finally recognizing the impotence of conservatives within the new power structure, he wrote an article abjectly entitled 'The Führer protects the law', (*Deutsche Juristen-Zeitung*, 1 August 1934) in which he proclaimed Hitler the 'highest judge' and defended the SA purges on the grounds of necessity. Though Schmitt condoned only the actions against the SA and took exception to the allegedly unauthorized murder of Schleicher, his article was remembered merely as a vindication of the hideous deeds of the Hitler dictatorship. Thereafter, he would find it increasingly difficult to extricate himself from his nazi entanglements.

The heightened antisemitism in Schmitt's writings after 1934 further indicates the extent to which he was willing to taint his reputation in order to appease the national socialists. Such obviously opportunistic compromises appear all the more despicable when it is remembered that before he joined the NSDAP there was not the slightest antisemitic note in any of his writings or personal relationships. In addition to his intimate friendship with Moritz Julius Bonn throughout the Weimar era, Schmitt had dedicated his classic legal study, *Verfassungslehre*, to Fritz Eisler, a Jew who had died in the first world war, and he had published a book in praise of Hugo Preuss.⁴³ By Autumn 1933, he had gradually begun to pay lip service to nazi views by inserting the odd antisemitic remark into his publications. But although he mentioned such terms as race and blood, it should be noted that he never did succumb to a belief in the biological racism of national socialist ideology. These early references to race, irrelevant to the content of his work and artificially placed within the text, reveal his desire to show himself in tune with the new order. As an office-holder in a national socialist legal organization he was, of course, expected to conform to the party line. By doing so he might also avoid embarrassing questions about his past close professional and personal involvements with Jews. As his position within nazi circles became increasingly vulnerable he became more vociferous in his antisemitism, which characterized many of his writings and utterances between 1934 and 1936. This is perhaps more understandable if we realize that in those years he faced direct attack from within the party and from abroad.

From the beginning Schmitt's tripartite constitutional scheme had led to difficulties with Nazi theorists. By opposing a merger of party and state, he had antagonized party members who intended to infiltrate the state apparatus and reduce it to a mere instrument of the party. Unlike Schmitt and other conservatives, theorists such as Rosenberg were unwilling to grant the state any significance in itself, fearing that the concept of the state might eventually predominate over that of the movement.⁴⁴ Furthermore, Schmitt had relegated the people to an apolitical role 'in the protection and shadow of political decisions',⁴⁵ whereas the Nazis idolized the people as the *Urkraft* of political life. Hitler had stressed: 'The Volk is primary. Party, state, army, economy, law, etc. are secondary manifestations and methods for the purpose of preserving this Volk.'⁴⁶ To convinced Nazis, Schmitt's theories appeared *unvölkisch*, neglecting the fundamental biological foundations of politics.⁴⁷

In addition to these ideological rebukes, various party members showed their disapproval of Schmitt's opportunism. His past association with Jews and the presidential government, which he hoped had been forgotten, was openly discussed in certain party circles.⁴⁸ Before the SA purges, Schmitt's position and his connections with Goering and Frank had discouraged subordinate officials from challenging him. But by Autumn 1934 the reckoning appeared nearer as rumours circulated that Schmitt would shortly be removed from his party offices and that Rosenberg too had doubts about his 'ideological side'.⁴⁹

Meanwhile, a group of German exiles in Switzerland had published a series of articles in *Deutsche Briefe*, an emigré journal founded by Waldemar Gurian and Ott Knab (Gurian had formerly been a close friend of Schmitt).⁵⁰ Here were confirmed in the most explicit terms all the Nazi counts against Schmitt: that he began his career with the assistance of non-Aryan liberals, that he had Jewish friends and that he was still a Roman Catholic. More damaging still was the public disclosure of his former opposition to national socialism, which he had once referred to as 'organized mass insanity'. Naturally, Schmitt's party rivals used this information to discredit the *Kronjurist*.⁵¹

Over the next two years *Deutsche Briefe* continually ridiculed and exposed Carl Schmitt.⁵² Obviously disturbed by the serious implications of these accusations, Schmitt made a determined attempt to appear as an unwavering national socialist, publishing several ar-

ticles justifying the repressive legal measures against Jews in which he declared the Nuremberg Laws 'the constitution of freedom'.⁵³ In Spring 1936, while *Deutsche Briefe* repeatedly taunted the party for its credulous acceptance of his recently acquired antisemitism, Schmitt prepared to introduce an anti-Jewish programme for the National Socialist University Teachers Group,⁵⁴ at whose conference in October he demanded a purging of the 'Jewish spirit' in German law.⁵⁵

This antisemitic offensive, while indelibly blemishing Schmitt's character and reputation, failed to make his ideological conversion convincing. In the summer of 1936, the SS had begun to investigate him. This most powerful party organization now took up the cause of his opponents, who had previously avoided confrontation with Goering and Frank. Close surveillance apparently showed that Schmitt intended to secure himself within the party by acquiring the sympathy of men close to Hitler, and for this reason had invited Julius Streicher to the teachers' conference on Jewry. The SS inferred that the entire conference was an attempt by Schmitt to rehabilitate himself within national socialism.⁵⁶

Believing that he was also ambitious to become State Secretary, the SS not only made Hans Frank's appointment as Minister of Justice conditional upon the exclusion of Schmitt, but urged the latter's removal from his offices in the Academy of German Law. Under SS pressure, by the end of November Frank had acquiesced in the deliberate isolation of Schmitt within the Academy. Although he had assumed that Schmitt would remain director of the Teachers Group, he was gradually forced to contemplate the appointment of a true national socialist before the end of 1936.⁵⁷

In a desperate effort to safeguard his position, Schmitt wrote to Himmler on 2 December, describing the fruitful work of his Teachers Group in purging the Jewish spirit from German law and offering full cooperation in the struggle against Judaism.⁵⁸ But he was too late. The next day a mild rebuke of Schmitt was published in *Das Schwarze Korps*, followed a week later by a denunciation of his antisemitic stance as a mere opportunist sham to cover former friendship with Jews and reliance upon Jewish scholarship; the article also quoted Schmitt's earlier views decrying the Nazi race doctrine.⁵⁹

Hans Frank immediately wrote to Gunter d'Alquen, the editor of *Das Schwarze Korps*, in defence of Schmitt, pointing out that these allegations merely repeated the denigrations of the Jewish emigré

press; had d'Alquen been familiar with Carl Schmitt's work over the last three years for national socialist goals, he would never have published the articles.⁶⁰ Despite these protests, however, Frank knew that he could not withstand the SS; over the past few months he had already complied with their wishes by removing Schmitt from various party offices, and requiring him to resign as editor of the *Deutsche Juristen-Zeitung*.⁶¹ Frank's position became even less tenable after Himmler had backed up *Das Schwarze Korps* in this matter.⁶²

In fact, the SS had determined to block off even Schmitt's scholarly contacts, which he might still attempt to preserve by turning to questions of international law rather than domestic politics.⁶³ Since they considered him as their avowed opponent, they would accept nothing less than a full disclosure of his disloyalty.⁶⁴ Schmitt's publications, together with other evidence, were collected in order to prepare a case against him which would nullify the protests of party functionaries like Frank.⁶⁵ Based on this material, two reports were made, stating that while older party members had opposed him as early as 1933, it was the emigré press which had first exposed his true political *Weltanschauung* and then exploited the situation in order to ridicule national socialism.⁶⁶ Even more striking than the accusations of philo-Judaism, Catholicism and opportunism was the irrefutable documentation of Schmitt's prior anti-party activity. As the *Kronjurist* of the presidential system he had advocated the constitutional suppression of the national socialists and, the report emphasized, the theory of the 'equal chance' embodied in his *Legalität und Legitimität* was expressly intended to prevent the legal acquisition of power by the NSDAP. Such evidence wielded by the SS inevitably held grave consequences for the individuals involved; it seemed that Schmitt might well be imprisoned, or worse.

Although the reports were kept secret, the articles in *Das Schwarze Korps* had aroused an atmosphere of anticipation. While party adversaries awaited the end of Schmitt's national socialist career, *Deutsche Briefe*, in long reports on his changing fortunes, pointed out that it had long ago unveiled his true nature, and that so long as he served a purpose for national socialism the nazis could overlook his past; now he was superfluous. With the case against him apparently almost closed, the paper, perhaps hopefully, declared his alternatives to be 'emigration or a concentration camp'.⁶⁷

Suddenly, the SS abruptly terminated its public campaign against Schmitt, although the extensive information on him still remained in the files of the *Sicherheitsdienst*. Hermann Goering, like Frank, objected to the public defamation of a prominent associate who, as Prussian State Councillor, fell into his sphere of influence. In a letter to d'Alquen demanding that, even if the evidence were accurate, open criticism of Schmitt should cease, Goering declared that he could not tolerate the denigration of his own appointee.⁶⁸

Goering and Himmler probably came to some compromise. Although secret investigations of Schmitt extended into 1937, the only result was the end of his work within the party. He retained his chair of law at the University of Berlin, as well as his official title of Prussian State Councillor, though the Council last assembled in 1936. Nevertheless, the immunity conferred by this position was upheld by Goering and Schmitt was not disturbed in it until the end of the Third Reich. To avoid further complications he never again dealt with domestic or party politics, but turned his attention to the study of international relations, and soon passed into obscurity, despite some further disputes concerning his interpretation of *Grossraum*.⁶⁹ Eventually he joined the ranks of the inner emigration, where he encountered a cold reception. He was now mistrusted on all sides, whether for his insincerity or for his closeness to the party.

Opportunism had certainly been a major factor in Carl Schmitt's national socialist career, but equally important was his own belief that he could, as the nazis' tame jurist, establish a constitutional framework for the Third Reich. To him, national socialism was a precocious movement which required further development of its theoretical political and legal foundations. His attempt to provide such foundations along the lines of a traditional authoritarian regime was foredoomed, and he succeeded only in helping to consolidate a totalitarian dictatorship. Certain members of the party hierarchy had welcomed his support in the initial stages of the regime because his reputation lent an aura of respectability to the nazi cause. But as soon as Schmitt attempted to exert any real influence the struggle to eliminate him began. In 1936 *Deutsche Briefe* aptly summed up his predicament in Schiller's phrase, 'the Moor has done his duty, the Moor can go'.

Notes

1. Karl Dietrich Bracher, *Die Auflösung der Weimarer Republik* (Berlin 1971), 54; Jürgen Fijalkowski, *Die Wendung zum Führerstaat: Ideologische Komponenten in der politischen Philosophie Carl Schmitt* (Cologne 1958); Erich Kaufmann, 'Carl Schmitt und seine Schule: Offener Brief an Ernst Forsthoff' in: *Deutsche Rundschau*, 84: 11 (October 1958), 1015; Christian Graf von Krockow, *Die Entscheidung: Eine Untersuchung über Ernst Jünger, Carl Schmitt, Martin Heidegger* (Stuttgart 1958); Walter Lewald, 'Carl Schmitt redivivus?' in: *Neue Juristische Wochenschrift*, 3 (1950), 377; Franz Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933-1944* (New York 1963), 42-43, 49-50; Karl Schultes, *Der Niedergang des staatsrechtlichen Denkens im Faschismus: Die Lehren des Herrn Professor Carl Schmitt, Kronjurist der Gegenrevolution* (Weimar 1947); Kurt Sontheimer, *Antidemokratisches Denken in der Weimarer Republik: Die politischen Ideen des deutschen Nationalismus zwischen 1918 und 1933* (Munich 1964), 94-98, 196, 261, 277; idem, 'Carl Schmitt: Seine "Loyalität" gegenüber der Weimarer Verfassung' in: *Neue politische Literatur*, 3: 10 (October 1958), 758-70; Friedrich von der Heydte, 'Heil aus der Gefangenschaft? Carl Schmitt und die Lage der europäischen Rechtswissenschaft' in *Hochland*, 43 (1950/51), 288-94.

2. Heinrich Muth, 'Carl Schmitt in der deutschen Innenpolitik des Sommers 1932' in: *Historische Zeitschrift*, Beiheft 1, Beiträge zur Geschichte der Weimarer Republik (1971); Helmut Rumpf, *Carl Schmitt und Thomas Hobbes: Ideelle Beziehungen und aktuelle Bedeutung mit einer Abhandlung über die Frühschriften Carl Schmitts* (Berlin 1972); George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (Berlin 1970).

3. Author's interviews with Carl Schmitt, Plettenberg. Although Schmitt's personal papers remain in his possession and closed to scholars, he allowed me access to selected correspondence and to the unpublished disquisitions he wrote at Nuremberg concerning his affiliations with the Third Reich: 'Beantwortung der Frage: Wieweit haben Sie die theoretische Untermauerung der Hitlerschen Grossraumpolitik gefördert?' (Nuremberg, 18 April 1947), and 'Beantwortung des Vorwurfs: Sie haben an der Vorbereitung des Angriffskrieges und der damit verbundenen Straftaten an entscheidender Stelle mitgewirkt' (Nuremberg, 28 April 1947). The accuracy of his statements, despite earlier criticism, has been corroborated by the documents in Schmitt File, Sicherheitsdienst des RFSS SD Hauptamt (1936) PA 651C, Wiener Library, London, copies in Institut für Zeitgeschichte, Munich, AKZ 4062/68, Fa 503, Nos. 1-2.

4. *Der Hüter der Verfassung* (Tübingen 1931); 'Der Hüter der Verfassung' in: *Archiv des öffentlichen Rechts*, Neue Folge XVI (March 1929), 161-237; 'Das Reichsgericht als Hüter der Verfassung', in: *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954: Materialien zu einer Verfassungslehre* (Berlin 1958), 63-100.

5. His more significant works from this period include: *Politische Romantik* (Munich 1919), *Die Diktatur* (Munich 1921), *Politische Theologie* (Munich 1922), *Verfassungslehre* (Munich 1928). For a complete bibliography see Piet Tommissen, 'Carl Schmitt-Bibliographie' in Hans Barion, ed., *Festschrift für Carl Schmitt zum 70. Geburtstag* (Berlin 1959), 273-330, and 'Ergänzungsliste zur Carl-Schmitt-

Bibliographie vom Jahre 1959' in Hans Barion, ed., *Epirrhosis: Festgabe für Carl Schmitt* (Berlin 1968), 739-78.

6. *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Munich 1923), *Volksentscheid und Volksbegehren: Ein Beitrag zur Auslegung der Weimarer Verfassung* (Berlin 1927), *Der Begriff des Politischen* (Berlin 1932), and 'Staatsethik und pluralistischer Staat' in *Kantstudien*, 35: 1 (1930), 28-42.

7. Schmitt to Moritz Julius Bonn, 17 June 1926, Bonn Nachlass, No. 50, Bundesarchiv, Koblenz. See also Schwab, op. cit., 38, 71, 77.

8. Carl Schmitt and Erwin Jacobi, 'Die Diktatur des Reichspräsidenten nach Art. 48 der Reichsverfassung' in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 1 (Berlin 1924), 63-136.

9. Colonel Erich Marcks to Schmitt, 6 September 1932, Schmitt Personal Papers; Ansgar Skriver interview with Schmitt in 'Hitlers Machtergreifung vor 40 Jahren im Gedächtnis von heute' Westdeutscher Rundfunk, Hauptabteilung Politik (30 January 1973), 12; author's interview.

10. 'Gesunde Wirtschaft im starken Staat' in *Mitteilungen des Vereins zur Wahrung der gemeinsamen wirtschaftlichen Interessen in Rheinland und Westfalen*, 1932, No. 1, Heft 21 (23 November 1932), 19-20.

11. Dr Erich Zwade to Rosenberg, 26 August 1932, Rosenberg-Akten, II, 76, MA-251 (22-23), Institut für Zeitgeschichte.

12. Skriver, op. cit., 13.

13. Ferdinand Hermens, *Zwischen Politik und Vernunft* (Berlin 1969), 156-59.

14. Schmitt, 'Das Gesetz zur Behebung der Not von Volk und Reich' in *Deutsche Juristen-Zeitung*, 38: 7 (1 April 1933), 455-58, and *Das Reichsstatthaltergesetz* (Berlin 1933), 9.

15. 'Kaas warnt vor Illegalität: Ein Schreiben an Schleicher und Hindenburg' in: *Germania*, 3: 29 (29 January 1933); Papen to Schmitt, 13 February, and Schmitt to Papen, 14 February 1933, Stellvertreter des Reichskanzleis Vizekanzlei von Papen, BA, R-53, No. 77, 138-39.

16. Author's interviews with Schmitt and with Heinrich Popitz, Freiburg. Hildemarie Dieckmann, *Johannes Popitz: Entwicklung und Wirksamkeit in der Zeit der Weimarer Republik* (Berlin-Dahlem 1960), 137. Lutz-Arwed Bentin, *Johannes Popitz und Carl Schmitt: Zur wirtschaftlichen Theorie des totalen Staates in Deutschland* (Munich 1972).

17. Papen to Schmitt, 31 March 1933, Gleichschaltung der Länder mit dem Reich, Reichskanzlei, BA, R-43-II, 1309.

18. Schwab, op. cit., 106, 148.

19. Schmitt, *Der Hüter*, 71-73, 94-96, and *Das Reichsstatthaltergesetz*, 3, 10, 13.

20. Staatsrat Schaeffer, Director of the Bavarian Finance Ministry, to Papen, 24 September 1932, State Secretary Planck to Schaeffer, 4 October 1932, Reichsverfassung, Reichskanzlei, R-43=I, No. 1865, 289-93.

21. Schmitt Personal Papers.

22. Schmitt, 'Beantwortung des Vorwurfs' in Note 3, and author's interview.

23. Personal File Carl Schmitt, Party Records Gau Köln-Aachen, and Nazi Party Records Central Munich, Document Center, Berlin.

24. Schmitt, *Ex Captivitate Salus: Erfahrungen der Zeit 1945/47* (Cologne 1950), 20-21.

25. Schmitt, 'Das gute Recht der deutschen Revolution' in *Westdeutscher Beobachter*, 9: 108 (12 May 1933), 1-2, and 'Der Staat des 20. Jahrhunderts' in *Westdeutscher Beobachter*, 9: 151 (28 June 1933), 1-2.

26. 'Der grosse nationale Staatsrechtslehrer Professor Dr Carl Schmitt an die Kölner Universität berufen' in *Westdeutscher Beobachter*, 9: 107 (11 May 1933), 3.

27. Schmitt, 'Beantwortung des Vorwurfs' in 4, and 'Staatsverwaltung und kommunale Selbstverwaltung im nationalsozialistischen Staat', speech before the first session of the Prussian State Council, 16 September 1933.

28. Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (Hamburg 1933). 'Gesetz über den Staatsrat' in *Preussische Gesetzsammlung*, 46 (10 July 1933), 241-43, Membership List, Akten betreffend Preussischer Staatsrat (1921-1936), Reichskanzlei, R-43-I, No. 2300.

29. Schmitt, *Staat*, 11-12, 21.

30. Schwab, op. cit., 110.

31. Akademie für Deutsches Recht, Records of Nazi Cultural and Research Institutes, US National Archives, No. T-82, Roll-23, Serial-28, Reel-806.

32. Professor Nipperdey to Schmitt, 29 May 1933, Schmitt Personal Papers. 'Die Studentenschaft an Professor Carl Schmitt' in *Kölnischer Zeitung*, 390 (21 July 1933).

33. 16 August 1933, Schmitt Personal Papers. In his autobiography Brecht makes no reference to this letter, though he mentions his attempt to obtain help from others: Brecht, op. cit., 443.

34. Schmitt, 'Beantwortung der Frage', 2.

35. Akademie für Deutsches Recht (1933-1935), Reichskanzlei, R-43-II, No. 1509.

36. Schmitt, 'Beantwortung des Vorwurfs', 4-5.

37. In this respect Hannah Arendt cites Schmitt as a classic example of the type of intellectual who was seduced by national socialism and then rejected by the movement. *The Origins of Totalitarianism* (New York 1964), 339.

38. Schmitt to Oberregierungsrat, 13 January 1934; and Press Office, *Bund NS Deutscher Juristen*, to Reichsgeschäftsführer Dr Heuber, 15 January 1934: Personalakte Carl Schmitt, Document Center.

39. Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hamburg 1934), 27-28, 42-44. For more detailed explanations of Schmitt's concept of 'concrete orders' see: Hasso Hofmann, *Legitimität gegen Legalität: Der Weg der politischen Philosophie Carl Schmitts* (Berlin 1964), Peter Schneider, *Ausnahmezustand und Norm: Eine Studie zur Rechtslehre von Carl Schmitt* (Stuttgart 1957), and Schwab, op. cit., 115-25.

40. Schmitt, *Staatsgefüge und Zusammenbruch des zweiten Reiches: Der Sieg der Bürgers über den Soldaten* (Hamburg 1934): author's interview.

41. Author's interviews with Schmitt. Colonel Erich Marcks to Schmitt, 9 June 1934, Schmitt Personal Papers.

42. 'Die deutschen Intellektuellen', *Westdeutscher Beobachter*, 9: 126 (31 May 1933), 1-2.

43. The previous cordial relationship between Bonn and Schmitt is clearly established by the letters found in the Bonn Nachlass, Nos. 49, 50, 56. See also: Moritz J. Bonn, *So macht man Geschichte: Bilanz eines Lebens* (Munich 1953), 330-32, and Schmitt, *Hugo Preuss: Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre* (Tübingen 1930).

44. Alfred Rosenberg, 'Totaler Staat', *Völkischer Beobachter* (9 January 1934), in *Alfred Rosenberg: Selected Writings*, Robert Pois, ed. (London 1970), 191-92.

45. Schmitt, *Staat*, 12.

46. 'Die Grundlagen unseres Verfassungs- und Rechtslebens: Aus der Reichstagsrede des Führers und Reichskanzlers vom 30. January 1937', in: *Zeitschrift der Akademie für Deutsches Recht*, 4: 4 (13 February 1937), 97. Similarly, according to the nazi legal theorist Gottfried Neesse, the *Volk* is no separate order outside the party and state, but the *Urgrund* of these two organizations. G. Krauss, 'Staat, Bewegung, Volk als selbständige Ordnungen. Bemerkungen zu einem neuen Buch von Gottfried Neesse', in: *Deutsche Juristen-Zeitung*, 41: 10 (15 May 1936), 620-24. See also Hans Fabricius, *Bewegung, Staat, und Volk in ihren Organisationen* (Berlin 1935); and Neumann, *op. cit.*, 65-66.

47. Otto Koellreutter, *Volk und Staat in der Weltanschauung des Nationalsozialismus* (Berlin 1935), 6-11, a lecture directly attacking Schmitt's teachings. For Koellreutter, 'the people as a biological organic unit' formed the basis of nazi political theory. See also Koellreutter, *Deutsches Verfassungsrecht: Ein Grundriss* (Berlin 1935), 3-4, 26, and *Der Deutsche Führerstaat* (Tübingen 1934), 16.

48. Bornhack to Koellreutter, 22 April and 1 June 1934, Heckel to Koellreutter, 6 October 1934, Sicherheitsdienst, I, 7, 11.

49. Gerland to Koellreutter, 16 June 1934, *ibid.*, 10; Schwinge to Koellreutter, 10 September 1934, *ibid.*, 6; Staff Director, Gemeinschaft studentischer Verbände, MA-1163, NSDAP (IV, 24), 95620-95622, Institut für Zeitgeschichte.

50. Heinz Hürten, *Waldemar Gurian: Ein Zeuge der Krise unserer Welt in der ersten Hälfte des 20. Jahrhunderts* (Mainz 1972), 12-13; Waldemar Gurian, 'Carl Schmitts Verfassungslehre' in: *Germania* (18 April 1929), *Die politischen und sozialen Ideen des französischen Katholizismus 1789/1914* (Gladbach 1929), especially the foreword, and *Der integrale Nationalismus in Frankreich: Charles Maurras und die Action Française* (Frankfurt 1931), 2, 124.

51. 'Carl Schmitt, der Kronjurist des III. Reiches' in: *Deutsche Briefe* (26 October 1934), in Heinz Hürten, ed., *Deutsche Briefe: Ein Blatt der Katholischen Emigration*, I, 1934-1935, II, 1936-1938 (Mainz 1969), I, 52-54. Koellreutter to Mirow, 1 November 1934, Becker to Koellreutter, 15 November 1935, Sicherheitsdienst, I, 8, 16-18.

52. Hürten, *Waldemar Gurian*, 13.

53. Schmitt, 'Die Verfassung der Freiheit', in: *Deutsche Juristen-Zeitung*, 40: 19 (1 October 1935), 1133-35, and 'Die nationalsozialistische Gesetzgebung und der Vorbehalt des "ordre public" im Internationalen Privatrecht' in: *Zeitschrift der Akademie für Deutsches Recht*, 3: 4 (20 February 1936), 204-11.

54. 'Ein Bolschewistenfreund als Nationalsozialistischer Kronjurist' (13 March 1936), 'Der NS Kronjurist Carl Schmitt über das Plebiszit' (3 April 1936), 'Carl Schmitt gegen Carl Schmitt' (22 May 1936), 'Der Fall Eschweiler, das Opfer Carl Schmitts' (19 June 1936), 'Staatsrat Carl Schmitt' (9 October 1936) in *Deutsche Briefe*, II, 107, 130, 204-05, 240, 405-06. 'Aus der Deutschen Rechtsfront' in: *Deutsche Juristen-Zeitung*, 41: 11 (1 June 1936), 695-96. 'Das Judentum in der Rechtswissenschaft: Tagung der Reichsgruppe Hochschullehrer des NSRB' in: *Mitteilungsblatt des National-Sozialistischen Rechtswahrerbundes* (Berlin 1936), 200-01.

55. Schmitt, 'Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist: Schlusswort auf der Tagung der Reichsgruppe Hochschullehrer des NSRB vom 3. und 4. Oktober 1936' in *Deutsche Juristen-Zeitung*, 41: 20 (15 October 1936), 1193-99.
56. Teilnahme des Gauleiters Streicher an einer Tagung von Carl Schmitt, Sicherheitsdienst, I, 47-49.
57. Ernennung Franks zum Reichsjustizminister, Ausschaltung Carl Schmitts aus der Akademie für Deutsches Recht, Besprechung mit Reichsminister Frank nach der Tagung des Polizeirechtssausschusses, Bericht: Staatsrat Carl Schmitt, *ibid.*, I, 42-43, 80-83, 90-101, 110-113, II, 126.
58. *ibid.*, II, 125.
59. 'Eine peinliche Ehrenrettung' (3 December 1936), 'Es wird immer noch peinlicher' (10 December 1936) in *Des Schwarze Korps*, 49: 14, 50: 2.
60. 11 December 1936, Sicherheitsdienst, II, 128-29.
61. Schmitt, 'Schlusswort des Herausgebers,' Hans Frank, 'Zum Abschluss' in *Deutsche Juristen-Zeitung*, 41: 24 (15 December 1936), 1449-56.
62. Himmler to Frank, 5 January 1937, Sicherheitsdienst, II, 240.
63. Besprechung über Carl Schmitt, Bericht: Staatsrat Carl Schmitt, *ibid.*, I, 84-87, 99-101.
64. Äusserungen Carl Schmitt über die Arbeit der SS, *ibid.*, I, 35-36.
65. Schriften von Carl Schmitt, SD Hauptamt to SD Oberabschnitt Sued., 14 December 1936, SD Hauptamt to State Secretary Lammers, *ibid.*, II, 132, 138, 154.
66. *Mitteilungen zur Weltanschaulichen Lage*, 1/3 (8 January 1937), *ibid.*, II, 184-220, 266-81.
67. *ibid.*, II, 155, 161-68. 'Des NS Kronjurist Carl Schmitt als Mohr . . .' (11 December 1936), 'Die Treibjagd gegen NS Kronjurist Carl Schmitt hat eingesetzt' (18 December 1936), 'Auf dem Wege in die Emigration oder ins Konzentrationslager?' (24 December 1936) in *Deutsche Briefe*, II, 489-91, 498-99, 510.
68. 21 December 1936, Sicherheitsdienst, II, 235.
69. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte: Ein Beitrag zum Reichsbegriff im Völkerrecht* (Berlin 1939), and 'Grossraum gegen Universalismus: Der völkerrechtliche Kampf um die Monroedoktrin' in *Zeitschrift der Akademie für Deutsches Recht*, 6: 7 (15 May 1939), 333-37. Werner Best, 'Völkische Grossraumordnung' in *Deutsches Recht*, 10: 25 (22 June 1940), 1006-07. Reinhard Höhn, 'Grossraumordnung und völkisches Rechtsdenken' in *Reich, Volksordnung, Lebensraum*, 1: 1 (1941), 256-88.

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