

Schmitt Set Precedent, Leader Can Change Law

by Steve Douglas

The precedent—if not the specific model and inspiration—for the Federalist Society-championed, unconstitutional practice of Presidential signing statements, is to be found in the legal doctrine that Nazi “Crown Jurist” Carl Schmitt espoused on behalf of the government of German Chancellor Heinrich Brüning in 1930. While the parliamentary Reichstag which Schmitt confronted differed from the U.S. Congress in obvious ways, nonetheless, the Schmittian drives for the arrogation of all power into the hands of a “unitary executive” Presidential dictatorship in both cases are, essentially, identical. The “Presidential signing statement” was introduced by the Schmittlerians as a new form of “quasi-law,” by means of which the President reserves for himself the right to override or implement any law, or parts thereof, enacted by Congress, as he deems fit. That is, the President *decrees* what he thinks about the law, and *substitutes* his own particular views for the substance of the law, when it comes to implementation, according to this doctrine.

This practice is precisely what Schmitt introduced into Germany in 1930. In order to circumvent the Reichstag, Schmitt declared that the president could rule, under conditions of financial or economic emergency, by means of *gesetzvertretende Verordnungen* or “law-substituting decrees,” which, while not formally laws, nonetheless carried the full weight of the law. With the introduction of this legal device, the president was free to ignore the Reichstag on all essential economic matters.

Schmitt’s moment of opportunity arrived on March 27, 1930, when the Social Democratic coalition government of Hermann Müller collapsed for financial reasons, in the deepening world depression. The next day, President Hindenburg appointed the *fiscal conservative* Brüning of the Catholic Center Party as Chancellor, with instructions to form a new type of government—a “Presidential Cabinet”—that was to be “above the parties.” The posts in the new Cabinet were not to be apportioned relative to the size of party delegations in the Reichstag, but according to technocratic, budget-balancing, *national security*, and related considerations. If the Reichstag didn’t approve of the Cabinet’s measures, the President would dissolve it, and the Chancellor and his Cabinet would continue to rule by emergency decree, invoking Article 48 of the Weimar Constitution as the

grounds for doing so.

President Hindenburg was encouraged to take this drastic course of action by, among others, his trusted State Secretary Otto Meissner. Meissner was a great admirer of Schmitt, and told him so in 1929: “I have taken special interest in your arguments and characterization of the Reich President. . . . I am also convinced that gradually a practice will arise that realizes your tenet. . . .” Meissner went on to witness that “practice” at length, in his subsequent capacity as Adolf Hitler’s state secretary.

Since, under Article 48 of the Weimar Constitution, emergency decrees invoked by the Cabinet could be repealed by a majority vote of the Reichstag, there was a real question as to whether the Presidential Cabinet-system plan was legal. But, based on the expert legal opinion of Schmitt, the government asserted that it had the right to rule by emergency decree, even after the Reichstag had voted to the contrary.

Schmitt Wrecks the Constitution

A showdown rapidly materialized. On July 16, the Reichstag voted to reject Brüning’s brutal financial austerity programs. Brüning responded by enacting his financial policy by means of Presidential emergency decrees. On July 18, the Reichstag invoked its Constitutional right, and rescinded Brüning’s emergency decrees. At that point, Brüning/Hindenburg dissolved the Reichstag, and proceeded to continue to rule by emergency decree. And, since the Reichstag had been dissolved, it could not any longer vote to reverse Brüning!

With political tension raging at a feverish pitch, the government asked Schmitt to render a legal opinion on this crisis. On July 28, Schmitt produced a legal brief which upheld the legality and constitutionality of all of Brüning’s actions. The two most notable features of Schmitt’s opinion were: 1) the nature of an exceptional or emergency condition—which falls under Presidential emergency authority, must be expanded to include the financial and economic realms; and 2) Presidential decrees or *gesetzvertretende Verordnungen*, though still not formal laws such as those passed by the Reichstag, *carried the authority of law*. Thus, according to Schmitt, the economic and financial programs of the Brüning government did not require formal laws, only Presidential decrees which substituted for laws!

Armed with Schmitt’s “expert” opinion, Brüning proceeded to implement brutal economic austerity measures, thereby helping to radicalize an already desperate population. In the Reichstag elections of Sept 14, 1930, Hitler’s Nazis surged from the 12 seats they had won in 1928, to 107 seats, as they became the second largest party. The Social Democrats, the largest party, won only 143 seats. Brüning, backed by Schmitt, ruled for two full years, as he implemented the financial austerity policies of Schmitt’s Synarchist backers, and thereby helped to pave the road to power for Adolf Hitler.