

Jurists "Coordinate" Themselves

The German Federation of Judges

In his New Year's greetings to his associates in the first 1933 issue of the *Deutsche Richterzeitung* (German Judicial Journal), the chairman of the German Federation of Judges, Karl Linz, had expressed his fear that positive developments were hardly to be expected that year: "rather, all signs point to new attacks and new struggles to maintain the rule of law and an independent legal system."¹ The federation of Judges had always protested alterations in the system under the republic and had fought against "the intrusion of politics into the administration of justice." In 1926 the president of the Supreme Court, Walter Simons (who had been appointed on the suggestion of a Social Democratic minister of justice by a Social Democratic president), even went so far as to dispute the suitability of Social Democrats for the judiciary in general, since they lacked the necessary objectivity.² The judges' organization feared nothing so much as democrats getting the upper hand through "preferential treatment of supporters of the parties making up the cabinet."³

In a number of decisions the existence of sympathy with the National Socialist movement had become too obvious to be overlooked; however, the appointment of Hitler as chancellor did not meet with undivided approval among judges. Chairman Karl Linz feared the new government might introduce measures "placing in question the security of judges' tenure in office and the independence of the courts."⁴ The behavior of the Nazi party leadership after various party members had been placed on trial gave these fears a very real basis in fact.

The majority of German judges soon resolved their doubts, however, in spite of the "Decree for the Protection of the German People" and the "Decree for the Protection of the People and the State" (also known as

the Reichstag Fire Decree), by means of which, as we have seen, the government had abrogated in coup-like fashion large parts of the constitution. And despite the terror tactics of the SA during the March election campaign of 1933 and the putsch-like maneuvers enabling the SA to take control of the police in most German states, the governing board of the Federation of Judges issued a declaration on March 19 expressing approval of "the will of the new government to put an end to the immense suffering of the German people" and offered its cooperation in the "task of national reconstruction": "May German law hold sway in German domains! German judges have always been loyal to the nation and aware of their responsibility." The declaration ended with the assurance: "German judges place their full confidence in the new government."⁵

This confidence would not easily be shaken. On April first, as part of a concerted action against Jews, the state ministries of justice suspended from duty all Jewish judges, public prosecutors, and district attorneys, and this was followed on April 7 by the "Law for Restoration of the Professional Civil Service" decreeing the permanent removal from the civil service of all judges and other officials who were Jews, Social Democrats, or otherwise "politically unreliable."⁶ Nevertheless, although this was tantamount to destroying the independence of the courts, Linz announced after an audience with Hitler on precisely this seventh of April: "We have placed everything in his hands with complete confidence. The chancellor was clearly in agreement with our remarks and assured us that he would continue to maintain the independence of judges, even though certain measures would be necessary. We may therefore rest assured that the regulations contained in the law on the civil service will be dropped again as soon as possible."⁷

These servile words were the extent of the protest ventured by the Federation of Judges on the removal from office of its numerous Jewish members—643 in Prussia alone. A number of people were quite glad to see the Social Democrats go, and the banning of the Republican Federation of Judges was received in judicial circles with great satisfaction. Only very few Social Democrats had succeeded in becoming judges in the fourteen years of the republic in any case, and it was even more difficult for them to rise to the higher ranks. Among the 122 judges belonging to the various panels of the Supreme Court, only one, Hermann Grossmann, was a Social Democrat, and he was the sole member of this court to be dismissed in April 1933 for political unreliability.⁸

While the governing board of the national federation was still engaged in tactical attempts to preserve its independence by ingratiating itself with the new regime, on April 21 its largest state organization, the Association

of Prussian Judges and Public Prosecutors, came out with an appeal to its members "to enter the front line of Adolf Hitler's ranks and join the Federation of National Socialist Jurists, for unconditional solidarity is a necessity for the success of our struggle."⁹

The board of the national federation hesitated a little longer, but more and more state organizations followed the Prussian lead. The Oldenburg Judges' Association voted to disband itself on April 29; on May 10 the officers of the Association of Supreme Court Judges resigned on "for the purposes of coordination" (*Gleichschaltung*); and on May 21 the Saxon Association of Judges and Public Prosecutors placed itself "jubilantly and dutifully under the leadership of the people's chancellor, Adolf Hitler."¹⁰ At this point the leaders of the national organization finally sent a telegram to the "leader of jurists in the Reich" (*Reichsjuristenführer*), Hans Frank, declaring in its own name and the name of its member organizations in the various states "its entrance as a body into the Federation of National Socialist Jurists" and acknowledging "the leadership of chancellor Adolf Hitler."¹¹

That this patronage would have consequences for the workings of the legal system was made clear only two weeks later in a declaration passed by delegates to a meeting of the national organization: "The German Federation of Judges sees as its main task . . . the cooperation of all judges in the revision of German law . . . Free of all shackles, as befits the Germanic ideal, judges must remain beyond the reach of the spirit of trade unionism and narrow professionalism."¹² As long as the federation's publication, the *Deutsche Richterzeitung* was permitted to exist—it was later absorbed by the official government organ *Deutsche Justiz*—it became a forum for judges' proposals as to what form the revision of the law should take. One example was Supreme Court judge Erich Schultze's suggestion as early as 1933 that there should be severe penalties for "betrayal of the race . . . that is, in short, the interbreeding of Germans with members of certain races named by law."¹³ A further clear sign of how far "coordination" had proceeded was the oath taken at a mass meeting held in front of the Supreme Court building during the first national convention of jurists in Leipzig in October 1933: 10,000 lawyers swore, with their right arms raised in the Nazi salute, "by the soul of the German people" that they would "strive as German jurists to follow the course of our Führer to the end of our days."¹⁴

There had been a few jurists among the "old guard" of the National Socialist movement: one of the "martyrs of the movement" killed during the march to the *Feldherrnhalle* on November 9, 1923, had been a judge at the Bavarian Supreme Court, and another of the judges from the same

court was a codefendant of Hitler's at the ensuing trial. In general, however, lawyers as a professional group had been underrepresented in the party. And among those who rose to prominence in the Third Reich, there were only a handful of "old" Nazis: Judge Werner Best, author of the "Boxheim Documents," after 1933 chief counsel of the Gestapo, and Reich minister to occupied Denmark during the war; attorney Hans Frank, who became minister without portfolio in the national cabinet in 1934, president of the Academy for German Law, and after 1939 governor general of occupied Poland; attorney Roland Freisler, made a senior official at the Prussian Ministry of Justice in 1933 and at the national ministry in 1934, and from 1942 president of the People's Court; Hans Kerrl, Prussian minister of justice in 1933–1934 and afterward Reich minister for church affairs until his death in 1941; and finally Otto Thierack, a public prosecutor who first became minister of justice in Saxony in 1933, then vice-president of the Supreme Court, then president of the People's Court in 1936 and after 1942 Reich minister of justice.

During the Third Reich, as in previous years, the courts remained the domain of those who had been right-wing German nationalists. Freisler and Thierack were the only out-and-out Nazis who obtained key posts in the legal system. All the other highest officials, including Franz Gürtner, the minister of justice who died in 1941, his undersecretary Schlegelberger, Supreme Court president Bumke, and Reich prosecutor general Karl Werner, had been either members or sympathizers of the *Deutschnationale Volkspartei* (German National People's Party). All of them had attained high office in the days of the Weimar Republic. The Third Reich had merely taken them over, and they embodied a continuing tradition in German law extending from the empire through the republic to the government of the Führer. Although their actions in the twelve years of the Third Reich may have been frequently prompted by opportunism, ambition cannot have been a motive. Their careers had been made before.

The Highest Judge

Erwin Konrad Eduard Bumke was born to affluent parents—his father was a physician—on July 7, 1874, in the Pomeranian town of Stolp. After finishing his schooling, completing his university studies with a doctorate in law, and passing the two-stage German bar examination, he obtained a position as judge at the County Court in the city of Essen.

Since he was intelligent, ambitious, financially independent, and also strictly conservative in his political views, Bumke's career advanced swiftly. As early as 1907 he became a provisional assistant at the Office of Judicial

Affairs (Reichsjustizamt)—which would later be known as the Ministry of Justice—and by 1909 he was appointed to the rank of privy councillor there. After serving in the First World War, at the end of which he held the rank of captain in the militia, he returned to the ministry, now under a democratic government, and was made head of a department in 1920. In this capacity he drafted several emergency decrees that had a profound effect on German law and, according to critics at any rate, threw the conduct of criminal trials back to the days before the Enlightenment. When Supreme Court president Walter Simons took early retirement in 1929, Bumke was named to succeed him. At the same time he became presiding judge of the Third Criminal Panel of this court, president of the Combined Panels, and chairman of the State Court for the German Reich.¹⁵ After Chancellor von Papen had ousted the Social Democratic government of the state of Prussia on July 20, 1932, the Supreme Court under Bumke's leadership first held up deliberation of the suit the Social Democrats had filed against this move, and then issued a scandalous decision declaring the eviction of the government to be legal for the most part. This move created favorable conditions for the National Socialist takeover: when Hitler became chancellor and appointed Hermann Göring as acting minister of the interior in the Prussian government, Göring thereby became head of the Prussian police, which had played such an important role in the power struggles of the Weimar Republic. As has been mentioned, this police force was by 1933 already largely "purged" of democratic elements and was prepared for the coming internal political battles.

In December 1932, Judge Bumke received yet another promotion when he was named deputy to *Reichspräsident Hindenburg*; this was largely an honorary title, but it made him—according to official protocol, at least—the second most important man in the country. When the Nazi takeover followed and the tactics to intimidate its opponents grew more and more brutal, Bumke is said to have been "most deeply concerned" and to have been thinking about resigning.¹⁶ Yet he was never indignant enough to take a public stand against what was happening, even though he was far from the sort of man to swallow everything without protest. In a letter to the State Chancery, he had once actually threatened to resign. This letter contained the courageous words, "It is almost more than I can bear to think that my name will be connected with a period in the history of the Supreme Court which means its downfall." Bumke's protest was not directed against the dismissal of his Jewish colleagues on the bench, however, or against the "coordination" of the legal system with Nazi principles, or against the murder of opponents of the regime. And the letter was not written in 1933, but in January of 1932—to protest the plans

contained in Chancellor Brüning's economy measures for limiting the extremely high pensions of retired Supreme Court judges to a maximum of 12,000 marks a year. For Bumke at that time, it was "almost an impossibility to remain the highest judge of a government which has departed so far from legal principles as would be the case if the law to reduce pensions were to pass."¹⁷

After the Nazis had had time to consolidate their rule and after "law and order" had returned to the Third Reich, Bumke, who had been a member of the German National People's Party, joined the NSDAP in 1937. Only a year later he was awarded the golden party badge. Bumke enjoyed Hitler's confidence to such a degree that not only was he made chairman of the "Special Panel" ("the Führer's Court," as it proudly called itself), which dealt with all of the special appeals lodged in the Führer's name in criminal cases; in addition, a special decree of July 4, 1939, exempted him from retirement at the age of sixty-five, allowing him to remain in office for another three years or even longer. Bumke proved to be worthy of such confidence in every respect, as we shall see. For now, it suffices to mention his extreme interpretation of the Race Laws, his "correction" of other courts' valid verdicts, and his participation in a meeting of the leaders of the German legal system to discuss the procedures for the mass murder of the handicapped. On April 20, 1945, as the U.S. Army was taking Leipzig, Judge Dr. Dr. Hon. Erwin Bumke committed suicide.

The State Thinker

Carl Schmitt was born on July 11, 1888, in Plettenberg in the Sauerland. His father was a merchant. After studying law in Berlin, Munich, and Strassburg under Max Weber and others, he wrote a thesis on a topic in criminal law and received a doctorate from the University of Strassburg. In 1916 he completed his *Habilitation* (a further examination qualifying a candidate for the rank of full professor), also in Strassburg, and became a full professor of public law at the University of Greifswald in 1921. In 1922 he moved to the University of Bonn and in 1926 to the Commercial College of Berlin. He owed his appointment to a professorship at the University of Cologne in 1933 largely to the efforts of a Jewish colleague, Hans Kelsen, whose views on political theory were the antithesis of Schmitt's. Soon afterward Schmitt took the lead in driving Professor Kelsen out of the university.¹⁸ When the Social Democratic Prussian government filed a suit with the Supreme Court against its ouster by Chancellor von Papen in July 1932, Schmitt was placed in charge of the national government's case, and he went on to become a close political friend and

adviser of Papen's successor in office, General von Schleicher. After the Nazis seized power, Göring, who was all-powerful in Prussia, obtained a chair for Schmitt at the University of Berlin and named him a Prussian privy councillor. Schmitt turned his back on the former conservative friends who had furthered his career and joined the Nazi party on May 1, 1933, barely escaping the ban on new members that went into effect for several years. The writer Ernst Niekisch has provided an excellent psychological portrait of Schmitt containing a comment on this move: "Hitler had barely got in, when Schmitt was ready: he slipped through the gates of the Third Reich just before they closed, so that he could not be overlooked when they needed a star jurist. Schmitt always managed to be a nose ahead of political developments, to an amazing degree. As a result he became something like the intellectual 'billeting officer' of the movement, coming in and setting up camp with such prudence and foresight that he earned the gratitude of the movement at every stage of the bourgeois restoration, while at the same time he always secured an advantageous position for himself."¹⁹ Within the Nazi organization known as the *Rechtswahrerbund* (Federation of the Guardians of the Law), Schmitt chaired the section of university professors; he served as editor of several scholarly journals and monograph series. Above all, however, as the teacher of Ernst Forsthoff, Ernst Rudolf Huber, and Theodor Maunz, the leading National Socialist professors of constitutional law, he was the originator of the "new" doctrine in this field.

To be sure, Schmitt could never completely shake off his past. Radical Nazi circles never forgave him the close contacts he had had with Jewish scholars: not only some of his benefactors but also some of his students had been Jews. The SS and its newspaper *Das Schwarze Korps* (The Black Corps) remained suspicious of his Catholicism and "reactionary" past association with chancellors Brüning and von Schleicher. The 1942 edition of the Brockhaus Encyclopedia, which had been "coordinated" to reflect Nazi thinking, noted that some of the privy councillor's writings were "not always free of contradictions; in addition they contain strikingly frequent shifts of position, so that objections to his 'situational jurisprudence' have been raised." Nonetheless, this official assessment recognized "Schmitt's achievement in contributing through his work to the undoing and destruction of outmoded and useless systems."

No one could argue with that. Carl Schmitt had always been the anti-democratic, conservative constitutional lawyer *par excellence*, a circumstance which explains his swift rise to prominence before and during the Third Reich as well as the strong influence he continued to exert afterward.

Although both friend and foe testified repeatedly to his "brilliance," Schmitt's obsessive need to adapt to his surroundings led him to commit numerous painful lapses during the Nazi era. His essay "The Führer as the Guardian of Justice,"²⁰ which is his legal and moral justification of the murders committed between June 30 and July 2, 1934, in the wake of the "Röhm putsch," is occasionally cited as a prime example of the depths to which German legal scholarship could sink. The lack of character evinced by this attempt to ingratiate himself with the killers was made all the more appalling by the fact that his onetime friend and mentor Kurt von Schleicher and von Schleicher's wife were among the victims.

When a number of intellectuals were stripped of their German citizenship and their books were burned, Schmitt's comment was: "German intellectuals like these we can do without . . . Germany has spit them out for all time."²¹

His anti-Semitic rantings were even worse, if anything. Already in 1933 he published as a gesture of obeisance to the National Socialists a book entitled *State, Movement, People*, in which he claimed, "Someone not of our kind may make every effort to appear a critical and penetrating thinker; he may read books and write books; yet he thinks and understands in different terms, because he is of a different kind, and his every significant thought remains determined by the existential conditions of his kind."²² In 1936 Schmitt organized a conference on the subject of "Jews in the Fields of Law and Economics," at which he proclaimed, "The Jew's relationship to our intellectual work is parasitical, tactical, and commercial . . . Being shrewd and quick, he knows how to say the right thing at the right time. That is his instinct as a parasite and born trader."²³ When someone in the audience pointed out that the Jewish law professor Friedrich Julius Stahl—a leader of the Prussian conservatives and one of the most important antidemocratic political thinkers of the nineteenth century, from whom many of Schmitt's own doctrines were derived—had made genuine contributions to German legal scholarship, Schmitt replied, "When it is pointed out again and again that this man was subjectively honest, that may be right, but I must add that I cannot see into the soul of this Jew and that we have no access at all to the innermost nature of Jews. We are aware only of the disparity between them and our kind. Once you have grasped this truth, then you know what race is."²⁴ "The constitutional theorist of the new Reich," as Schmitt like to be called,²⁵ had outdone virtually everyone else in grasping the connections between intellect and race. In his opening address to the conference mentioned above, he objected strenuously to the way Jewish German emigrants had characterized "the magnificent efforts of *Gauleiter* Julius Streicher as un-

intellectual.²⁶ [The Nazis divided Germany into regions, each known as a *Gau*. The *Gauleiter* was the regional Nazi party leader.—*Translator*.]

When Schmitt fell slightly out of favor in 1936 and lost his top office in the Nazi Federation of the Guardians of the Law, he once again displayed his opportunism in his choice of a research topic. Leaving the field of constitutional law, the legal analogue of domestic policy, he shifted his interest to international law, the analogue of foreign policy. Until 1945 his published papers were devoted almost exclusively to this field. Previously he had supported the dictatorship and had attempted to justify the Nazis' seizure of power and the suppression of "the enemy within" the borders of Germany. Now, as Hitler prepared to conquer Europe, and later, when the Germans occupied half of it, he developed a doctrine justifying the subjection of neighboring peoples, the legal concept of *Grossraum*. [*Grossraum* translates literally as "large area," and in National Socialist thinking is related closely to the concept of *Lebensraum*. It refers to the territory outside the borders of Germany which the Nazis claimed as their natural sphere of influence.—*Translator*.] "The new ordering concept of a new international law is our concept of the Reich, [which] is capable of acquiring influence reaching into Central and Eastern Europe and of repelling interference by powers alien to the territory and the *Volk*. The Führer's deed has given political reality, historical truth, and a great international future to the ideas of our Reich."²⁷

Once the great international future had turned into the political reality of unconditional surrender (to powers alien to the territory and the *Volk*, no less), the Americans placed *Grossraum*-theorist Schmitt in a detention camp and even debated making him a defendant at the Nuremberg war crimes trials. However, the prosecutors apparently thought it would be more advantageous to make use of Schmitt's notorious opportunism in order to discredit a witness summoned by the attorneys who were defending Ernst von Weizsäcker, a senior official in the foreign ministry. This witness was Erich Kaufmann, Schmitt's former teacher, a German nationalist, and a Jewish professor of constitutional law.²⁸ Schmitt did not disappoint his new masters. He provided quotations from Kaufmann's writings in which Kaufmann glorified war and dreamed the dream of *Grossraum*. After this the value of Kaufmann's testimony was considerably diminished. Schmitt was released from detention and promised to withdraw "into the security of silence." Nonetheless, back home in Plettenberg, he published a few writings, partly to justify his earlier publications and to convert his contributions to Nazi rule into a subtle form of "resistance." In so doing he did not shrink from massive falsifications: one of the main authors of the "national defense" doctrine brazenly claimed that he

had "never participated . . . in the talk about the 'state emergency.'²⁹ Later, federal chancellor Kurt Kiesinger never denied a report of the newspaper *Frankfurter Rundschau* that at the time of the "grand coalition" government (1966–1969), Schmitt was his "secret adviser in matters of constitutional law" and that Kiesinger was in the habit of conferring with a small group in Plettenberg that included the theorist of "national defense."³⁰ In 1948 it had not been possible to celebrate Schmitt's sixtieth birthday with appropriate ceremony, and instead of a *Festschrift* there was merely a little book dedicated to him on the occasion: *Imagery in the Texts of Works by Johann Sebastian Bach*.³¹ However, the fat *Festschrift* volumes for his seventieth³² and eightieth birthdays³³—the latter entitled *Epirrhosis*, which means "enthusiastic agreement" in Greek—included contributions from every postwar German authority on constitutional law; it documented the esteem in which Carl Schmitt and his antidemocratic doctrines were held even by the legal scholars of the Federal Republic.

Schmitt, who died in 1985, had much in common with Erwin Bumke. Both numbered among Germany's most respected jurists prior to 1933, and both were highly cultivated men: Schmitt had a great fondness for Bach's organ music, and Bumke is said to have been a talented violinist. Both were conservative and German nationalists in their thinking; both longed for an authoritarian government and sympathized openly with the Nazis, while supposedly detesting them in private. And finally, among their legal colleagues, neither the president of the Supreme Court nor the celebrated constitutional scholar was exceptional in sympathizing with the Nazis. On the contrary, they were quite representative of the rank and file of less prominent judges, public prosecutors, law professors, and—to a lesser extent—attorneys. This is shown by events during the process of "coordination": soon after Hitler became chancellor, every trace of opposition was crushed. The sympathy demonstrated by German jurists with the rise of the National Socialist movement, from its beginnings to the seizure of power, was at most only temporarily clouded by the brutality of the "coordination."