that of 1871. What has come to pass in this past year and what is yet to come on a much broader scale is not the so-called totality of the state but rather the totality of the National Socialist movement. The state—whether as a mechanized apparatus or as an instrument of domination—is no longer something that should exist independent of the *Volk* and of the movement; it is rather a tool of the prevailing National Socialist worldview. [. . .] Should we continue to speak in terms of a "total state," gradually today's young National Socialists, as well as future generations, would again seek to focus primarily on the notion of the state and on the actions of government officials. However, if we are unequivocal now in stressing that it is a specific political worldview and movement that lays claim to the right of totality, then future generations will concentrate on this movement and will come to view the relationship between the state and the NSDAP in an entirely different light than they would as long as the concept of "nationhood" or "statehood" per se is assigned primacy. The National Socialist movement is the tangible expression of twentieth-century thought regarding the safeguarding of the greater German *Volk,* its blood and its character. The state is the most potent, the manliest instrument of power that the movement has at its disposal, and the seeds of the state's vigor and motive forces are to be sown by the movement, that it might remain supple and unyielding and circumvent the dangers of bureaucratization, of ossification, and of alienation from the *Volk.* It is only in this context that the lifeblood of the National Socialist conception of state and nationhood comes to the fore, and we believe that this context is also what properly consecrates the state, its inner strength and its greater authority, far more so than if it were to be transformed, possibly through the efforts of energetic individuals, into a means to an end and ossify as a result.

For all these reasons, all National Socialists should henceforth refrain from speaking in terms of a total state and speak instead of the totality of the National Socialist movement, of the National Socialist German Workers' Party as the physical embodiment of this worldview, and of the National Socialist state as the instrument for securing the soul, the mind, and spirit, and the blood of National Socialism as the epochal manifestation that has its beginnings in the twentieth century.

30

CARL SCHMITT

The Führer Protects the Law

On Adolf Hitler's Reichstag Address of 13 July 1934

First published as "Der Führer schützt das Recht: zur Reichstagsrede Adolf Hitlers vom 13. Juli 1934," in his *Positionen und Begriffe im Kampf mit Weimar—Genf—Versailles 1923–1939* (Hamburg: Hanseatische Verlagsanstalt, 1940), 198–201. Translated by Timothy Nunan

I

At the German Jurists' Annual Convention held in Leipzig on 3 October 1933, the Führer spoke on the subject of the state and the law. He elaborated the distinction between substantive *law,* inseparable from neither morality nor justice, and the empty *legality* of a false neutrality, and he elaborated on the inner contradictions of the Weimar system, which destroyed itself by this neutral legality and turned itself over to its enemies. To this he added, "This must be a warning to us."

In his Reichstag address of 13 July 1934, directed to the entire German *Volk,* the Führer recalled another historical warning. The powerful German Empire, founded by Bismarck,

collapsed during the World War, because at the decisive moment it did not have the strength "to avail itself of its articles pertaining to war." Paralyzed by the logic of a liberal "constitutional state," the civil bureaucracy lacked all political instinct and could not find the courage to handle mutineers and enemies of the state according to the law entrusted it. Whoever reads today in volume 310 of the Reichstag official record the report about the public plenary session of 9 October 1917 will be appalled and will understand the Führer's warning. The Reich government reported that the ringleaders of the mutinying sailors had carried on negotiations with Reichstag representatives of the Independent Socialist Party.

The German Reichstag responded with loud indignation to the fact that one was not allowed to curtail a party's constitutional right to disseminate propaganda among the army and argued that in this case there was no conclusive proof of high treason. And just a year later, the Independent Socialists spat this hard proof right back into our faces. With exemplary bravery and with dreadful sacrifices, the German *Volk* held the onslaught of an entire world at bay for four years. But the political leadership failed woefully in this struggle against the poisoning of the German *Volk* and the undermining of the German law and its sense of honor. To this very day we still atone for the hesitations and paralyzed state of the German governments during the World War.

All moral outrage over the shame of such a collapse has coalesced in Adolf Hitler and has become in him the driving force of a political act. The experiences and warnings of the history of the German misfortune are alive in him. Most people are frightened by the severity of such warnings and would rather flee into an evasive and compensatory superficiality. The Führer, however, takes the warnings of German history quite seriously. This gives him the right and the power to found a new state and a new order.

II

The Führer protects the law from its worst abuse when in the moment of danger he, by virtue of his domain as Führer and as the supreme judicial authority, directly creates law: "In this hour, I was responsible for the destiny of the German nation and thereby became the *supreme judicial authority of the German* Volk." The true Führer is always a judge as well. From his domain as Führer flows his domain as judge. Whoever wants to separate, or even to juxtapose, these two domains makes the judge into an anti-Führer or into the tool of an anti-Führer and seeks to unhinge the state with the help of the judicial system. It was characteristic of the legal blindness of liberal legal thought that it sought to make out of criminal law a general amnesty, the "Magna Carta of the criminal" (Fr. von Liszt). Constitutional law thus became the Magna Carta of the high traitor and the treasonous. The judiciary is transformed into a calculating machine through whose predictable and calculable functioning the criminal has won his well-earned subjective right. Yet, in this respect, the state and the *Volk* are fettered to a supposedly all-encompassing legality. In the most extreme emergencies, however, some liberal jurists may secretly permit some underhanded apocryphal emergency loopholes depending on the nature of the circumstances but that are denied by others in the name of the constitutional state and regarded as "juridically nonexistent." This manner of jurisprudence, however, does not grasp the word of the Führer that he has acted as "the supreme judicial authority of the *Volk*." This manner of jurisprudence can only reinterpret the act of the Führer as an ex post facto measure justified by the clear and present danger of the state of siege. Through this reinterpretation, a fundamental principle of our present constitutional law, the principle of the primacy of political leadership, would become a juridically meaningless phrase and the gratitude that the Reichstag expressed to the Führer in the name of the German *Volk* would be contorted into an indemnity or even an acquittal.

In truth, the Führer's deed was an exercise of real legal jurisdiction. It was not subordinate to the judiciary; it was rather itself the supreme judiciary. It was not the action of a republican

dictator, who in extralegality creates a fait accompli while the law shuts its eyes for a moment so that the fictions of all-encompassing legality can find traction. The judicial domain of the Führer springs from the same source of law from which springs the law of every *Volk*. The supreme law proves itself in extreme necessity, when there appears the highest degree of judicially administered revenge as the realization of this supreme law. All law stems from the *Volk*'s *right to exist*. Every legal statute, every judicial decision only contains justice insofar as it flows from this source of law. What remains is not law but rather a "positive network of coercive norms," which every clever criminal scoffs at.

III

The Führer has emphasized the difference and sharp contrast between his government and his state against the state and government of the Weimar system: "I did not want to hand the young Reich over to the same fate as the old one. . . . A new government was not formed for the umpteenth time on 30 January 1933; rather, a new rule has done away with an old and diseased era." When the Führer demands the liquidation of a sad chapter of German history with such words, then his words must also have juridical consequences for our legal thinking, legal practice, and interpretation of laws. We must examine anew our usual methods and trains of thought, as well as the heretofore-prevailing theories and preliminary decisions of the highest courts in all areas of the law. We cannot blindly be permitted to adhere to the juridical concepts, arguments, and prejudices brought forth by a sick and diseased era. Many a sentence in the grounds for decisions of our courts can be understood from the perspective of justified resistance against the corruption of the previous system. If perpetuated thoughtlessly today, this practice would have the opposite significance and would turn the judiciary into the enemy of the current state. When the Reichsgericht (Imperial Court of Justice) in June 1932 (RGSt. 66, 386) regarded the meaning of judicial independence in terms of its duty "to protect the citizen of the state in accordance with his legally recognized rights from the potential arbitrariness of a government prejudiced against him," this was expressed from a liberal-individualistic position.[1] "We understand the judiciary as being in an adversarial position against not only the head of state and the government, but also the administrative organs in general." Such a statement is comprehensible from the perspective of those times. Today, however, we have incumbent on us the responsibility to assert the *new sense of meaning in all public legal institutions,* including the judiciary, with the greatest decisiveness.

At the end of the eighteenth century, the aged [Karl Friedrich] *Häberlin,* pondering the question of state emergency law in connection with the problem of the separation of *judicial affairs and government affairs,* came to the conclusion that in the event of danger or great damage to the state, a government could interpret every judicial affair as a government affair. In the nineteenth century, [Gabriel Michel] *Dufour,* one of the fathers of French administrative law, defined the act of government (*acte de gouvernement*) immune to ex post judicial review as that act whose goal was the defense of society—indeed, the *defense of society* from *enemies* within and without, open or hidden, present or future. Whatever one thinks of these determinations, they exhibit at any rate a juridically significant particularity of political "acts of government" that has even procured legal recognition in liberal constitutional states. In a Führer state, however, in which legislation, government, and judiciary do not coercively and distrustfully control one another, as in a liberal constitutional state, then what is legitimate for a "government act" must be valid to an incomparably higher degree for an act through which the Führer has stood the test of his highest domain as Führer and judicial authority.[2]

The Führer himself determines the content and scope of his course of action. Once again: the Führer's speech has assured us of the fact that since early in the morning on Sunday 1 July, the situation of "normal law" has been restored. The law on measures of state self-

defense of 3 July 1934 (RGBl. I, 529) [. . .] designates the temporal and substantive scope of the Führer's immediate action in the form of a government decree.[3] "Special operations" not empowered by the Führer, not standing in any connection to the dealings of the Führer, or falling outside or inside of the time frame of these three days, are unjust; the higher and purer is the justice of the Führer, the more direly unjust are such actions. According to the statements of the Prussian prime minister, *Göring,* on 12 July and the statements of the Reich justice minister, *Gürtner,* on 20 July 1934, especially strict prosecution is to be employed against such impermissible special courses of action.[4] The fact that determining the distinction between authorized and unauthorized acts cannot be in the competency of a court in such cases of doubt goes without saying following the previous indication about the particularity of the government act and the acts of the Führer.

IV

Within the period of those three days, the judicial acts of the Führer through which he, as leader of the movement, punished the *breach of loyalty committed against him,* the highest leader of the movement, *by his subordinate* (*Unterführer*), has a special significance. The Führer of the movement has a particular judicial duty whose inner justice cannot be realized by any other actor. The Führer explicitly accentuated the fact in his Reichstag address that there is only one carrier of the political will in our country, the National Socialist Party. Yet in such a collective entity, one that is structured and divided into state, movement, and *Volk,* there exists the proprietary inner right of those state-supporting life as well as communal institutions that are especially based on their sworn loyalty to the Führer, secured through the oath. And today no less than the fate of the political unity of the German *Volk* depends on the party fulfilling its tasks. "This mighty task, in which is concentrated the entire danger of the political, cannot be taken away from the party or the SA by any other institution, least of all by a juridically proceeding civilian court. Here this task stands by itself."[5] Therefore, the political Führer became the supreme judge, as a result of the special qualifications of the crime.

V

The Führer reminds us again and again of the collapse of 1918. Our situation today can be determined only from the perspective of that date. Whoever wants to correctly judge the serious events of the 30th of July may not take the individual events of that and the two following days out of the context of our political situation. They may not, as is procedurally done in certain punitive cases, isolate and seclude those discrete events until they have been emptied of their political substance and only the "purely juridical facts of the matter" and "facts not pertaining to the matter" remain. Such methods do not deal justly with a matter of high politics. To depict this procedural of isolation as the one and only practice fit for a liberal constitutional state was one aspect of the poisoning of the *Volk* over the past decade and is a long-used trick of anti-German propaganda. In the fall of 1917, all the confused German parliamentarians—capitalists as well as Communists, clerical politicians as well as atheists—remarkably demanded in their perverse unanimity that Germany's political fate be handed over to such procedural fictions and distortions. The spiritually hapless bureaucracy never emotionally grasped the political sense of those "juridical" demands. In the face of Adolf Hitler's deed, many of Germany's enemies will come forth with similar demands. But they will be shocked to find that today's German state has the power and will to distinguish between friend and enemy. They will promise us the praise and applause of the entire world, if only we would once more, as in 1919, lie down and sacrifice our political existence to the false idols of liberalism. Whoever sees the daunting background of our political situation will

understand the admonitions and warnings of the Führer and arm themselves for the great spiritual struggle in which we have to preserve our own righteous law.

Notes

1. Compare the recent writings of Heinrich Henkel, *Die Unabhängigkeit des Richters in ihrem neuen Sinngehalt* (Hamburg: Hanseatische Verlagsanstalt, 1934), 10f.

2. Compare to the essay by E. R. Huber, "Die Einheit der Staatsgewalt" in *Deutsche Juristen-Zeitung* (August 1934), 950.

3. RGBl. I, 529 is a reference to the Gesetz über Maßnahmen der Staatsnotwehr of 3 July 1934, justifying the state-sanctioned murders committed during the Röhm purge on 30 June 1934.—Eds.

4. *Völkischer Beobachter* (13 July 1934 and 22/23 July 1934); *Deutsche Justiz* (1934), 925, 983.

5. Carl Schmitt, *Staat, Bewegung, Volk* (Hamburg: Hanseatische Verlagsanstalt Hamburg, 1933), 22.

31

HANS FRANK

On the Position of the Judge before National Socialist Law and in the National Socialist State

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1. The judge is not placed over the citizen as a government authority. Instead, he stands in the ranks of the living community of the German *Volk.* It is not his task to help apply a legal order that is higher than the racial community or to enforce some system of universal values; far more, he is charged with the task of safeguarding the concrete order of the racial community, exterminating pestilential elements, punishing behaviors that are detrimental to the community, and arbitrating quarrels among members of the community.
2. The basis for interpreting all legal sources is the National Socialist *Weltanschauung,* especially as expressed in the party program and in statements made by our Führer.
3. A judge has no right to examine a decision of the Führer that has been issued in the form of a law or a decree. The judge is bound, too, by other decisions of the Führer that clearly express a desire to establish law.
4. Legal regulations issued prior to the National Socialist revolution may not be applied if such application should violate today's healthy sentiment of the people. If a judge should suspend some legal regulation with this in mind, it will be possible to obtain the decision of the highest court on the matter.
5. To fulfill his task in the racial community, the judge must be independent. He is not bound by instructions. The independence and dignity of the judge make it essential to protect him properly against efforts to influence him and against unjustified attacks.