

Constitutional entrapment

And yet discrimination in such matters seems difficult, Ulrich said. Suppose, for instance, that the composer of the latest worldwide musical hit happened to be a political schemer [*ein intrigant*] and managed to become president of the world—which was certainly conceivable, given his enormous popularity—would this be a leap forward in history or an expression of the cultural situation [*der geistigen Lage*]?”
“That’s quite impossible!” Arnheim said seriously. “Such a composer couldn’t possibly be either a schemer or a politician—otherwise, his genius for musical comedy would be inexplicable, and nothing absurd [*nichts Unvernünftiges*] happens in world history.”¹

Alluding to last summer’s decision in *Trump v. United States*² Walter M. Shaub Jr. wrote, some days after the 2024 election, “Thanks to the fringe-right Supreme Court justices who recently invented presidential immunity, no one knows how many crimes he will commit.”³ SCOTUS did not invent criminal immunity of the executive of a democracy, the *Staatsrechtler* Carl Schmitt did.

No surprise the Court did not cite a Nazi jurist in its opinion, even though Schmitt’s reasoning does foreshadow the Court’s in *Trump*. The facts of the situation calling for Schmitt’s legal interpretation are well-attested. In late June 1934 Reich Chancellor Adolf Hitler ordered the murder of a number of domestic threats to his party’s hegemony.⁴ Two weeks after the killings Hitler addressed the Reichstag and ‘enlightened the nation’ about his decision process “in a speech broadcast on the radio and blared out to the population in pubs, bars and town squares across the land.”⁵ Two weeks after that address Schmitt wrote a piece in the pro-Nazi Bar journal *Deutsche Juristen-Zeitung* asserting the legality of Hitler’s act. “In truth,” Schmitt wrote, “the Führer’s deed was an exercise of authentic jurisdiction. His deed is not subordinate to justice but itself constitutes supreme justice.”⁶ Concurring in *Trump*, Justice Clarence Thomas wrote, “In this case, there has been much discussion about ensuring that a President ‘is not above the law.’ But, as the Court explains, the President’s immunity from prosecution for his

¹ Robert Musil, *The Man Without Qualities, Volume 1* (tr. Sophie Wilkins, ed. consult. Burton Pike 1995) 184-185. *Der Mann ohne Eigenschaften 1 | Erstes Buch | Zweiter Teil | Kapitel 43*: <http://musilonline.at/musiltext/der-mann-ohne-eigenschaften-1/moe1-teil-2-kapitel-40-49/>.

² No. 23-939; 603 U.S. ____ (2024), July 1, 2024: https://www.supremecourt.gov/opinions/23pdf/23-939_e2pg.pdf.

³ “The Return of Trump—II,” *The New York Review of Books Online*, November 9, 2024: <https://www.nybooks.com/online/2024/11/09/the-return-of-trump-ii/>.

⁴ See Richard J. Evans, *The Third Reich in Power* (2005) 29-41. “At least eighty-five people are known to have been summarily killed without any formal legal proceedings being taken against them. Twelve of the dead were Reichstag deputies.” *Id.* 39-40.

⁵ *Id.* 37.

⁶ *In Wahrheit war die Tat des Führers echte Gerichtsbarkeit. Sie untersteht nicht der Justiz, sondern war selbst höchste Justiz.* Carl Schmitt, “Der Führer schützt das Recht: Zur Reichstagsrede Adolf Hitlers vom 13. Juli 1934,” 15 *Deutsche Juristen-Zeitung* 945, 947 (1 August 1934): https://www.flechsigsig.biz/DJZ34_CS.pdf.

official acts *is* the law. The Constitution provides for ‘an energetic executive,’ because such an Executive is ‘essential to . . . the security of liberty.’”⁷ (As Hitler put it, “If disaster was still to be averted, then action had to be taken at lightning speed.”⁸). True jurisdiction, *echte Gerichtsbarkeit*, sounds in the dynamic of the President’s official acts as such, not in any legal norm. In exercising his constitutional duty to “take Care that the Laws be faithfully executed” (Art. II, sec. 3), the President, *per* the opinion in *Trump*, has authority to decide which laws he shall faithfully execute and which he shall violate for whose benefit and when.

By the Court’s decision in *Trump* a President’s official acts are ‘the law of his term’ (not the Court’s phrase), no matter that they may be violations of criminal statutes. The Constitution provides explicitly one sanction against a President whose official acts are also crimes (e.g., taking bribes for pardons, ambassadorships, judicial appointments, tariff waivers, etc.), and that is impeachment and removal from office. Since the Senate has never been able to remove a President from office—not even the criminally seditious Trump—that sanction is toothless, especially in light of the President’s new-found immunity from prosecution for ordering Armed Forces to murder Senators likely to vote for removal.⁹ Moreover, there is now an argument that the rationale for Presidential immunity for crimes *ex officio* also immunizes a President from impeachment for high crimes and misdemeanors so long as he perpetrates those in the course of his official acts; e.g., as Commander in Chief of the Armed Forces of the United States. Just as we cannot allow fear of prosecution to stay the President’s hand so also we cannot let fear of impeachment for crimes *ex officio* balk his zealous interventions for the security of liberty. As Hitler justified his own “ruthless and bloody intervention,” “If anyone reproaches me and asks why we did not call upon the regular courts for sentencing, my only answer is this: in that hour, I was responsible for the fate of the German nation and was thus the Supreme Justiciar of the German Volk!”

⁷ Thomas, J., concurrence at slip op. 8-9 (his italics).

⁸ <https://der-fuehrer.org/reden/english/34-07-13.htm>.

<https://archive.org/details/AdolfHitlerAllEnglishSpeeches/10+Adolf+Hitler+ADDRESS+TO+THE+REICHSTAG+REGARDING+THE+PURGES+OF+THE+NIGHT+OF+THE+LONG+KNIVES+13+Jul+1934.mp4> at 22:00.

⁹ “I asked you a yes or no question, could a president who ordered SEAL Team Six to assassinate a political rival, who was not impeached, would he be subject to criminal prosecution?

“Mr. Sauer [Counsel for Donald J. Trump]: My answer is qualified yes.”

Oral argument in *Trump v. United States* before the D.C. Circuit Court of Appeals January 10, 2024:

<https://www.rev.com/blog/transcripts/dc-circuit-court-of-appeals-oral-argument-u-s-v-trump-1-10-24-transcript> .

The final answer from SCOTUS in *Trump* is ‘Absolutely no.’ (‘But **American** warriors would never carry out an unlawful order!!’ It seems plausible to me that the remit of Secretary Hegseth and Directors Noem and Ratcliffe (and Patel if confirmed) includes identifying and readying precisely those military and law enforcement personnel willing to carry out unlawful orders from the President. And the likelihood of Trump’s ordering a domestic political murder increases apace with his mind’s decay.)

One reads in the text of the Constitution no exception to “shall take Care” for exigent circumstances (states of emergency, *Ausnahmezustanden*), and no exemption of the President from faithful execution of the laws. The Court teaches that this is a childish naive reading. Sophisticated jurists see at a glance that it won’t do; “the Constitution is not a suicide pact.” (Too late anyhow.)

Turns out (who knew?) the Constitution instantiates Schmitt’s principle “Sovereign is he who decides on the exception.”¹⁰ The sovereign, by the theory of the immune executive, is the President.

So it’s a reasonable conjecture that when the cases reach it the Court will gut the Impoundment Control Act of 1974.¹¹ For *Trump v. U.S.* establishes the *Präsidentprinzip*, i.e., because *der Präsident schützt die Sicherheit der Freiheit* the President’s official acts are not constrained by criminal statutes. (To alter slightly Richard Nixon’s maxim, ‘It’s not prosecutable if the President does it.’) *A fortiori* not constrained by chickenshit fiscal statutes. Nor by the contempt power of a self-gelded judiciary.

Such is the force of the “inner truth and greatness of this movement,”¹² Trumpism, MAGA. What then is the nature of that inner truth and greatness? Schmitt wrote in his diary after the war, “This is the secret key to my entire intellectual and published existence: a struggle for intrinsically Catholic intensification (against the neutralizers, the aesthetic idlers, against abortionists, cremators, and pacifists).”¹³ So rather than one of the ‘fringe-right,’ the decision in *Trump* may be understood as an intrinsically monotheistic intensification of a structural lust for submission to (ostensibly salvific) authority. That ole-time *geistige Lage*.¹⁴ Manifest in *Trump* as jurisprudential ontotheology.

DCW 02/10/2025

¹⁰ *Souverän ist, wer über den Ausnahmestand entscheidet*. Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* ([1933] 10^{te} Aufl. 2021).

¹¹ <https://www.lawfaremedia.org/article/a-primer-on-the-impoundment-control-act> .

¹² Martin Heidegger, *Einführung in die Metaphysik* (1935); *Gesamtausgabe Band 40*: 208:

<https://www.beyng.com/gaselis/?vol=40.00&pg=208> .

¹³ Diary entry 1948, as cited by Volker Neumann, “Carl Schmitt,” in *Weimar: A Jurisprudence of Crisis* (ed. Arthur Jacobson and Bernhard Schlink 2000) 280, 284. ‘Aesthetic idlers’ form Hitler’s “fourth group of pathological enemies of the State” enumerated in the *Reichstagsrede* of July, 1934.

¹⁴ “The suggestion that a person may be in some sense liberated through acceding to a power which is not subject to his immediate voluntary control is among the most ancient and persistent themes of our moral and religious tradition. It must surely reflect some quite fundamental structural feature of our lives.” Harry G. Frankfurt, *The importance of what we care about: Philosophical essays* ([1988] 1998) 89.