

Editorial

Lessons from the Torture Memos

In this issue *EIR* presents its documentation of the parallels between the Bush Administration's "torture memos," and Hitler's orders to the armed forces of Nazi Germany as they were about to invade the Soviet Union in June 1941. We also show that the legal arguments of the Carl Schmitt, the "Crown Jurist of the Third Reich," find their echoes in today's U.S. Justice Department under Attorney General John Ashcroft and his band of ideologues in the Office of Legal Counsel.

As we document, every argument advanced by the White House and Donald Rumsfeld's Pentagon, were first generated in the Justice Department. The first phase, which proceeded in late 2001 and early 2002, was the development of the argument that the President could ignore or suspend the operation of international treaties (which are the law of the land, under the U.S. Constitution) and U.S. laws such as the War Crimes Act and the Anti-Torture Statute, both passed by Congress less than ten years ago. This was particularly focussed on the Geneva Convention, but drew on arguments that John Yoo in the Office of Legal Counsel (OLC) and others were putting forward even before the 9/11 attacks.

The second phase was the development of a legal justification for torture, which is laid out in the Aug. 1, 2002 Justice Department Office of Legal Counsel memo authored largely by Yoo, and signed by Jay S. Bybee. The Bybee memo argued, pathologically, that almost any degree of infliction of pain would be permitted under the OLC's interpretation of the Anti-Torture Statute. Further, the Bybee memorandum put forth the argument, long argued by advocates of untrammelled Presidential power, that the Anti-Torture Statute—or, indeed, any law that put restrictions on the President's conduct of war or of foreign policy—is an unconstitutional infringement on the President's inherent powers as Commander-in-Chief.

This, as John Dean points out in his new *Worse than Watergate* book (reviewed in our June 18 issue), has been a central theme of Dick Cheney since his days in the Ford White House, when, as Dean puts it, "Con-

gress set about dismantling the imperial presidency" in the wake of Vietnam and Watergate. "Cheney still seems to resent these moves to bring the presidency back within the Constitution," Dean wrote, and he notes that the current Vice President took a leading role in Congress in obstructing the Congressional investigation of Iran-Contra in the 1980's.

It is illustrative that the Bybee brief cites a 1970 memorandum from the then-head of the Office of Legal Counsel—one William H. Rehnquist—to the then-Special Counsel to the President—one Charles W. Colson—on the subject of "The President and the War Power: South Vietnam and the Cambodian Sanctuaries," in support of its arguments that Congress cannot interfere with the President's powers as Commander-in-Chief "to ensure the security of the United States in situations of grave and unforeseen emergencies."

In the Bybee memo, the Rehnquist-Colson memo is cited in the context of showing that the Anti-Torture Statute is unconstitutional if it infringes on the President's power to order torture in times of emergency. This leads directly into the discussions of the legal defenses of "necessity" and "self-defense," which Bybee and the OLC contend could be raised in any future war-crimes prosecution.

This argument, among other things, willfully flies in the face of the United States Constitution, which, in Article I, Section 8, vests in the Congress several crucial powers relating to the military and war, in particular:

- "To define and punish . . . Offenses against the Law of Nations";
- "To declare War . . . and make Rules concerning Captures on Land and Water"; and
- To make Rules for the Government and Regulation of the land and naval forces."

Moreover, the Ashcroft Justice Department argument perfectly mimics that of Nazi theorist Carl Schmitt, who prescribed precisely the same powers, unencumbered by the law, to the Leader, in defense of the German nation and people in times of emergency.