Bush and Hitler: What The 'Torture Memos' Reveal

by Edward Spannaus

In the Spring of 1941, as Nazi Germany was preparing to invade the Soviet Union, Adolf Hitler issued an infamous edict which has become known as the "Commissar Order," to govern the conduct of German armed forces on the Eastern Front. This order provides a largely-unnoticed precedent for the "legal" rationalizations found in a number of hitherto-secret Bush Administration legal memoranda, which have recently come to light.

As is documented in William L. Shirer's *The Rise and Fall of the Third Reich,* Hitler outlined this policy during a meeting with the heads of the three armed services and key army field commanders early in March 1941: "The war against Russia will be such that it cannot be conducted in a knightly fashion. This struggle is one of ideologies and racial differences and will have to be conducted with unprecedented, unmerciful, and unrelenting harshness. All officers will have to rid themselves of obsolete ideologies. . . . German soldiers guilty of breaking international law will be excused. Russia has not participated in the Hague Convention and therefore has no rights under it."

On May 13, 1941, Field Marshal Wilhelm Keitel, the head of the Armed Forces High Command, issued an order in Hitler's name, severely limiting functions of the military courts martial system, and virtually giving immunity to German forces for war crimes against Russians: "With regard to *offenses* committed against *enemy civilians by members of the Wehrmacht, prosecution is not obligatory,* even where the deed is at the same time a military crime or offense." Yhe army was explicitly instructed to go easy on any such German offenders, "remembering in each case all the harm done to Germany since 1918 by the 'Bolsheviki.' "

Underlying such orders was the legal philosophy set forward by the "Crown Jurist of the Third Reich," Carl Schmitt, whose writings have unfortunately undergone a revival in the United States in recent years. Schmitt contended that, in times of emergency and crisis, the actions of the Leader were not subordinate to justice, but constituted the "highest justice." In passages which remind one of the legal defenses of "necessity" and "self-defense" posed by John Ashcroft's Justice Department (DOJ) today, Schmitt wrote: "All law is derived from the people's right to existence. Every state law, every judgment of the courts, contains only so much justice, as it derives from this source. The content and the scope of his action, is determined only by the Leader himself."

'A New Kind of War'

President George W. Bush's counsel, Alberto Gonzales, addressed a memorandum to the President on Jan. 25, 2002, about four months into the "war of terrorism." Gonzales noted that Bush had called the war against terrorism "a new kind of war," which "renders obsolete" and "quaint" some of the provisions of the Geneva Convention on the treatment of prisoners of war. And Gonzales warned the President that he and other officials stood in potential danger of being prosecuted for war crimes; he suggested steps that could be taken by Bush to set up "a solid defense to any future prosecution"—most importantly, to declare that the Geneva Convention did not apply to the war against Taliban and Al-Qaeda in Afghanistan.

Jan. 9, 2002: The alarm as to possible war crimes prosecutions was sounded by John Yoo, a Deputy Assistant Attorney General in the Justice DOJ's Office of Legal Counsel (OLC)—a traditional haunt of right-wing ideologues in times of Republican administrations.

The arguments for ignoring international law and letting "Presidential prerogative" set the law, which White House Counsel Alberto Gonzales (left) got from John Ashcroft's Justice Department, have a very dark history.

Yoo and Robert Delahunty pulled together the arguments for ignoring international treaties and laws, in a 42-page draft memorandum addressed to Department of Defense (DOD) General Counsel William Haynes, and entitled "Application of Treaties and Laws to al-Qaeda and Taliban Detainees." Yoo's memo really constituted a defense lawyer's brief against future war-crimes charges; its discussion of the War Crimes Act began on its first page. Much of its discussion centered on the Geneva Conventions, particularly the Third Convention concerning the treatment of prisoners of war (GPW); the Fourth, concerning the obligations of an occupying power; and on what is known as "Common Article 3." The latter is a provision common to all four Geneva Conventions; it prohibits not only torture and other acts of violence, but also, "Outrages upon personal dignity; in particular, humiliating and degrading treatment." This applies to *all* detainees, whether or not they are technically classified as prisoners of war under Geneva III. Yoo's memo warned the Pentagon that the War Crimes Act "criminalizes violations of what is known as 'common' Article 3. . . ."

Yoo endeavored to show why neither Taliban nor al-Qaeda should be covered by Geneva. One argument was that Afghanistan under the Taliban was a "failed state," and therefore its previous status as a signator to the Geneva Conventions no longer applied. His conclusion was that "neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions at Guantanamo Bay."

According to knowledgable sources, the Yoo draft went not only to DOD General Counsel Haynes, but also to White House Counsel Gonzales and Dick Cheney's General Counsel David Addington, all of whom approved it. But others, particularly the State Department and the Joint Chiefs of Staff (JCS), seriously disagreed.

Jan. 11, 2002 State Department legal advisor William H. Taft IV told Yoo that the DOJ's advice to the President was "seriously flawed . . . incorrect as well as incomplete"; that DOJ's arguments were "contrary to the official position of the United States, the United Nations, and all other states that have considered the issue"; and that Yoo's idea that the President could "suspend" U.S. obligations to the Geneva Convention was "legally flawed and procedurally impossible." Lawyers for the JCS also raised concerns about the Administration's decision to declare that Geneva protections were not available to captured Taliban militia members. JCS Chairman Gen. Richard Myers and the senior military leadership all believed that the Geneva Conventions should apply to the Taliban.

Jan. 22, 2002 The arguments of the Yoo memorandum were substantially incorporated into what appears to be a final version, now styled as a Memorandum for the Counsel to the President Alberto Gonzales, and for DOD General Counsel Haynes. This was signed by Jay Bybee, the Assistant Attorney General for OLC. Its conclusion was that "neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions of al-Qaeda prisoners," and that "the President has the plenary constitutional power to suspend our treaty obligations toward Afghanistan," either on the grounds that it was a failed state, or by determining "that members of the Taliban militia failed to qualify as POWs under the terms of the [Geneva] treaty."

Secretary of State Colin Powell then requested that the President reconsider his decision. Powell urged that the President determine that the GPW did apply, but that individual al-Qaeda fighters could be determined not to qualify for prisoner-of-war status—only after an individual hearing—which is a permissible procedure under the Convention.

Jan. 25, 2002: In response to Powell's protests, Gonzales wrote a "Memorandum for the President," cited above, in which he stated: "As you have said, the war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians. . . . In my judgment, this new paradigm renders obsolete Geneva's strict lim-

itations on questioning of enemy prisoners and renders quaint some of its provisions. . . ."

Gonzales said that another advantage of such a determination was that it: "Substantially reduces the threat of domestic criminal prosecution under the War Crimes Act (l8 U.S.C. 2441). . . . That statute, enacted in 1996, prohibits the commission of a 'war crime' by or against a U.S. person, including U.S. officials. 'War crime' for these purposes is defined to include any grave breach of GPW or any violation of common Article 3 thereof (such as 'outrages against personal dignity'). . . . Punishments for violations of Section 2441 include the death penalty. A determination that GPW does not apply would mean that Section 2441 would not apply to actions taken with respect to the Taliban."

Gonzales went on the explain to President Bush why his determination that GPW does not apply, would guard against a "misapplication" of Section 2441, and he noted that "it is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441." He tried to reassure Bush, "Your determination would create a reasonable basis in law that Section 2441 does not apply, which would provide a solid defense to any future prosecution."

January 26, 2002: It has been reported that Powell "hit the roof" when he read Gonzales' memorandum. Powell fired off a counter-memo to Gonzales and National Security Advisor Condi Rice the next day, warning of the immense damage this would cause to the United States—politically, diplomatically, morally, militarily, and legally. To declare that the Geneva Convention does not apply, Powell contended, "will reverse over a century of U.S. policy and practice in supporting the Geneva conventions, and undermine the protection of the law of war for our troops, both in this specific conflict and in general." Powell also listed other negative consequences, such as undermining support among allies, and that it could even provoke investigations and prosecutions of U.S. troops by foreign prosecutors.

Feb. 1, 2004: Attorney General John Ashcroft weighed in, with a letter to Bush arguing that the best course of action would be for the President to determine that GPW did not apply to Taliban detainees from Afghanistan because it was a failed state; Ashcroft argued that this was preferable to asserting that Taliban detainees did not deserve GPW protection because they were unlawful combatants: "If a determination is made that Afghanistan was a failed state, various legal risks of liability, litigation, and criminal prosecution are minimized." Ashcroft wrote, "a Presidential determination against treaty applicability would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees."

Feb. 7, 2002: Bush sided with the DOJ, and signed a directive declaring that "the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians. . . . This new paradigm . . . requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva."

Bush's directive stated that "none of the provisions of Geneva apply to our conflict with Al-Qaeda. . ." He accepted Ashcroft's argument that the President has "the authority to suspend Geneva as between the United States and Afghanistan," but that he would not exercise that authority. He determined that Geneva "will apply to our present conflict with the Taliban," but that Taliban detainees do not qualify as prisoners of war, but are "unlawful combatants," ineligible for hearings to determine their status under the Geneva Conventions. (It has been reported that Joint Chiefs Chairman Myers and other military officials and lawyers did want the Taliban to be treated as prisoners of war under the GPW.)

Most astoundingly, Bush accepted the DOJ conclusion that "common Article 3 of Geneva does not apply to either al-Qaeda or Taliban detainees"—but then went on to state, in self-serving language, "The United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." But, as later argued by the Justice Department, "military necessity" provides a massive exception and loophole, to the provisions of U.S. laws and international treaties.

'Moderate' Torture OK

Aug. 1, 2002 saw the most infamous of the "torture papers," DOJ/OLC chief Bybee's memorandum to Gonzales entitled: "Standards of Conduct for Interrogations, under the Convention Against Torture and the U.S. Anti-Torture Act (18 U.S. 2340-2340A)." This memorandum was reportedly drafted by the DOJ for the CIA, and sent directly to the White House without consultation with either the State Department, or the Joint Chiefs and Joint Staff legal experts. It is an extremely detailed, 50-page memorandum, giving the most lenient interpretation conceivable, of the anti-torture treaty and laws. The memo states at the outset:

> We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture.
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> We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is

difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of body function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. . . .

In Part V, we discuss whether Section 2340A may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers. We find that in the circumstances of the current war against al-Qaeda and its allies, prosecution under Setion 2340A may be barred because enforcement of the stature would represent an unconstitutional infringement of the President's authority to conduct war. In Part VI, we discuss defenses to an allegation that an interrogation method might violate the statute. We conclude that, under current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A."

When the White House officially released this memo (it already having been leaked), DOJ attorneys suddenly disavowed it, telling reporters that it would be "repudiated" and "replaced." But the official who signed it, Jay Bybee, is now a Federal appellate judge, sitting on the 9th Circuit Court of Appeals.

October-November 2002: In mid-October, commanders at Guantánamo asked for authority to use more coercive interrogation methods, on the grounds that the methods then being used had become less effective over time, and that interrogators were finding some prisoners using their training in resistance to interrogation. Some of the techniques for which approval was requested, included death threats against a detainee or his family, stress positions, inducing a fear of suffocation or drowning, and the use of dogs. Gen. James Hill, the head of the Southern Command, forwarded the requests to the JCS on Oct. 25, stating that he questioned the legality of some of the methods proposed. "I am particularly troubled by the use of implied or expressed threats of death of the detainee or his family," Hill wrote.

On Nov. 27, DOD General Counsel Haynes sent an "Action Memo" to Rumsfeld accompanying the requests from Guantánamo. Haynes stated that he had discussed this with Deputy Defense Secretary Paul Wolfowitz, Doug Feith (the Undersecretary of Defense for Policy), and JSC Chairman Myers.

Rumsfeld authorized some of the techniques in early December, including hooding, stripping of all clothing, sensory deprivation, and "Using detainees' individual phobias (such as fear of dogs) to induce stress."

Jan. 15, 2003: Rumsfeld rescinded his approval of the more severe techniques, and directed General Counsel Haynes to set up a DOD working group "to assess the legal, policy, and operational issues relating to the interrogation of detainees held by U.S. Armed Forces in the war on terrorism." The documents do not show what triggered Rumsfeld's January moves, but the *Washington Post* reported on June 24, that sometime in December, two Navy interrogators heard military intelligence personnel talking about using techniques which they considered "repulsive and potentially illegal." Their concerns were brought to DOD General Counsel Haynes by Navy General Counsel Alberto Mora. Haynes apparently ignored Mora's appeals until Mora threatened to put them in writing.

The Pentagon Working Group

Rumsfeld's directive to Haynes said that the Working Group "should consist of experts from your Office, the Office of the Undersecretary of Defense for Policy [Feith], the Military Departments, and the Joint Staff. He also directed Haynes "to report your assessments and recommendations to me within 15 days." The Working Group reportedly was wracked with bitter controversy, especially between the DOD civilian and uniformed lawyers. Senior Army, Air Force, and Marine lawyers wrote classified dissenting memos, as did the Navy's Mora, in opposition to the position taken by DOD civilians and the DOJ to allow tougher interrogation techniques to be used. The dissenters argued that the information obtained by the use of coercive techniques was not reliable, and that the tougher methods could endanger U.S. military personnel detained by other countries.

Part of a draft of the report, dated March 6, 2003, was recently leaked to the media, causing a firestorm of protest from experts in military law and international law. The full, just-declassified report, dated April 4, 2003, was released to the public by the DOD on June 22. It is clear from a reading of the Working Group Report that it incorporated the now-repudiated August 2002 DOJ Bybee memorandum, which had justified torture so long as it doesn't result in organ failure or death. Almost half of the 50-page Bybee memo was incorporated virtually *verbatim* into the Working Group Report. This included:

- a nine-page section analyzing the anti-torture statute;
- six pages arguing that the anti-torture statute would be unconsitutional if it infringed on the President's inherent authority as Commander-in-Chief to do whatever he wants in war-time; and arguing, in essence, that nothing that the President orders can be the subject of a criminal statute;
- seven pages setting forth legal defenses that could be raised in the event of a prosecution for torture or war crimes, emphasizing the Carl Schmitt-like defenses of "necessity," and "self-defense."