Interview: Scott Horton

Bush Team Revives Nazi Legal Ruses, Rejected at Nuremberg

Scott Horton is chair of the Committee on International Law of the Bar Association of the City of New York and lecturer in international humanitarian law at Columbia University. During 2002 and early 2003, when civilian lawyers in the Pentagon, working with White House laywers such as Alberto Gonzales and David Addington, and Justice Department lawyers in the Office of Legal Counsel, were developing policy positions declaring that the Geneva Conventions did not apply to the Afghanistan conflict, and were loosening restrictions on methods of interrogation so as to violate U.S. military law, Horton was contacted by top lawyers in the military services who opposed these new policies, but whose voices were not being heeded. Edward Spannaus interviewed Horton on Jan. 14, 2005.

EIR: Scott, the most famous of the Gonzales memos, is that of Jan. 25, 2002, which talks about the war on terrorism being a new kind of a war, and that this renders provisions of the Geneva Conventions obsolete, and so forth and so on. Is this argument—that this is "a new kind of a war"—actually a new argument? Or, is this a rather old argument?

Horton: It's an absurd argument, actually. Only a person with very little background in history could make such an argument. The major launching point for modern international humanitarian law, is the 1907 Hague Convention. And, at the time that Convention was being negotiated and was being drafted, the United States and Europe were in the midst of a wave of terrorism, which people at the time said was "completely unprecedented"! Which people said, had "never occurred before in human history!"—and, of course, that was principally the Anarchist movement.

The Anarchists were systematically targetting leaders of the intellectual community, and the political community; the American President had been assassinated, an extremely traumatic event in this country; numerous political figures all across Europe had been assassinated—the Empress of Austria, the Prime Minister of Russia. And then of course, leading into World War I itself, we have the Archduke Franz Ferdinand.

EIR: Yes, exactly.

Horton: So, these documents were drafted against the backdrop of a wave of terror, in fact, which bears parallels to what's going on today.

Then, when we get to 1949, there was a realization at the end of the war, which I would say started with the Americans, that the old Geneva Convention and the Hague Convention didn't go far enough; that *horrible* things had happened that hadn't been adequately covered by the law: crimes that had been committed by the Nazis. There was a need to move away from the old model, which was based on very technical rules of the law of war, and required declarations of war, and things of that sort; and that operated on a model of "just war"—to move away from that, to something that was *much more* encompassing, and was designed to protect, in particular, also, civilian populations, not just combatants.

And so, when you get the 1949 restatement of the Conventions, that is the major transformation that occurred. So, it was really a sweeping expansion of the old Convention.

EIR: Now, the general way the Administration talks about this, is that the Geneva Convention is the question of prisoners of war, and that if someone, say, al-Qaeda or Taliban, is not entitled to be classified as a prisoner of war, therefore they have no protections whatsoever.

Horton: Well that sounds like someone has derived their understanding of law from watching Hollywood movies. That's not the way the Geneva Conventions operate.

EIR: How do they operate?

Horton: They operate on the basis of application to conflicts. So that a conflict is either covered by, or is not covered by, the Conventions. And, of course, in 1949, things were redrawn with the notion that *all* kinds of conflicts would be covered, in some respect, by the Convention: Whether it's a civil war, or an international conflict, there would be some level of coverage by these Conventions.

EIR: So, if someone's not classified as a prisoner of war, what are they entitled to?

Horton: Well, there's a comprehensive plan of categorization and treatment under these Conventions. And, a major focus, of course, is the rights of prisoners of war. But, we have combatants who are *not,* who are not entitled to that treatment under the Convention, and the specific category label for them is "spies and saboteurs."

By the way, the Administration is always saying, "These Conventions don't cover 'unlawful combatants.' " And, can you *think* of a combatant that is more unlawful than the spy or saboteur? Of course, they're covered! They don't have the extensive protections that POWs have, privileges against coerced interrogation, for instance. But the unlawful combatants still have a basic right to humane treatment. There are also specific categories for civilian noncombatants. There's a special categorization and treatment of humanitarian aid workers, like the Red Cross—who have very particular rights and responsibilities, in connections with conflicts. The intention of the people who drafted the '49 Conventions (as distinguished from the 1864 Convention, the 1906 amendments and the 1907 Hague Convention, which were not all-encompassing), was to cover every actor and every non-actor, and any fair reading of the text reveals that.

EIR: Now, are there any other precedents from the World War II period, or going into it, to what's happening now?

Horton: Well, I'd say in the course, really, of the last two years, a very great number of scholars are finding sweeping precedents across-the-board, between things that happened and the years leading up to World War II and during World War II, to what's happening now.

For instance, Fritz Stern, former Provost at Columbia University, probably the nation's leading historian of the Nazi state, gave a major speech recently, in accepting the Leo Baeck Award, in which he paralleled the interaction between the Bush Administration and the Religious Right, to the political campaign that the Nazi Party launched *in 1933,* and its exploitation of religious values. Stern gave a sustained and convincing comparison which raised so much comment that it was reported in the *New York Times.*

It's not an exact parallel, obviously; it's not a *complete* parallel. But, nonetheless, it's clear, that there are very strong similarities.

And then other scholars, in the legal area, which is of course my major field, people have been noticing for quite some time, that legal policy advocates in the Bush Administration produce arguments—particularly about international law—that are startlingly similar to the arguments that Nazi international law scholars articulated. For instance, Sanford Levinson at Texas, Detlev Vagts at Harvard, and Robert Bilder at Wisconsin—three very important scholars who are actively writing and speaking on this subject now. But to the comparison: They're similar in content; they're similar in style of presentation; they include a strident voice of ridicule; a strong sense of a paramount national interest that overrides any international obligation; an insistence on preservation of unilateral prerogatives for the Executive.

There is a tendency to have an asymmetrical pattern of interpretation; that is to say, the United States has rights under these Conventions, which it may enforce against others—but it has no corresponding obligations. Or, the United States has all these rights, but other nations don't have corresponding rights. Completely asymmetrical. And also, the asymmetry is consistently based on a notion of countries being friends or enemies: and the friends have rights, but the enemies don't. And, if we look at the Nazi international law scholar Carl Schmitt, that was the core of his writing, and his theories. That's exactly the path he took in addressing almost every significant issue.

Nazi jurist Carl Schmitt espoused the "asymmetrical" doctrine popular in Rumsfeld's Pentagon, that our friends have rights, but our enemies don't.

EIR: We've written—that is, Mr. LaRouche and others in our publications—about Carl Schmitt, in particular; and his notion that everything is justified by the state, or the interest of the state. And those arguments seem to be popping up very much, again.

Horton: It's not just the interest of the state—of course, if you look at Carl Schmitt, it's the "interests of the nation," I think is the way the Nazis would put it. And that they would have more of an ethnic understanding to it. So, that's an area where there's a bit of a difference, obviously, between our times and their times.

But, there would be a strong focus on the powers and prerogatives of the leader—specifically. And a very disdainful attitude towards the liberal core values of modern democracy. They would say that the "spirit of the nation" is reflected in the "leader." And therefore, it's essential to vest all power and all prerogative in that leader, and therefore, you work very, very hard to overcome any limitations that could be imposed on your leader's prerogatives and rights, under international law.

EIR: Now, that sounds strikingly similar to some of the arguments made in the Justice Department torture memos, about the so-called "inherent powers of the commander-in-chief in wartime" that can't be subject to any limitations.

According to Nazi legal ideology, the apex of the legal system and of legal authority was the Führer. This idea echoes in the current DOJ torture memos, about the "inherent powers of the commander-in-chief in wartime" that can't be subject to any limitations.

Horton: That's right. One of the things that was typical of writers in the Nazi period—like Carl Schmitt, for instance—is that even on points where the law was really quite well settled, and there was an international consensus, that no argument was *too ridiculous,* to avoid being presented by the Nazis.

It seems that their volume and the stridency would make up for the absence of logic in their arguments; that also, as a style, has a certain redolence to America, today; I certainly know of talk show hosts on cable TV who use this model.

EIR: There has been—and we wrote about this, some of my colleagues—a revival of Carl Schmitt, in the U.S., in the past decade or more.[1] Is there any seepage of that, explicitly into this sort of conservative theory about the "unitary executive" and the "strength of powers"?

Horton: No, we don't see explicit citation of it anywhere. But, I think most people who read some of these things, and I think—you know, you can go to recent meetings of the Federalist Society, and listen to some of the speakers talk about these things.

It's just a fact that their approach to belittling international law, international legal scholarship, and so forth, is remarkably similar to the writings of Carl Schmitt. Both in style and substance. No one ever doubted that Carl Schmitt was a brilliant writer and thinker; but it was a very dark brilliance, to put it mildly.

One thing that is different is racism. Carl Schmitt would stand up and say, "Jews!" "They're all Jews!" And he would have long lists of the professors who themselves would become targets. That is not an element of the current debate. But, aside from that, we are seeing a wholesale revival of ideas which appear largely banished from legal scholarship since the end of World War II.

This idea of the "paramount power of the Presidency" is a critical element. Scholars purport to cite *The Federalist Papers* and Alexander Hamilton, and other—I would say—conservative, strong-central-government writers, from the American tradition—purporting to cite these people for views which are *totally contrary* to the views of Alexander Hamilton and his contemporaries.

EIR: Absolutely.

Horton: Absolutely contrary. On the question of international law—or, as they would have said, "the law of nations"—there's no question whatsoever, that Alexander Hamilton, for instance, felt that was a binding and very important part of the law. And something that just never would have been questioned.

EIR: In fact, the Constitution says that.

Horton: They are suggesting, frequently, that the "law of nations" exists to *usurp* the Constitution, or the Constitutional authority of the government. Frequently, they ask derisively, "What *is* this 'international law'?"

And if you look at the Constitution, and you look at the writings of the Founding Fathers, they had little doubt about it: There was a law of nations, an integral part of the law. There wasn't a really extensive body of law of nations, but there were rules. And those rules were binding, and had to be observed!

And one of the major areas, certainly, at the time of the Constitution—1789—was "the laws of war." Another was the law governing "piracy." Pirates were in a sense the terrorists of their day. But of particular importance to the drafters of the Constitution was the current question: How do you treat—as the Constitution calls them—"captures," in time of war?

EIR: So, this is not something new.

Horton: Absolutely not! I mean—it was so important, that it was, in fact, one of the *expressly* articulated prerogatives *of the Congress, not of the President!* Congress was given the

1. See, for example, Barbara Boyd, "Carl Schmitt Revival Designed To Justify Emergency Rule," *EIR,* Jan. 19, 2001; *Children of Satan* (Leesburg, Va.: LaRouche PAC, 2004).

right to set the rules implementing the law of war, including treatment of detainees. And for a military person at the end of the 18th Century, this was important, for many reasons. I would say the concerns weren't entirely humanitarian: The concerns were also a matter of deciding who got the benefit of a ship or wagon-train that was seized!

EIR: Now, moving ahead to the 20th Century, the types of arguments that are made—which have been made in the context of the current, so-called "war on terrorism," there are echoes of that, also, in the Nazi period, or going into World War II.

Horton: No doubt about that! I think if you look at the Nazi climb to power, starting from 1933, that climb to power was driven by fear-mongering on what might be an historically unprecedented scale.

Fear-mongering was used as the tool to change the law, to undermine civil liberties. So, where the constitution was changed, the code of criminal procedure was changed in this period, and extraordinary powers were vested in the Executive, including police powers; the powers of an independent judiciary were destroyed. And, this was all done based on a "terrorist menace." And exactly what the menace was, shifted from time to time during the Nazi period. It was a matter of opportunism, or convenience.

But clearly, 1933, at the beginning, if you look at the campaign speeches in the elections to the Reichstag, probably the number-one target is the "international Bolshevik conspiracy." So, it's multi-ethnic, rooted in ideology, it's all around us, you never know if your next-door neighbor isn't a member of this conspiracy—but it is also tied to a local political party. And they're definitely labeled as a terrorist conspiracy.

The seminal event for the Nazification of Germany, the so-called *Gleichschaltung,* was, then, the burning of the Reichstag building—1933. And, again, that event occurred a matter of months after the new government was formed. It was seized upon *immediately* by the Nazi leadership, as a pretext for strengthening their control of the state and rooting out the liberal democratic protections of the Weimar Constitution and of German law.

EIR: On the specific military questions that have come up—on treatment of captives, prisoners of war, enemy combatants, and so forth—what kind of parallels are there in that respect?

Horton: Let's just start at the threshold question: Do the Geneva Conventions apply to the conflict? From the outset Nazi leaders talked dismissively of the Geneva Conventions and looked for ways to avoid them.

They looked for technical exceptions. And the arguments that were advanced, are essentially identical to the arguments that are made in Judge Gonzales's memorandum of Jan. 25, 2002: First, the adversary didn't sign the Convention, and therefore the adversary is not entitled to its protections. And in this case, you have the Soviet Union, which, of course, was not a state party to the Geneva Convention.

The Reichstag fire of February 1933 was the seminal event for the Nazification of Germany. "It was seized upon immediately by the Nazi leadership, as a pretext for strengthening their control of the state and rooting out the liberal democratic protections of the Weimar Constitution and of German law."

And then, secondly, all the demonization of the Russians as "Bolshevik terrorists" was trotted out: That these people, they are terrorists, and therefore, in the language of the Geneva Convention, "they don't abide by the rules of war." And therefore, you cannot fight a modern war against terrorists, under the rules of this Convention. And we see a specific argument being trotted out, about the "obsolescence" of the Convention; it's being described and denigrated as the "product of a notion of chivalry of a bygone era."

EIR: Who said that?

Horton: That was General Field Marshal Keitel.

And he said that in response to the famous memorandum that was written by Helmuth von Moltke.

EIR: Yes, can you say something about that? Let's talk about the opposition that arose within the German military to this.

Horton: I think the German military was viewed as one of the few places in German society, where there was a sort of "internal emigration" from the Nazis. Because while the Nazi Party took control of almost all the important institutions of

Helmuth von Moltke's arguments for extending POW treatment to Soviet soldiers are almost identical to those used by Colin Powell, in a letter to Alberto Gonzales.

German life, and that included professions, and trade unions, and government offices, and universities, the Army as an institution always remained outside of it. In fact, the Nazis seemed to be intimidated by the Army to a certain extent. And while they did appoint people loyal to them to the upper echelons of the Army, for the most part they focussed on creating their own parallel militarized structures, the SA, SS, and Gestapo.

And, at the top of the Army, we had a number of aristocrats, mostly north German aristocrats, but some from all over the country. And these people were well educated, and they had a very strong sense of military tradition; they had the German military tradition. Quite a few of them also had international exposure in education.

And one of the most significant of those was Helmuth von Moltke—Helmuth James von Moltke we should say—who was half-English. His mother was an English aristocrat. Well, her family actually had a very prominent position in South Africa; her father had been a judge in South Africa for some time. And von Moltke therefore was raised in a completely bicultural, bilingual environment—speaking English and German; going to university in Germany and England; and studying law. And he studied law with some of the most important international law scholars of his age in Germany. He also was at Oxford; and he also became a barrister, in London. And his own convictions—it would be too strong to say he was a pacifist. That's not right. And he was a strong believer in the curative power of international law: that international law would provide a way, over time, to make the brutal consequences of war milder and milder. And ultimately also, provide a way to bring an end to war.

EIR: What was his response to the Nazi trespass, so to speak, on these concepts?

Horton: He courageously opposed what he saw was going on. He was legal counsel to the Abwehr, what we would call Military Intelligence. And, he, in this capacity, was being briefed about things that were going on, on the Eastern Front and the Western Front, and about legal orders that were being given by the government. Whenever he saw what was transparently a violation of international law, he raised a very loud objection to it.

And I think he was careful to pick things which were the most egregious of violations: So, in the case of the Russians, for instance, he wrote a memorandum, presenting the case for giving Soviet soldiers POW treatment. And, in fact, the arguments in that memorandum are close to identical to the arguments that are made by Gen. Colin Powell, in the letter that he sent to Alberto Gonzales.

Moltke acknowledges that there are "technical" legal grounds for saying the Convention doesn't apply and for excluding Soviet soldiers from POW protections; but, he says, we have strong interests in giving them those protections. Those interests are, to protect our own soldiers, who might be captured in battle, whether in this war, or in future wars, because it creates a tradition of compliance with the Geneva Conventions, and that tradition, that historical practice, protects you, under the terms of the Conventions themselves.

He also said, this is necessary to maintain discipline, and order. If you lead the soldiers to believe that the Geneva rules and Geneva protections don't apply, what you get is mayhem, violence, and chaos, in dealing with the detainees, which is very bad for military discipline and order.

EIR: How much support did von Moltke have among the military lawyers?

Horton: I'd say he had broad support from the small circle of international law lawyers. That includes people like Berthold Schenk von Stauffenberg, and Peter Yorck von Wartenburg. And Admiral Canaris backed him, of course.

But, then, I think when we get generally into the broader General Staff, there he met with derision, and disrespect. I would say, in his case, of course, I think people were a little bit reluctant ever to show disrespect, because his name was a powerful one to someone in the German military; imagine in our world someone whose grandfather was Robert E. Lee and whose father was Douglas MacArthur. Moltke's great-uncle was *the* most important figure in German military history, and his father was the Chief of General Staff of the Army in the First World War. That protected him.

EIR: What eventually happened with him?

Horton: It only protected him so far. Because, there was an enormous struggle over control of counterespionage and intelligence that went on between Nazi leaders and Admiral Canaris. And that led to raids on people who worked for Admiral Canaris, and he was arrested. He was arrested over really nothing of consequence. But then, the investigations began, and it became clear that there had been a whole con-

Adm. Wilhelm Canaris, who supported von Moltke's effort to prevent war crimes, was executed for his role in the plot to assassinate Hitler in 1944.

spiratorial group and that he was in the center of it. And ultimately, he was executed.

His conspiratorial group include Count von Stauffenberg, and others who actually carried out the attempt to assassinate Hitler. Now, Moltke himself had actually been arrested before any of those plans were finalized. And he always insisted that he had never been involved in any plans to assassinate Hitler. But, he and his group had been involved in discussions all along, about how to deal with this "dilemma," as they put it. And the "dilemma," of course, was Hitler.

EIR: Now, these were the military lawyers, the equivalents of our JAGs. What about domestic lawyers, the equivalent of our Ashcrofts, or Gonzales (the would-be Attorney General), and so forth?

Horton: A very sad story there: By and large, the legal profession in Germany consisted of a small group of lawyers, who were courageous to oppose the Nazis, and almost all of whom fled the country. A large number of them came to the United States, in fact. And others, who stayed behind and were coopted. And the process of cooption started with the professional organizations, and also with the civil service. They were all forced to swear oaths of loyalty to The Leader, and to accept new notions of law based on Nazi legal ideology, under which the apex of legal system and of legal authority was The Leader.

EIR: You've talked about Franz Schlegelberger, in this regard. Can you say something about him? [Schlegelberger served in the Ministry of Justice from 1932 to 1942, was its director in 1941-42.]

Horton: Schlegelberger, I think, just offers you a perfect counterpoint to von Moltke. Because, von Moltke is someone who had a profoundly ethical sense of the lawyer's responsibilities to society and to mankind. On the other hand, Schlegelberger approached the profession the way a plumber approaches repairing a broken pipe—he viewed his role as doing the client's bidding and enforcing the law as written. Moreover, he ultimately bought into the Nazi political and legal ideology. As the judgment in his case in Nuremberg stated, he "prostituted an entire system of justice to a totalitarian dictatorship."

EIR: What was his formal position?

Horton: He had been a judge for many years, and afterwards he was the Minister of Justice. And Schlegelberger, when he was tried at Nuremberg, defended everything by saying, "Well, under our system, the Führer was the source of all law and all authority." And he gave a complete articulation of this notion, known as the *Führerprinzip.*

I think, not a few people who look at this today, and then look at the memoranda prepared by John Yoo (I guess two of them, now), in which he argues that the President has unlimited authority, is not beholden to international law, or to Congressional enactments, and see a certain intellectual similarity. In fact if you had to render the notion advanced in Yoo's memo—the notion of the supremacy of the Executive—into German, the word almost certainly would be *Führerprinzip.*

There are important distinctions, of course. Yoo's notion limits it to certain areas of competence, and the commander-in-chief's authority in time of war. But then, the other thing we have to keep in mind, is that they've introduced a new definition of "war," which seems to be without any limitation in time, or in terms of space. So that all we have, is "in times of war" today.

Gen. Field Marshal Wilhelm Keitel in the Nuremberg courtroom. Rather than going in front of a camera and saying "I am responsible," but suffering no punishment, he was condemned, and executed.

And that's certainly not the way the Founding Fathers viewed war and peace, and not the way it's described in the Constitution.

EIR: Absolutely. Now, let's jump ahead to the Nuremberg Tribunals. Just describe what happened there, please.

Horton: Well, at the end of the war, there were a whole series of trials dealing with the worst Nazi abusers. And I guess the trials that had the most immediate bearing on international humanitarian law and the Geneva Conventions, were the Wehrmacht trials, and right in the center of that, was the case against General Field Marshal Keitel. And, in that case, you had a very, very long charge-sheet against him.

But, at the beginning of it, is his disrespect for the Geneva Convention and the Hague Convention. And the fact that he was behind what was called the "Commando Order," which had provided for the summary execution, or, let's say in the first instance, refusal to provide Geneva Convention protections to Allied commandos captured behind lines. And, the so-called "Airmen Order," under which airmen who were captured and who were "guilty of terrorist acts," were to be treated as terrorists and not as prisoners of war. And therefore, were to be subject to summary executions—

EIR: So these were British, French, American?

Horton: Absolutely.

Then, the so-called "Commissar Order," which had to do with the execution of Russian political leaders, again, justified on the grounds that they were terrorists. Although political officers would also have been uniformed officers of the Red Army, because the Red Army units had political leaders and military leaders, side by side.

So, this series of orders he gave, had direct bearing on the interpretation of international legal obligations. And in every case, Keitel came and justified the decision he had made—in a technical sense, he would say, "Oh yes, but of course, the Soviets were not a party to the Geneva Convention, so of course, they were not entitled to these protections anyway"—and, moreover, he justified what happened on the basis of terrorism! That they were engaged in terrorist conduct.

Ditto with the airmen. He said this didn't apply to all airmen. It applied to airmen who had bombed and strafed civilians. And bombing and strafing civilians is, and was, conduct inconsistent with international humanitarian law, and was consistent with international legal definitions of terrorism, and therefore, these people will be labelled as terrorists, and therefore they weren't entitled to any protections.

And on and on, in this nature.

Then, he also went on to say, that, "Well if abuses occurred, it wasn't a result of *my* instructions." Because all soldiers were given a service book, a service pamphlet, which had at the very beginning of it, a statement of what the rules of the Geneva Convention were and how they were to be applied.

EIR: Isn't that somewhat similar to the defense that's raised, today?

Under President Bush, "the rule seems to be: Scapegoat a few enlisted men, but no senior official or senior officer will be held to account for anything. It's the total abnegation of the Nuremberg rule." Here: Abu Ghraib Prison in Iraq.

Horton: It's absolutely similar. It's what we would call today, the "rotten apples defense." He was saying, "Oh yes, well, those who did it are an affront to the military as a whole, I can't be held accountable for these rotten apples."

And the Tribunal absolutely rejected each of these defenses. I would say, to start with, this idea that you would interpret the Geneva Conventions in a niggling, technical way, and deny protections based on highly technical interpretations of something that was rejected: The view of the Tribunal was, that, whether a country is a member or not, this is international customary law, accepted by all the nations of the world, and you have to observe it. So, they dismissed that pretty quickly. They also dismissed, absolutely, all these notions that these people were terrorists, and therefore to be segregated out and treated differently: That was viewed as inhumane, and not justified. In any event, such a determination could only be made by raising charges against the detainee and trying him through a military tribunal, as provided in the Geneva Convention.

And then, when we came to sentencing, the fact that he had talked about the "obsolescence" of the Geneva Conventions, was specifically cited as a reason for seeking the death penalty.

EIR: And he did receive the death penalty.
Horton: Yes. He was executed in 1946. But, I would say, his ideas, obviously, are not dead.

EIR: Now, you hear, also, from the Administration—Rumsfeld and others—that these memos, drafted up there in outer space, or in the ether some place, have no connection whatsoever, to what happened in Abu Ghraib, or Guantánamo. Was that type of argument raised also at Nuremberg?
Horton: Absolutely! First of all, there was evidence given at Nuremberg, that there had been one meeting at which Keitel had said: All these matters are so dangerous that let's avoid creating paperwork to deal with them. We will have orders, and make decisions orally, and we won't leave a paper trail.

This is something he talked about very explicitly, so as to limit the amount of paper. And all paper that was generated about this, was to be very tightly guarded, and kept very secret. Does that strike you as having any parallels to recent developments?

And then, of course, they made this argument: We may have had policy discussions about this thing, or that thing, or the other thing. But there's no evidence that shows that these policies were transmitted into orders directly at the front anywhere. Where's the paper trail showing that?

And the Tribunal was utterly unimpressed with these arguments. They took the view, that if the policies were made at the top, and you saw the results of it out in the front line, that was quite enough. And they moved forward with a notion of almost absolute ministerial accountability: That is, in this case, with respect to the Army, that those in senior command positions—and the ministerial position, of course, would have been Keitel; he would have been the equivalent, effectively, of the Secretary of Defense—they had a responsibility, positively, to enforce the Conventions, and a responsibility to *train* people, and a responsibility to *punish* people who failed to enforce the Conventions.

So, if we see that a consistent pattern of violations going on on the front lines, grave war crimes have been committed and the Minister (in our case Secretary of Defense) is held to account for them. And by "held to account," I do not mean that he goes in front of a camera and says "I am responsible," but then suffers no punishment of any sort. No. I mean the death penalty.

EIR: This is exactly the opposite of what seems to be hap-

Historian Fears Repeat of Nazi-Style Fanaticism

Fritz Stern, former provost at Columbia University and a leading scholar of European history, made some attention-drawing comments on Nov. 14, 2004, in accepting the Leo Baeck Award. Stern, whose family fled Nazi Germany in 1938, told his audience that "events of the past 10 days [i.e., around the U.S. Presidential elections] have intensified my reasoned apprehension, my worry about the immediate future of the country that saved us and taught us and gave us so much." Stern noted the contrast between Hitler, "who preached fear in order to exploit it," and Franklin Roosevelt's motto that "the only thing we have to fear is fear itself." There were "unpleasant elements" in the United States in those days, Stern said, "but the dominant note of Franklin Roosevelt's era was ebullient affirmation of reform and progress."

The rise of National Socialism "was neither inevitable nor accidental," Stern asserted, and "the most urgent lesson is that it could have been stopped."

Among the reasons Stern cited, as to why so many Germans embraced National Socialism, was that Hitler was "a brilliant populist manipulator who insisted and probably believed that Providence had chosen him as Germany's savior, that he was the instrument of providence, a leader who was charged with executing a divine mission." Stern continued: "Some people recognized the moral perils of mixing religion and politics, but many more were seduced by it. It was the pseudo-religious transfiguration of politics that largely ensured his success, notably in Protestant areas." For example, in his first radio address after taking power, Hitler declared: "The National Government will preserve and defend those basic principles on which our nation has been built up. They regard Christianity as the foundation of our national morality and the family as the basis of national life."

There is no doubt that Stern intended to warn the United States, and American Jews, about the dangers of Bush and the religious right. "The Jews in Central Europe welcomed the Russian Revolution, but it ended badly for them," Stern was quoted by the Jan. 6 *New York Times.* "The tacit alliance between the neo-cons and the Christian right is less easily understood. I can imagine a similarly disillusioning outcome."

On Jan. 20, the *Frankfurter Allgemeine Zeitung* published an interview with Stern, in which the historian described what is emerging in the United States as "a new type of authoritarianism—a Christian-fundamentalist plutocracy system, based on secrecy, intimidation, and lies."

pening right now, in this country.

Horton: Certainly the United States, in 1946-49, in the Nuremberg trials, articulated very firm and harsh rules; and during the International Criminal Tribunals for Yugoslavia and Rwanda, the United States repeated the Nuremberg rules—that was only a few years ago, in fact. Now under President George W. Bush, all of that seems completely forgotten, and the rule seems to be: Scapegoat a few enlisted men, but no senior official or senior officer will be held to account for anything. It's the total abnegation of the Nuremberg rule.

EIR: Just to emphasize what you just said: You're saying, that if those standards, that were used by American prosecutors at Nuremberg, were applied today, then Rumsfeld and so forth, would have to be held accountable for what has happened on the front lines.

Horton: We should start by noting that the crimes for which Keitel was convicted dwarf anything that has ever been alleged against U.S. forces in Iraq, Afghanistan, and Guantánamo. What Keitel did had strong implications of genocide and involved the death of millions, and of thousands of uniformed soldiers. By comparison the abuses and war crimes in the current war seem minor. But who can take solace in the fact that these abuses are less than the darkest chapter in the history of mankind? We have 50 deaths in detention and a good dozen or so raise serious questions of torture. That's grave enough.

Applying the Nuremberg rule, let's ask some questions: Were there policy memoranda created that opened the doors for abuse, that advocated or blessed unlawful conduct?

Absolutely. No question about it.

Did the abuse occur?

Absolutely. No question about it.

Was it widespread and systematic?

We have internal Department of the Army investigations that can be cited for that proposition. The number of "rotten apples" went from six to a dozen, to sixty, to several hundred, and the number is always climbing. Moreover, the nature of the abusive acts is so similar that the criterion of "systematic" has been met! And we have a number of other reports that they've been sitting on, nervously, not releasing.

Those facts, alone, would be enough, to establish a *prima facie* case under the Nuremberg standards. But the facts are not yet fully developed; much is unknown. The United States has prosecuted some offenders, which counts as intention to enforce and uphold the law. Keitel never did this. And of course, we would have to hear a defense from the accused. Unlike Secretary Rumsfeld, I believe in a presumption of innocence.

Let's keep in mind that in that Jan. 25, 2002 memo, Judge Gonzales seems to be driven by one particular fear: prosecution of members of the Administration for War Crimes. Based on what has happened, it certainly seems his concern is well founded.