Cheney's Addington Was Chief Author Of U.S. Torture, War Crimes Policy

by Edward Spannaus

A little over one year ago, on Oct. 24-25, 2004, the *New York Times* ran a lengthy account of the "Secret Rewriting of Military Law" which took place after Sept. 11, 2001. The article was illustrated by a chart identifying "senior administration officials who exercised unusual power in the days after Sept. 11." At the pinnacle of the section naming "Key Players" was Vice President Dick Cheney. Next in the hierarchy were three lawyers: Cheney's Counsel David S. Addington, White House Counsel Alberto Gonzales, and Gonzales's Deputy Timothy Flanigan.

From the evidence in the *Times*'s and other published accounts, and from reports provided to *EIR* over the past four years, the following picture comes together:

In the days and weeks after the 9/11 attacks, a small group of White House and Justice Department lawyers set out to give the Executive Branch a free hand to interrogate and torture suspected terrorists, by eliminating virtually all restrictions imposed upon the Executive by U.S. law and by international law and treaties.

The evidence is clear, and will be much more so, when the relevant documents are declassified. From the outset, Addington and others set out to circumvent the the U.S. War Crimes Act, the U.S. Federal Anti-Torture Act, and Common Article 3 of the four Geneva Conventions—which provides that *under all circumstances* detained persons "shall be treated humanely," and which prohibits "at any time and in any place whatsoever . . . cruel treatment and torture" and "outrages upon human dignity, in particular humiliating and degrading treatment."

It is clear beyond any reasonable doubt, as we have shown in our coverage over the past few years, that Cheney, Addington, and the others, such as the Justice Department's John Yoo, *knew* that what they were advocating constituted war crimes under U.S. and international law.

Potential War Crimes Prosecutions

Addington's state of mind is shown, for example, in a memorandum he drafted for the President in January 2002. This is the memorandum, over Gonzales's signature, best known for its mocking of certain provisions of the Geneva Conventions as "quaint" and "obsolete." But much less attention has been paid, to what it says about war crimes.

Addington's argument is framed in opposition to one put forward a few days earlier, by Secretary of State Colin Powell and Powell's Legal Advisor Will Taft IV, that the Geneva Convention on the Treatment of Prisoners of War (GPW) should apply to Taliban and al-Qaeda prisoners. Addington contends that the opposite position, urged by the Justice Department's Office of Legal Counsel, should be considered as definitive, and he motivates this in a section of the memo captioned: "Substantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)."

Addington notes that "war crime" is defined "as any grave breach of GPW or any violation of Common Article 3," and he warns: "Punishments for violations of Section 2441 include the death penalty." He assumes that there is no danger of the death penalty or anything else from the current Justice Department, but he cautions 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." Addington therefore urges the President to make a formal detemination that the GPW does not apply, "which would provide a solid defense to any future prosecution."

Who Is David Addington?

Who is this character, who is widely seen as the most forceful advocate—except for Dick Cheney himself—of unbridled executive power and White House secrecy (which Addington demonstrated with his successful concealing of documents pertaining to Cheney's consultations with Enron during the preparation of his Energy Task Force report).

After graduating from Duke University Law School, Addington worked as Assistant General Counsel at the CIA from 1981 to 1984. He then served as Counsel to the House Intelligence Committee and the House Committee on International Relations in 1984-87; as such, he worked with Cheney on the Intelligence Committee, and also in the Iran/Contra investigation and coverup. For the next two years he was a special assistant and deputy assistant to President Reagan, before going to work for then-Secretary of Defense Dick Cheney in 1989—first as Special Assistant to the Secretary of Defense, where he had an office right next to Cheney's, and then as

DOD General Counsel, up through 1992. While at the Pentagon, Addington was known as Cheney's "gatekeeper."

During the Clinton years, Addington worked as a trucking industry lobbyist, and headed a political action committee founded by Cheney, which explored the latter's possible Presidential bid. Then, in January 2001, Addington, along with Scooter Libby, was quickly brought on board by now-Vice President Cheney.

In an October 2004 profile, "In Cheney's Shadows," *Washington Post writer* Dana Milbank wrote: "Even in a White House known for its conservative philosophy, Addington is known as an ideologue, an advocate of an obscure philosophy called the unitary executive that favors an extraordinarily powerful president." This argument is found throughout the series of "torture memos" either authored or influenced by Addington, when it is contended that neither the Congress nor the courts can "tie the President's hands" in his pursuit of the war on terrorism. (Addington reportedly made the same arguments during the 1980s, contending that Congress could not tie the hands of the President by barring aid to the Contras.)

If this rings an historical bell, it should. It is, in all fundamental respects, identical to the argument made by Carl Schmitt, the "Crown Jurist" of the Third Reich, that the Führer, in time of crisis, both *creates* the law, and *is* the law. Schmitt asserted that the Leader is not subordinate to the law or justice, but that the action of the Leader is the "highest justice."

Bypassing the Military

To return to the events of the immediate post-9/11 period: Within the inner circles of the Administration, discussions and planning began immediately, as to the legal ground rules for the detention, interrogation, and possible trials of those captured in the war on terror. The first public manifestation of this, came with the announcement of the President's Military Order in mid-November, establishing Military Commissions (or tribunals) to try terrorist suspects. In December, *EIR* was the first to report that aides in Cheney's office were instrumental in drafting the scheme for military tribunals, and we reported on the intense anger among military lawyers at being excluded from the process.

It took years for details of this process to come out. A rather thorough account, in the October 2004 *New York Times* series, documented Cheney's and Addington's specific roles in crafting a scheme to bypass both the traditional military justice system, and the civilian Federal courts, in order to create a system under which prisoners could be held indefinitely as "enemy combatants" and then eventually—perhaps—be tried by military tribunals.

Although that planning process began with a larger interagency group, that group, and especially the State Department and senior military lawyers, were sidelined, and a draft Executive Order was instead written by Addington and Flanigan. Cheney went so far as to order that the draft be withheld from National Security Advisor Condoleezza Rice, and Secretary of State Powell.

As *EIR* was told at the time, military lawyers were extremely angry at the President's Order and at the bypassing of the court-martial system, fearing that the entire system of military justice would be tainted. Adm. Donald Guter, who has since retired as the Navy's Judge Advocate General, was quoted in the 2004 *Times* article: "The military lawyers would from time to time remind the civilians that there was a Constitution that we had to pay attention to."

Treatment of Prisoners

After prisoners from Afghanistan began arriving at the Guantanamo Bay prison camp in January 2002, the debate continued within the Administration over whether the General Conventions should apply.

On approximately Jan. 21, while returning from a "field trip" to Guantanamo, Addington reportedly urged Gonzales to seek a blanket designation declaring all prisoners at Guantanamo to be covered by Bush's Order on military tribunals. It was immediately after this, that Addington penned the infamous Jan. 25 memorandum sent to President Bush, over Gonzales's name, which characterized the Geneva Conventions as "quaint" and "obsolete," warned of the danger that Administration officials could be prosecuted for war crimes, and urged the dumping of the Geneva Conventions.

It was publicly known already at that time, that a fierce dispute was raging within the Adminstration over the legal status of prisoners. In this context, Cheney appeared on Sunday talk shows on Jan. 27, where he was asked about Colin Powell's objections. On ABC's "This Week," Cheney asserted that "the Geneva Convention doesn't apply in the case of terrorism." He said went on: "These are bad people. I mean, they've already been screened before they get to Guantanamo. They may well have information about future terrorist attacks against the United States. We need that information. We need to be able to interrogate them, and extract from them whatever information they have."

The debate over the next months, was just how far interrogators could go to "extract" information. Throughout this period, Addington played a crucial role. The most infamous of the torture memos, was that drafted by the Justice Department's Office of Legal Counsel and dated Aug. 1, 2002, known as the "Bybee memo." This argues that "moderate" torture, even that which may be "cruel, inhuman, or degrading," is permissible, so long as it doesn't reach the point of organ failure or death.

Addington's particular contribution to his shameful document, was the section on Presidential power, in which it is argued that the application of the International Convention Against Torture and the U.S. Anti-Torture Act would constitute "an unconstitutional infringement of the President's authority to conduct war." It was an argument which would have easily rolled off the pen of Hitler's Crown Jurist, Carl Schmitt.