Chapitre/Chapter 30

War Crimes, Bush's Lawyers and the U.S. Military

Robert S. Rivkin

Introductory Note: *[In my April 2006 presentation to the Chambery conference, which formed the basis for this article, I was much too optimistic. In June 2006, in the case of Hamdan vs. Rumsfeld, the United States Supreme Court rejected as unconstitutional the Bush Administration's sweeping claims to extraordinary presidential powers; its ad hoc system of military tribunals to try "unlawful combatants"; and its attempts to immunize CIA operatives and other government officials who committed or authorized torture in violation of the Geneva Conventions.*

Subsequently, instead of requiring the executive branch to adhere strictly to established American and international guidelines for fair trials, the U.S. Congress caved in to President Bush and his fascistic lawyers. The New York Times condemned the new legislation as giving "Mr. Bush the power to jail pretty much anyone he wants for as long as he wants without charging them, to unilaterally reinterpret the Geneva Conventions, to authorize what normal people consider torture, and to deny justice to hundreds of men captured in error."

The new statute, the Military Commissions Act of 2006, strips from detainees the right to file **habeas corpus** *petitions with the courts to determine if there is any factual basis for their detentions; allows the use of evidence kept secret from the accused and evidence obtained by coercion; and immunizes Americans who may have committed war crimes in the past. The new legislation will no doubt be challenged in the courts as unconstitutional.]*

Since emerging victorious from World War II, the United States has been considered by some people around the world as a beacon of democracy and protector of human rights. President George W. Bush is rapidly destroying what remains of this image of America, though many U.S. citizens still consider it to be the world's foremost protector of freedom and constitutional due process. I believe they are deluded. Under the current Bush Administration, U.S. government policy has evolved, to put it mildly, into a regime with authoritarian, and I would argue, even fascistic tendencies. [1]

If you want to lose your audience in the U.S., you draw comparisons between the Bush regime and the Third Reich. Such comparisons are considered to be "over the top" -- downright hyperbolic. I believe that Americans will become more receptive to these comparisons as increasing evidence of the Bush Administration's lawlessness emerges. (They still refuse to declassify documents relevant to the torture debate on the alleged ground of "national security.") This article documents the chilling parallels between how Hitler's lawyers argued against human and procedural rights for select categories of people, and how Bush's lawyers have done the same thing for so-called "unlawful combatants" -- meaning Osama bin Laden terrorists and Taliban fighters. Both Hitler's lawyers and Bush's lawyers did it for the same purported reason -- security for society at large.

Americans have forgotten (if they ever knew about) the 1968 Mai Lai massacre of innocent Vietnamese civilians by American troops. Americans in general don't want to believe that the torture and abuse committed by American soldiers upon Iraqi civilian

[1] Lawrence Britt, "Fascism Anyone?" *Free Inquiry*, Spring 2003, p. 20. In his article, Britt analyzes 14 features that the fascist regimes of Hitler, Mussolini, Franco, Suharto and Pinochet had in common, and suggests that many of these features are exhibited by the current Bush Administration.

detainees at Abu Ghraib prison and elsewhere, [2] were the inevitable results of policies emanating from the highest levels of their government. But they were. Americans prefer the Administration's spin on Abu Ghraib, that it was due to poor military supervision and the excesses of "a few bad apples." But then, most Americans don't read the foreign press, progressive news sources in the U.S. or the essays of law professors.

Before analyzing how the Bush lawyers twisted the established law to justify criminal behavior, I should first describe briefly the state of military law before September 11, 2001. That will lead to a better understanding of why Bush's legal sycophants shocked even conservatives and career military officers.

The Law Before 9/11.

For hundreds of years, military courts were considered as agents of the executive branch of government. [3] If commanders were unhappy with the result, such as an acquittal of the accused, they would simply send the case back to the court for the purpose of finding the man guilty. [4] As a result of forced contact with the military in two world wars, American civilians became aware of what was going on and became outraged. To make the system a little more fair, some features of the Anglo-American adversarial system were transplanted in the military. American military law changed significantly after World War II, when the Uniform Code of Military Justice (UCMJ) was enacted. It went into effect in 1950, not long after the Nuremberg trials were completed.

It was the Americans who pushed hardest at Nuremberg for the notion of personal responsibility for a soldier. The oft-repeated Nazis' defense, "I was only following orders" was rejected. Soldiers and civilians were deemed to be reasoning agents: everyone has an obligation to refuse obedience to unlawful orders, such as orders to commit cold-blooded murder, or even to engage in "ill-treatment", including torture, of POW's or civilians.

The notion of holding warriors responsible for their excesses probably derives from the idea that wars will always be with us, so humanity needs to place limits on the carnage wrought by war. Section 8 of the Nuremberg International Military Tribunal Charter established that "The fact that the defendant acted pursuant to order of his government or a superior shall not free him from responsibility…" The Nuremberg principles were embodied in American military law under the UCMJ. For example, a military appeals court held in 1953, in the case of *U.S. v. Kinder,* [5] that superior orders was no defense

---

[2] See, Eric Schmitt and Carolyn Marshall, "In Secret Unit's 'Black Room,' a Grim Portrait of U.S. Abuse," *The New York Times,* March 22, 2006.

[3] (Robert S. Rivkin, *GI Rights and Army Justice: The Draftee's Guide to Military Life and Law*, Grove Press, N.Y., 1970, p. 242).

[4] *Ibid*.

[5] 14 CMR 72. See, Rivkin, *supra* Note 3, at p. 201.

to a murder prosecution, where the soldier killed a subdued intruder at a South Korean base during the Korean war.

It is clear that even in the absence of the Geneva Conventions, American military law makes it a crime to commit cruelty and maltreatment (Article 93), assault (Article 128), maiming (Article 124), murder (Article 118) and manslaughter (Article 119). In addition, an officer can be prosecuted for "conduct unbecoming an officer" (Article 133), and an enlisted person can be prosecuted under the general article (134), for all "conduct of a nature to bring discredit upon the armed forces."

Army Field Manual 34-52 sets forth guidelines for military interrogators, basically instructing them to be careful not to cross the line of legality in the interrogation of prisoners and detainees. As we shall see, career military lawyers fought Bush's politically appointed lawyers to prevent the U.S. from subverting the standards of military law and endorsing a culture of torture and abuse of detainees.

The principle that the soldier is a reasoning agent and must refuse orders that are obviously illegal was most dramatically applied in the prosecution of Lt. William Calley for the murder of dozens of civilians, mostly women and children, at Mai Lai during the Vietnam War. [6] Many Americans had trouble accepting the application of Nuremberg-type principles to an American officer doing his "duty." Millions of Americans protested against his conviction, believing that his defense of "following orders" should have been upheld. Responding cynically to pressure from his right-wing political base, President Nixon intervened in Calley's case and placed him under house arrest, rather than in prison, pending his appeal. [7]

After Vietnam, the U.S. entered a number of treaties, including the updated Geneva Conventions, and passed a number of laws, which may be regarded as having expanded on the Nuremberg principles. Notable among these is the War Crimes Act of 1996 (18 USC Sec. 2441). It defines a war crime as "a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the U.S. is a party…" Incorporated into the War Crimes Act is the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which provides that ***"no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."*** [8] Also applicable is a federal anti-torture statute

---

[6] Robert S. Rivkin, "Is Discipline Bad for the Army?," *The New York Times*, December 21, 1970, p. 35.

[7] See, Robert S. Rivkin, "Will Nixon Empty the Stockades?", *The Washington Post*, May 16, 1971, p. B3. This was probably the first time in history that an American convicted of murdering twenty-two women and children was granted the relative comfort of house arrest pending his appeal.

[8] Human Rights Watch Report, "Leadership Failure: Firsthand Accounts of Torture of Iraqi Detainees by the US Army's 82nd Airborne Division," Sept. 25, 2005, as summarized in "Torture in Iraq", *The New York. Review of Books*, Nov. 3, 2005, p. 67).

(18 USC Sec. 2340A), enacted 1994. It provides for the prosecution of a U.S. national or anyone else present in the United States who, while outside the United States, commits or attempts to commit torture. [9]

How the Bush Lawyers Tried to Subvert the Law After 9/11.

We now fast forward to after September 11, 2001. President Bush, Vice President Cheney, Secretary of Defense Rumsfeld and other high officials, decided that they needed a free hand to fight terrorism. As one insider put it, "the gloves are off." The pursuit of their agenda, ostensibly limitless in scope, led us into the Iraq War -- we now know on false pretenses. Some have asserted that the U.S. has committed war crimes in Iraq by a) launching a war of aggression, b) indiscriminate bombing of civilian populations, c) using depleted uranium, d) using cluster bombs, and e) sending suspected terrorists to foreign countries to be tortured ("extraordinary rendition"). These matters are beyond the scope of this article. Rather, I will be discussing here the attempts by lawyers for high officials to justify torture and abuse ***by Americans*** of suspected terrorists, and the attempts to provide cover for the officials who promote, commit and condone such tactics.

We might as well begin with Bush's closest legal adviser, Alberto R. Gonzales, who had the title of Counsel to the President. In a Jan. 25, 2002 memorandum, he urged that the Geneva Convention III on the Treatment of POW's not be heeded by the United States. He wrote, "this new paradigm [of the stateless terrorist] ***renders obsolete*** Geneva's strict limitations on questioning of enemy prisoners and ***renders quaint*** some of its provisions…" An official presidential decision that the Geneva Convention "does not apply to al Qaeda and the Taliban… substantially reduces the threat of domestic criminal prosecution under the War Crimes Act." If the War Crimes Act does not apply to treatment of "unlawful combatants," as determined by the President, then officials, (or, by implication, those who engage in abuses) would, according to Gonzales, have "… a solid defense to any future prosecution." [10]

Lawyers in the U.S. State Department strongly opposed these extremist views, which were expressed in this and other memos originating in the Pentagon and the office of Vice President Cheney. The highest ranking career military lawyers, the Judge Advocates General of the armed forces, opposed these views as well, since they saw the memos as undermining the American military laws mentioned above and honorable military traditions. They understood that such policies might endanger American troops

---

[9] *Ibid.*

[10] See, Robert Higgs, The Independent Institute (online), "Has the U.S. Gov't Committed War Crimes in Afghanistan and Iraq?" May 23, 2004. Higgs, a senior fellow in political economy at the Institute, comments, "If today the U.S. government were to put *itself* on trial, on the same basis it employed to try the Nazis at Nuremberg, for actions taken in Afghanistan and Iraq in recent years, it might have to convict itself -- if only for the sake of consistency."

who may become POW's in the future -- because if we mistreat others we will have no moral basis to demand that others treat our own soldiers humanely in the event of capture. As we will see later, Gonzales' and the other Bush and Cheney appointees' opinions echoed eerily those of German General Staff, General Field-Marshal Wilhelm Keitel. In 1939, Keitel expressed the belief that the Geneva Conventions were ***obsolete*** in respect to American and British commandos and Soviet soldiers, the "terrorists" of Hitler's Third Reich. Keitel opined that Geneva was ***"the relic of a chivalrous notion of warfare."*** [11]

The other infamous Bush Administration memo, the "Torture Memo", was produced at the request of the same Alberto Gonzales, and was signed by Jay Bybee, then the head of the Office of Legal Counsel, a section of the U.S. Justice Dept. that has traditionally served as the "conscience" of the Justice Department. Dated August 1, 2002, it was drafted by John Yoo, a Berkeley law professor (who had clerked for radically conservative Supreme Court Justice Clarence Thomas). Yoo's views of executive authority can fairly be described as extremely authoritarian. [12] These views were advocated by David Addington, Cheney's Chief of Staff, by Stephen Cambone, Under-Secretary of Defense for Intelligence, and by William Haynes, the Pentagon's General Counsel, among other civilian officials at the top of the Bush power structure.

The August 1, 2002 Torture Memo was drafted in response to a request for guidance by the CIA on the legality of tactics already in use against prisoners held in Afghanistan and elsewhere. In it, Yoo defined torture so narrowly that what most civilized people would consider torture was **not** torture, and therefore "legal." He said that torture was only "physical pain [which] must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." For mental pain or suffering, the memo opined that only "prolonged mental harm" was torture. It said, "the harm must cause some lasting, though not necessarily permanent, damage."

In this analysis, "moderate physical pressure" was not torture. Merely cruel, abusive or inhumane treatment was not "torture." Although not specifically discussed in this memo, it was later determined by other officials, including Rumsfeld, that such acts as stripping detainees naked, dousing them with cold water, bombarding them with loud music for hours on end, putting them in stress positions, depriving them of light, threatening them with dogs, sexually humiliating them and other coercive tactics were **not** torture. Let us not forget that all this guidance preceded the Abu Ghraib tortures. If the narrow definition of torture was not enough to protect American officials and interrogators from prosecution, Yoo offered Bush ***the ultimate loophole***. Yoo wrote (and his boss, Bybee agreed) that any attempt to apply the US anti-torture law to the

---

[11] Scott Horton, "Through a Mirror Darkly: Applying the Geneva Conventions to a New Kind of Warfare", in *The Torture Debate in America ,* edited by Karen J. Greenberg, Cambridge Univ. Press, 2006, p. 140.

[12] See, David Cole, "What Bush Wants to Hear," *The N.Y. Review of Books*, November 7, 2005, p. 8.

President, exercising his authority as commander in chief, would be null and void -- unconstitutional in fact! The memo says, "As commander in chief, the president has the constitutional authority to order interrogations of enemy combatants." Any method, including torture, could be employed if the President determined it was necessary and based on national "self-defense." The memo continues: Any measure "that interferes with the president's direction of such core war matters as the detention and interrogation of enemy combatants would thus be unconstitutional." ***Even Congress lacks the power to limit presidential prerogatives, according to Yoo and Bybee***. Defendants facing American criminal charges for having used extreme interrogation techniques could therefore rely on presidential cover, and invoke mitigating circumstances like "necessity" and "self-defense". [13]

When the memo was leaked after the Abu Ghraib scandal broke in 2004, [14] the Justice Dept. rescinded it, and claimed it had never been operative. Before the scandal broke, Mr. Bybee was nominated by Bush and confirmed by the U.S. Senate to be a judge on the second highest court in the country, the Ninth Circuit Court of Appeals, where he now has a lifetime job (and where he is supposedly upholding the Constitution).

William Haynes had been nominated by Bush for another federal appeals court appointment, but he was not so lucky as Bybee. His nomination was filibustered by Democrats and his confirmation thwarted after his role in the torture debate was exposed.[15] And of course, we are all aware that the promoter of torture got his promotion. Bush nominated Alberto Gonzales to be the Attorney General of the United States, and the Republican-controlled Senate approved the nomination. [16]

It was in response to one of these secret memos which defined torture narrowly, that several of the top career lawyers in the armed forces sought out Scott Horton, head of the Human Rights Committee of the Association of the Bar of the City of New York, to ask for assistance. Perhaps you need to have practiced military law for nearly 30 years -- as I did -- to realize just how astonishing it is that top military lawyers were driven to seek out a civilian lawyer for assistance in upholding military law and tradition; and to seek his help in opposing runaway extremists in the civilian chain of command over them!

I should mention that there was another hero among the top lawyers, a civilian by the name of Alberto J. Mora, the civilian general counsel of the Navy, who mightily resisted the attempts by his boss, the aforementioned Mr. Haynes, and others close to Cheney, to

---

[13] See, Lisa Hajjar, "In the Penal Colony," book review in *The Nation*, February 7, 2005, pp. 23, 29.

[14] See, Seymour M. Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10, 2004, p. 42.

[15] However, *The Wall Street Journal* is still urging the Senate to confirm Haynes. Editorial: March 27, 2006, p. A-16.

[16] See, Bob Herbert, "Promoting Torture's Promoter," *The New York Times*, January 7, 2005.

justify torture, cruelty and abuse at Guantanamo. Mora was unable to remain a "team player." He just couldn't accept the idea of granting immunity to criminals -- even before the criminal acts were performed. [17]

It is clear that Mr. Mora and the judge advocates general had a sense of history -- and that the Bush/Cheney lawyers did not. [18]

The Bush Lawyers' Totalitarian Mindset.

The most frightening thing about the Bush/Cheney lawyers' memos is the totalitarian mindset they reveal. In Nazi Germany, torture of "normal" defendants was considered to be unlawful. With "enemies of the state" (substitute, "unlawful combatants") however, it was a different story. Gestapo Chief Counsel Werner Best drew this distinction. He said, "So long as the police force carries out the will of the country's leadership, it acts legally." [19] (Whatever Hitler says is legal -- is legal). In his acclaimed book, *Hitler's Justice: The Courts of the Third Reich*, prosecutor and law professor Ingo Müller documents how German judges twisted the country's traditional laws which had protected civil liberties to convert virtually every Nazi atrocity into a "legal" act. The concept of "defense of the state" (analogous to Gonzales' "necessity and "self-defense" arguments for unbridled power for Bush) was used to crush all opposition to the regime, and became the justification for legalized murder. [20]

Although a comparison between the abuses taking place in 1940's Germany and the American abuses taking place between 2002 and the present day reveals a vast dissimilarity in scale, the question does present itself: What is the logical difference -- on the one hand -- between the Gestapo lawyer's advocacy of the police force carrying out the "will of the country's leadership" to justify torture, and – on the other hand -- the Bybee memo's advocacy of President Bush's power to order any measure pursuant to his so-called "core authority" as commander in chief – to justify torture? The obvious answer: there is no difference. [21] In addition to the parallels in legal reasoning, there is

---

[17] Jane Mayer, "The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted," *The New Yorker*, Feb. 27, 2006, p. 32.

[18] Some commentators have suggested that for their roles in aggressively promoting the culture of torture and abuse that followed these memos, the Bush/Cheney lawyers may be subject to professional discipline, or even criminal prosecution. See, e.g., Christopher Kutz, "The Lawyers Know Sin: Complicity in Torture," in Greenberg (Note 11), *supra*, p. 241.

[19] Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, Harvard University Press, 1991, p. 180.

[20] *Id*, at 23.

[21] See, Robert S. Rivkin, "Torture and Gonzales: An Exchange," *The New York Review of Books*, February 10, 2005, p. .

at least one significant parallel in the type of players who played their respective roles in the two legal systems.

Scott Horton, the human rights lawyer I referred to earlier, has written and lectured extensively about the comparison between the Geneva Convention debate within the Third Reich's legal circles, and the Geneva Convention debate within the Bush Administration. [22] Horton discloses that General-Field Marshal Keitel, referred to earlier, issued orders which created two types of enemies that did not enjoy any rights: The *"Kommissarbefehl"* (commissar order) said that political officers of the Communist Party who accompanied Soviet soldiers into battle had no rights, and could be subject to torture and summary execution; under the *"Kommandobefehl,"* (commando order) Allied commandos captured behind German lines would be subject to the same fate. [23] These people were the "unlawful combatants" of the Third Reich.

According to Horton, it was the German military lawyers who "led a valiant effort to challenge this viewpoint." [24] Led by Helmuth James von Moltke, legal counsel to the German General Staff, they attempted to persuade the Hitler sycophants that Germany would be better off by respecting international humanitarian law. To no avail. Another military lawyer, named Berthold Graf Schenk von Stauffenberg, also tried to rein in Hitler's political lawyers, and he too failed, and ended up, as did Moltke, being executed for his involvement in the plot to assassinate Hitler. Just as German military lawyers had done in the Third Reich, American military lawyers tried to stop the ***political*** lawyers from forsaking the laws and democratic traditions of their country.

Summary.

It would be unseemly for someone (like myself) whose distant relatives died at Auschwitz, to exaggerate the parallels between the mindset of Hitler's lawyers and that of Bush's lawyers. I have tried not to do that. For one thing, there is a huge difference between the situation facing the tradition-minded military lawyers who served in the Third Reich and the contemporary American military lawyers whose sense of honor and decency was offended by Bush's political hacks. The Americans knew they would be protected if they blew the whistle and sought help outside the system. Moltke and Stauffenberg had no equivalent safe haven to which they could turn. In the Third Reich, there was no independent bar association or American Civil Liberties Union.

Nevertheless, there are four significant parallels between what happened in the Third Reich and here in the United States. 1) Ideologically driven lawyers in both systems decided the Geneva Conventions did not apply; 2) those same groups of lawyers justified

[22] So have a few law professors. See, e.g., Richard B. Bilder and Detlev F. Vagts, "Speaking Law to Power: Lawyers and Torture", in Greenberg, *The Torture Debate in America,* (Note 11), at p. 155.

[23] Horton, *supra,* (Note 11), at pp. 138, 142-143.

[24] *Id*, at p. 139.

evasions of established legal doctrines on the ground that the nation's Leader had unchallenged power to mandate changes in the law; 3) these lawyers either assumed or argued for total immunity from criminal prosecution for human rights violations of those targeted as especially dangerous "enemies" of the state; 4) Finally, it was the career military lawyers in both systems who tried to put the brakes on rampant distortion of legal doctrine.

In the United States, of course, the Bush Administration was forced to retreat after the Abu Ghraib scandal broke. We are not yet a fascist state, and are not likely to become one -- now that U.S. citizens have begun to resist the Bush Administration's fear-mongering, and to understand the ugly reality of its lawlessness.

One law professor, Stephen Holmes, himself a critic of Bush's torture policies, suggests that comparisons of Bush administration policy with that of the Nazis are "wildly implausible." [25] Let the reader judge that for himself.

[25] Stephen Holmes, "Is Defiance of Law Proof of Success? Magical Thinking in the War on Terror," in Greenberg, *The Torture Debate in America*, Note 11, p. 125.