War Crimes Was the Policy

by Edward Spannaus

Yet another report, in a series of investigations commissioned by Defense Secretary Donald Rumsfeld, has concluded that there was no systemic policy for abuse and torture, and no culpability on the part of top Administration officials, for what took place at Abu Ghraib and at other detention facilities in Afghanistan and Iraq.

Yet, the conclusions put forward in this latest report—prepared by Navy Inspector General Vice Adm. Albert Church, on Defense Department detention and interogation policies—as well as in the previous reports, are belied by the Administration's own paper trail, which documents a fervent search for ways to escape prosecutions for war crimes which were in the process of being committed under the policies promulgated by top Administration officials.

From the outset of the so-called Global War on Terrorism, U.S. policymakers anticipated that U.S. personnel would be committing actions defined as war crimes in violation of international treaties and U.S. law. At the beginning of 2002, as the United States was determining how to deal with prisoners captured in Afghanistan, Justice Department lawyers in the Office of Legal Counsel (OLC) prepared a memo for the Pentagon's top civilian lawyer, DOD General Counsel William J. Haynes, in response to a request about the application of treaties and Federal law to the treatment of prisoners of war.

Already, in the second paragraph of this 42-page OLC memo, author John Yoo says that he will focus on the applicability of the Federal War Crimes Act, which defines violations of the Geneva Conventions as war crimes under U.S. law, which can be prosecuted in U.S. courts. This same memorandum, with only stylistic changes, was soon submitted to both Haynes and then-White House Counsel Alberto Gonzales.

These memos set off a furious fight within the Administration, with the State Department and the senior military leadership, including the Joint Chiefs of Staff, arguing for U.S. compliance with the Geneva Conventions.

The arguments in favor of trashing the Geneva Conventions, were then boiled down into a three and one-half page memo for President Bush, reportedly drafted by Vice President Dick Cheney's General Counsel David Addington, in Gonzales's name. The memo explicity advised Bush that he and others were potentially facing "the threat of domestic criminal prosecution under the War Crimes Act."

Two weeks later, the President adopted the recommendations made to him by Cheney's office, the Defense Department civilians, and the Justice Department—the recommendations to carry out policies that they all *knew* could be regarded as war crimes.

How can anyone, in the face of this evidence, contend that what did subsequently occurr in Afghanistan, Guantanamo, and then Iraq, was simply the result of spontaneous and uncoordinated actions taken by low-level military personnel? But, nevertheless, this is what Admiral Church and others have done.

We should perhaps qualify this, by indicating that rather, this is what Admiral Church *appears* to have done. By and large, the only knowledge most people have of what Church did, is derived from the 21-page unclassified summary which was made public on March 10. But sources tell *EIR* that some people who have read the entire 400-page report, say that its content does *not* justify the conclusion of no high-level responsibility. (This was also the case with the August 2004 Schlesinger Report.) This disparity is seen as a primary reason why the full Church Report remains classified, with only the sanitized summary available to the public, thereby allowing the news media to claim that the report "exonerates" Rumsfeld et al.

Military Lawyers Frozen Out

There was one bombshell dropped at the Senate Armed Services Committee hearing on March 10 at which Admiral Church appeared, which pertains to a hitherto-undisclosed item contained in the full secret report.

Sen. Carl Levin (D-Mich.) asked Church about the Pentagon "Working Group" on interrogation techniques, which Rumsfeld had directed Haynes to create in January 2003; this was composed of "experts" from the civilian side of the Pentagon, and the top lawyers from the uniformed military services.

Levin disclosed that the Working Group and its military lawyers were stopped from developing their own legal analysis, and were told that they must adopt the legal argument contained in a March 14, 2003 memorandum from the Justice Department's OLC, written by John Yoo. That memo's conclusions were nearly identical to the most infamous of the Torture Memos—the August 2002 OLC memo by Jay Bybee, which contended that for physical pain to amount to torture, it had to be equivalent in intensity to the pain accompanying "organ failure, impairment of body function, or even death."

According to statements made by both Senators Levin and Edward Kennedy (D-Mass.), the military lawyers, includ-

ing the Judge Advocates General (JAGs), argued for adherence to the Geneva Conventions and other international treaties, and for compliance with U.S. law. They were overruled by DOD General Counsel Haynes, who instructed them that the DOJ opinion was binding on them, and must be regarded as the "controlling authority."

One former military legal officer has described Haynes's attitude toward the JAGs as "sit down and shut up"—which comports with the description reportedly given in more polite terms in the Church Report.

About six weeks after the Working Group was ordered to drop their objections and to adopt the DOJ/OLC memo, a number of the military participants made contact with officials of the New York City Bar Association, and subsequently met with one of those officials, attorney Scott Horton. According to many accounts, the military lawyers told Horton that they were being frozen out of the process of formulating policy for interrogations, and that the military's 50-year tradition of adherence to the Geneva Conventions was in jeopardy.

Vice Adm. Albert Church, the Navy Inspector General, prepared the latest whitewash report on Pentagon interrogation and detention policies. His full report remains classsified, and even Congressmen are denied access to it.

What's in the March 2003 Memo?

The March 14, 2003 Yoo memorandum was apparently considered so sensitive, that participants in the Working Group were not provided copies of it, or even allowed to take notes on it. And even after the Bybee memo and other Yoo memos were made public, Admiral Church and his staff were still not allowed to copy the March 2003 memo, and initially they could not even take notes on it. It is still apparently too sensitive to even include in the classified version of the Church report.

As to what specifically makes March 2003 memorandum so hot, some people believe that it may contain the OLC's arguments that the President can override or ignore the Uniform Code of Military Justice (UCMJ), the Congressionally enacted legal code for the military, which strictly prohibits any abuse of prisoners. Just as Yoo and others had argued earlier that the President could ignore the Geneva Convention, the international Convention Against Torture, and the U.S. anti-torture statute, they may have felt the need to make the same arguments with respect to the UCMJ.

The need for immunity from the UCMJ had come during the debate over interrogation methods which took place in the Fall of 2002, when the legal advisor to the commander at Guantanamo had cited at least ten articles of the UCMJ which could be violated by proposed interrogation techniques. Lt. Col. Diane Beaver, the Staff Judge Advocate to then-commander Maj. Gen. Michael Dunleavy, urged consideration of this in an Oct. 11, 2002 memorandum, in which she suggested that "It would be advisable to have permission or immunity in advance . . . for military members utilizing these methods."

Beaver's memo was one of the documents which fed into Rumsfeld's decision to establish the Working Group a few months later.

New York attorney Scott Horton thinks that this may be the subject of the March 14, 2003 memo. "The missing piece in all of this so far," Horton told *EIR,* "is how did they set aside the clear-cut criminal provisions of the UCMJ?" Horton thinks that it is reasonably clear that that is what the still-secret memorandum does. "There is no *even plausible* legal argument that would support the legal conclusions that Yoo obviously put forward," Horton continued. "It's essential now, that we actually see this document and what it says," Horton said, adding that since it is a statement of legal policy, there is no tenable basis for keeping it secret.

Horton also points out that this was the issue that Sen. Lindsey Graham (R-S.C.) focussed on, during his questioning during Alberto Gonzales's confirmation hearing for the post of U.S. Attorney General on Jan. 6. Graham brought up the matter of the disputes in the Working Group, noting that the interrogation methods that were being proposed would potentially put troops in violation of the UCMJ and subject them to court martial.

At the March 10 Senate hearing, Senator Levin told Committee chairman Sen. John Warner (R-Va.), that the committee has a right to the March 14, 2003 document, and that "not to have a copy of that memo is totally unacceptable." Warner responded that unless there is Executive Privilege attached to such documents as this, Congress should have them, and he promised that he "will look into this."

Pressure From the Top

While Admiral Church was telling the Senate committee that there was no policy from the top which was responsible for the pattern of abuse of detainees, the American Civil Liberties Union was making public more documents, obtained under a Freedom of Information Act lawsuit, which demonstrate just the opposite.

Notable among these, is the 200-page deposition of Brig. Gen. Janis Karpinksi, whose Military Police Brigade was originally in charge at Abu Ghraib. When Guantanamo com-

mander Maj. Gen. Geoffrey Miller was sent to Iraq in August 2003 by Rumsfeld, Rumsfeld's deputy for intelligence Stephen Cambone, and Cambone's deputy Gen. William Boykin, Miller insisted on removing control of Abu Ghraib from Karpinski so he could "GITMOize" the operation there. Karpinski testified that Miller said he was there to apply the interrogation techniques used at Guantamamo, to Iraq. She said that Miller told her and others, "You have to treat these detainees like dogs."

Karpinski said that there was no arguing with Miller. "He was on a mission. He told me he had permission from General Sanchez," the top Commander in Iraq.

According to another source, Gen. Ricardo Sanchez was getting phone calls from Rumsfeld while Miller was there, and Sanchez gave Miller everything he wanted. The cellblock for "high-value detainees" was put under the control of Military Intelligence, and the pressure from Sanchez and from Washington (Karpinski specifically cites Cambone) intensified enormously. It was within a months of Miller's visit, that the worst documented (and photographed) abuses began to take place at Abu Ghraib.

For many months, there has been a systemic campaign to discredit Karpinski, and now, *EIR* has been told, defenders of Rumsfeld and the Administration are also planning to launch a smear campaign against Sen. Jay Rockefeller (D-W.Va.), the leading Democrat on the Senate Intelligence Committee, and Sen. Carl Levin of the Senate Armed Services Committee. They will be accused of being unpatriotic and "undermining our troops," because of their pressing for a full investigation of the torture issue.

Documentation

Senators Ask About Secret Justice Department Memo

Following are excerpts from the hearing of the Senate Armed Services Committee hearing on March 10, in which Senators Carl Levin and Edward Kennedy asked Vice Adm. Albert Church about the still-secret Justice Department memorandum on interrogation policy, to which the military lawyers in the Working Group had vehemently objected.

Senator Levin: Admiral, according to your report, in response to a JCS Joint Staff request for comments on the request for Guantanamo commanders in November of 2002 for authorization to use more aggressive interrogation techniques, military service lawyers expressed "serious reservations" about approving the proposed interrogation techniques without further legal and policy review. What was the nature of their serious reservations?

Admiral Church: They felt that the techniques were too aggressive, that it needed additional legal review to see if they were, in fact, lawful. . . .

Senator Levin: OK now, there was a Department of Defense Working Group on interrogation techniques which was initiated in January 2003. And that working group ultimately recommended interrogation techniques for use against enemy combatants. And most of the recommendations were adopted. However, as you note in the body of your report, you show that the working group, in which military lawyers were participating, was stopped from developing its own legal analysis and instead, was required to accept the legal analysis contained in a memorandum from the Justice Department's Office of Legal Counsel, a memorandum in which the working group strongly disagreed. According to your report, that memo, entitled "Military Interrogation of Alien Unlawful Combatants" was prepared by Deputy Assistant Attorney General John Yoo for Department of Defense General Counsel Haynes, and that memo had a date of March 14, 2003. This memo was presented, as your report indicates, to the Working Group as "controlling authority" on all legal issues. . . .

Access of Working Group members to this memo was apparently restricted, as you noted, and no notes were permitted. You also noted that conclusions of that memo are nearly identical to those of the Aug. 1, 2002 Office of Legal Counsel memo which is known as the Torture Memo, which the Administration avowed in the middle of—disavowed in the middle of last year, which among other things concluded that for physical pain to amount to torture, it had to be equivalent to the pain accompanying "organ failure, impairment of bodily functions, or even death." So, basically that Working Group in the DOD was told they had to follow this March 14 memo from the Deputy Assistant Attorney General Yoo to Mr. Haynes. My question is, did you have access to that March memo?

Admiral Church: Yes sir, we did.

Senator Levin: And do you have a copy of it?

Admiral Church: No sir, we did not get a copy. We were—we went and read it and took notes—

Senator Levin: Were you allowed to take a copy of it?

Admiral Church: No sir, we, they didn't—we were not to take a copy.

Senator Levin: So even in your classified report, there is no copy of that memo. Is that correct?

Admiral Church: That's correct, sir. . . .

Senator Kennedy: On page 124 on your report, Admiral Church, on the unclassified paragraphs you describe the initial meetings of Haynes Working Group and their briefing from the Office of Legal Counsel on the applicable law. Your report states that fairly early in the Working Group process, the OLC draft legal memorandum was presented to the action officers

as the "controlling authority" for all questions of domestic and international law. This memorandum was basically the Bybee Torture memorandum, and you said that the Working Group expressed a great deal of disagreement with the OLC analysis. In your report, you write that members of the Working Group were only permitted to read the memoranda in Mr. Haynes' or Ms. Walker's offices, initially without taking notes. In addition you write that your investigators were not allowed to obtain this crucial memorandum either, but only could review it without taking verbatim notes. This memo has never been provided to the committee, despite our requests. This issue also highlights the involvement of Mr. Haynes. Now the memo was—you said the Working Group expressed a great deal of disagreement of the OLC analysis. They said interrogation techniques should follow Geneva Conventions, the conventions against war and U.S. law. Now that's not what the Haynes group finally recommended. . . .

The point I am trying to find out is, who made the judgment? When you had talk about a great deal of disagreement with the OLC, who was the one who made the call on this? Who was the one that finally said, when there was disagreement—in your own words, a great deal of disagreement—and as we all know that from other memoranda, there was an enormous amount of disagreement. Someone finally made the call that what they were going to do is in the Working Group, they would actually print exactly the words in Bybee memorandum. I'm just asking you who made that call.

Admiral Church: I believe the answer was, the Office of the General Counsel.

Senator Kennedy: That's Mr. Haynes?

Admiral Church: It is. . . .

Senator Levin: Thank you, Mr. Chairman. There's been reference to a very critical memo here that you were able to look at but not take a copy of, and that's that March 14th memo prepared by Deputy Assistant General Mr. Yoo for Mr. Haynes.

Mr. Chairman, we have a right to that memo. I think the Admiral had a right to have a copy of that memo, but that's up to him to decide. But this committee has a right to that memo. And I would ask that we, on an urgent basis, get that memo. . . . It was a key part of this whole interrogation decision. It was a memo which was the controlling memo, despite the concerns of the lawyers inside of the military.

And I would ask you, Mr. Chairman, that we make a formal request for a copy of that memo. Obviously if they want to give it to us on a classified basis, that's one thing. But not to have a copy of that memo is totally unacceptable. And I'm afraid it's too typical of a very great reluctance on the Department's part to be fully supportive with documentation which has been requested on other occasions by us. . . .

Senator Warner: In our long working relationship of 27 years on this committee, I feel that the Congress is a co-equal branch, and as such, unless there's Executive privilege attached to certain documents, the Congress should have them. And I will look into this.

Arnie's Lies Can't Hide Shultz's Fascism

by Harley Schlanger

When George Shultz threw his not inconsiderable weight behind Arnold Schwarzenegger's candidacy for Governor of California, it was said that he did so because he agreed with former Gov. Pete Wilson, that Arnie "has the stomach" to impose the harsh medicine that Wall Street has prescribed for the state's economy.

Shultz, who co-chaired the campaign and runs the Governor's Council of Economic Advisers, has given Arnie his marching orders: Impose drastic austerity, through budgets cuts targetting health care, human services, and education; take power out of the hands of the legislature, through use of referenda/plebiscites, and a redistricting scheme like Rep. Tom DeLay carried out in Texas; tear down the government, through "administrative reform," which Schwarzenegger calls "blowing up the boxes"; and loot the state, through reimposing electricity deregulation, and "pension reform"—i.e., privatizing the state public employee pension funds.

In his first year in office, Schwarzenegger's main accomplishments were adding $15 billion to the state's total debt, and paralyzing the state legislative process, through intense partisan attacks against Democrats (remember his charge that those who opposed him are "girlie men"?), and threats to use his celebrity status to force reforms through by referenda, to "go over the heads" of elected legislators.

It was in his State of the State address on Jan. 5, 2005, that Schwarzenegger made it clear that he would implement Shultz's fascist austerity policies, looting what was still viable in the state's physical economy, and grabbing whatever income stream was still flowing.

The most crucial piece of Shultz's agenda was the pension grab, for the same reason that Shultz's other golem, George W. Bush, was fixating on privatizing Social Security: to divert the funds, which had been promised to retirees, to the bankrupt Wall Street predators.

The Great Pension Swindle

As details of the public pension "reform" plan touted by Schwarzenegger begin to emerge, the would-be Terminator of government is being confronted by growing opposition. At every stop of his fundraising tour the week of March 7, in Ohio, New York City, and Washington, D.C., he was greeted by aggressive demonstrators, while on the home front, in California, Democrats are becoming bolder in taking on the lies which flow effortlessly through Arnie's synthetic teeth.