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Cheney Exposes Torture Conspiracy

By Robert Parry

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If the United States had a functioning criminal justice system for the powerful – not just for run-of-the-mill offenders – former Vice President Dick Cheney would have convicted himself and some of his Bush administration colleagues with his comments on ABC’s “This Week.”

On Sunday, Cheney pronounced himself “a big supporter of waterboarding,” a near-drowning technique that has been regarded as torture back to the Spanish Inquisition and that has long been treated by U.S. authorities as a serious war crime, such as when Japanese commanders were prosecuted for using it on American prisoners during World War II.

Cheney was unrepentant about his support for the technique. He answered with an emphatic “yes” when asked if he had opposed the Bush administration’s decision to suspend the use of waterboarding – after it was employed against three “high-value detainees” sometimes in repetitive sequences. He added that waterboarding should still be “on the table” today.

Cheney then went further. Speaking with a sense of impunity, he casually negated a key line of defense that senior Bush officials had hidden behind for years – that the brutal interrogations were approved by independent Justice Department legal experts who thus gave the administration a legitimate reason to believe the actions were within the law.

However, on Sunday, Cheney acknowledged that the White House had told the Justice Department lawyers what legal opinions to render. In other words, the opinions amounted to ordered-up lawyering to permit the administration to do whatever it wanted.

In responding to a question about why he had so aggressively attacked President Barack Obama's counter-terrorism policies, Cheney explained that he had been concerned about the new administration prosecuting some CIA operatives who had handled the interrogations and "disbarring lawyers with the Justice Department who had helped us put those policies together. ...

"I thought it was important for some senior person in the administration to stand up and defend those people who'd done what we asked them to do."

Cheney's comment about the Justice lawyers who had "done what we asked them to do" was an apparent reference to John Yoo and his boss, Jay Bybee, at the Office of Legal Counsel (OLC), a powerful agency that advises the President on the limits of his power.

In 2002, Yoo – while working closely with White House officials – drafted legal memos that permitted waterboarding and other brutal techniques by narrowly defining torture. He also authored legal opinions that asserted virtual dictatorial powers for a President during war, even one as vaguely defined as the "war on terror." Yoo's key memos were then signed by Bybee.

In 2003, after Yoo left to be a law professor at the University of California at Berkeley and Bybee was elevated to a federal appeals court judgeship in San Francisco, their successors withdrew the memos because of the sloppy scholarship. However, in 2005, President George W. Bush appointed a new acting chief of the OLC, Steven Bradbury, who restored many of the Yoo-Bybee opinions.

Legal Fig Leaf

In the years that followed, Bush administration officials repeatedly cited the Yoo-Bybee-Bradbury legal guidance when insisting that the "enhanced interrogation" of "war on terror" detainees – as well as prisoners from the Iraq and Afghan wars – did not cross the line into torture.

In essence, the Bush-Cheney defense was that the OLC lawyers offered honest opinions and that everyone from the President and Vice President, who approved use of the interrogation techniques, down to the CIA interrogators, who conducted the torture, operated in good faith.

If, however, that narrative proved to be false – if the lawyers had colluded with the policymakers to create legal excuses for criminal acts – then the Bush-Cheney defense would collapse. Rather than diligent lawyers providing professional advice, the picture would be of Mob consiglieres counseling crime bosses how to evade the law.

Though Bush administration defenders have long denied that the legal opinions were cooked, the evidence has long supported the conspiratorial interpretation. For instance, in his 2006 book *War by Other Means*, Yoo himself described his involvement in frequent White House meetings regarding what "other means" should receive a legal stamp of approval. Yoo wrote:

“As the White House held its procession of Christmas parties and receptions in December 2001, senior lawyers from the Attorney General’s office, the White House counsel’s office, the Departments of State and Defense and the NSC [National Security Council] met a few floors away to discuss the work on our opinion. ...

“This group of lawyers would meet repeatedly over the next months to develop policy on the war on terrorism. ”

Yoo said meetings were usually chaired by Alberto Gonzales, who was then White House counsel and later became Bush’s second Attorney General. Yoo identified other key players as Timothy Flanigan, Gonzales’s deputy; William Howard Taft IV from State; John Bellinger from the NSC; William “Jim” Haynes from the Pentagon; and David Addington, counsel to Cheney.

Yoo’s Account

In his book, Yoo described a give-and-take among participants at the meeting with the State Department’s Taft challenging Yoo’s OLC view that Bush could waive the Geneva Conventions regarding the invasion of Afghanistan (by labeling it a “failed state”). Taft noted that the Taliban was the recognized government of the country.

“We thought Taft’s memo represented the typically conservative thinking of foreign ministries, which places a priority on stabilizing relations with other states – even if it means creating or maintaining fictions – rather than adapting to new circumstances,” Yoo wrote.

Regarding objections from the Pentagon’s judge advocate generals – who feared that waiving the Geneva Conventions would endanger American soldiers – Yoo again stressed policy concerns, not legal logic.

“It was far from obvious that following the Geneva Conventions in the war against al-Qaeda would be wise,” Yoo wrote. “Our policy makers had to ask whether [compliance] would yield any benefit or act as a hindrance.”

What Yoo’s book and other evidence make clear is that the lawyers from the Justice Department’s OLC weren’t just legal scholars handing down opinions from an ivory tower; they were participants in how to make Bush’s desired actions “legal.”

They were the lawyerly equivalents of those U.S. intelligence analysts, who – in the words of the British “Downing Street Memo” – “fixed” the facts around Bush’s desire to justify invading Iraq.

The importance of this question – whether the OLC lawyers were honest brokers or criminal conspirators – was not missed by some of the congressional leaders who pressed for a serious investigation of Bush’s use of torture and other war crimes.

Two years ago, Sens. Dick Durbin, D-Illinois, and Sheldon Whitehouse, D-Rhode Island, wrote a letter to the Justice Department’s watchdog agencies requesting an investigation into the role that “Justice Department officials [played] in authorizing and/or overseeing the use of

waterboarding by the Central Intelligence Agency... and whether those who authorized it violated the law.”

In the Feb. 12, 2008, letter, the senators questioned whether the OLC lawyers were “insulated from outside pressure to reach a particular conclusion” and whether Bush’s White House and the CIA played any role in influencing “deliberations about the lawfulness of waterboarding,” a technique that creates the sensation of drowning.

Whitehouse, a former federal prosecutor, said those questions were designed to get to the point that having in-house lawyers dream up a legal argument doesn’t make an action legal, especially if the lawyers were somehow induced to produce the opinion.

Defining Torture

In the case of waterboarding and other abusive interrogation tactics, Yoo and Bybee generated a memo, dated Aug. 1, 2002, that came up with a novel and narrow definition of torture, essentially lifting the language from an unrelated law regarding health benefits.

The Yoo-Bybee legal opinion stated that unless the amount of pain administered to a detainee led to injuries that might result in "death, organ failure, or serious impairment of body functions" then the interrogation technique could not be defined as torture.

Since waterboarding is not intended to cause death or organ failure – only the panicked gag reflex associated with drowning – it was deemed not to be torture.

The “torture memo” and related legal opinions were considered so unprofessional that Bybee’s replacement to head the OLC, Jack Goldsmith, himself a conservative Republican, took the extraordinary step of withdrawing them after he was appointed in October 2003.

However, Goldsmith was pushed out of his job after a confrontation with Cheney’s counsel Addington, and the later appointment of Bradbury enabled the Bush White House to reinstate many of the Yoo-Bybee opinions.

Last month, Newsweek reported that Yoo and Bybee had avoided any disciplinary recommendations because a draft report by the Justice Department’s Office of Professional Responsibility had been rewritten to remove harsh criticism that the two lawyers had violated professional standards, softening the language to simple criticism of their judgment.

The weaker language meant that the Justice Department would not refer the cases to state bar associations for possible disbarment proceedings.

Cheney’s frank comments on “This Week” – corroborating that Yoo and Bybee “had done what we asked them to do” – suggest that former Bush administration officials are confident that they will face no accountability from the Obama administration for war crimes.

Though the ABC News interviewer Jonathan Karl deserves some credit for posing the waterboarding question to Cheney, it was notable that Karl didn't react with any shock or even a follow-up when Cheney pronounced himself a fan of the torture practice. Cheney's waterboarding endorsement was only a footnote in ABC's [online account](#) of the interview.

Surely, if a leader of another country had called himself "a big supporter of waterboarding," there would have been a clamor for his immediate arrest and trial at The Hague.

That Cheney feels he can operate with such impunity is a damning commentary on the rule of law in the United States, at least when it comes to the nation's elites.