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'Just when you thought it was safe to go back in the water'

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By Charles R. Church

(Parts 1 and 2)

The tagline for "Jaws II" is apropos for what I will write about, which is not great white sharks. Rather, it's about something far more ferocious: torture.

I had hoped America was done with torturing. But now there may be reason to fear that it will be revived. That's what I intend to examine.

While on the campaign trail, Donald Trump infamously declared that as president he would use torture in the fight against terrorism.

"Don't tell me it doesn't work — torture works Believe me, it works."

He would approve waterboarding "in a heartbeat," because "only a stupid person would say it doesn't work. [And, if] it doesn't work, they deserve it anyway, for what they're doing."

He would "immediately" resume waterboarding, and other techniques that are "much worse," because the U.S. is facing a barbaric enemy. Waterboarding, after all, is but a "minor form" of interrogation.

At the time, I cast aside such rants as ignorant and perverse demagoguery, nothing more. And besides, I thought, what chance did Trump have of winning even the primary? Of course, I was totally wrong about the latter, as were many others. But after his election, I took a bit of comfort from Trump's announced intention to defer to his advisers on such matters, especially Defense Secretary James Mattis, and Director of Central Intelligence, Mike Pompeo.

In his confirmation hearing, Mattis declined to pull back from his opposition to torture. Pompeo, too, has been reported to be against torture, but we need to take a closer look at that.

On February 2, 2017, The New York Times reported that Pompeo "has said that waterboarding and other techniques do not even constitute torture, and praised as 'patriots' those who used such methods in the early days of the fight against Al Qaeda."

With Pompeo, we're clearly talking about semantics, not reality. There's good reason for this, as criminal penalties should attend torture. (I say "should attend" because Bush's torturers never were prosecuted, save for one low-level contractor who beat a prisoner to death.) But clearly Pompeo's remarks signify his approval of what I and many others consider to be torture.

Late in July, Pompeo sat for an interview at the Aspen Security Forum in a session titled "The View from Langley," moderated by The New York Times columnist Bret Stephens ("Langley" is the widely used term for the CIA's headquarters.) Pompeo was asked this quintessential question: "Do we have the authorities that we need to properly interrogate detainees who may have valuable information, life-saving information?"

Pompeo replied: "I haven't had anybody present me yet with a situation where I didn't feel [that] the Army Field Manual was sufficient, but the ... day that happens I will come make the case As we are presented with situations, or as we anticipate situations where the Army Field Manual may not deliver against what America needs, you can be sure I'll go back and advocate for it."

Though not widely admired by human rights groups — its Appendix M is highly controversial — the field manual nonetheless stands miles apart from the now-infamous torture memos issued by John Yoo, Jay Bybee and Steven Bradbury during the George W. Bush years.

While on its face the manual regulates only military interrogations, President Obama's Executive Order 13491 extended its reach to all U.S. interrogations, including those conducted by the CIA. The problem with executive orders, of course, is that the next president can rescind or modify them with a few pen strokes.

Pompeo's remarks in Aspen set off a small tweetstorm. Mark Fallon, the knowledgeable Naval Criminal Investigation Service veteran, wrote on Twitter: "And so it begins ... the Trump administration setting the stage for a return to torture." Other tweets struck a similar note.

I agree with Mark Fallon that, if Pompeo can, someday when we have more prisoners to interrogate (right now, Guantanamo holds merely 41 captives, though plans are afoot to increase its population dramatically), the influential head of the agency will persuade Trump that the CIA must be freed from the restraints of the Army Field Manual. But why is the field manual so important? Isn't torture against the law?

It certainly is. A rich trove of U.S. criminal law; international agreements, exemplified by the UN Convention Against Torture; customary international law; centuries of Anglo-American law and the longstanding policy of the United States should provide a bulwark of protection against a return to torture.

Yet it failed to do so when John Yoo and Jay Bybee issued their notorious pair of torture memos on August 1, 2002. One of these approved 10 enhanced interrogation techniques ("EITs") for Abu Zubaydah (whom, with others, I represent), which later were used on many other captives, and the other deployed highly imaginative legal legerdemain to dilute our criminal statute to render it nearly unrecognizable.

The result of this pathetic handiwork was torture and CIA "black sites" (prisons in foreign lands where the EITs were used for interrogating detainees.)

More recently, Steven Bradbury in his May 10, 2005, memo, to the amazement and horror of many who later read it, approved 180 hours of sleep deprivation!

Hence all those broad proscriptions couldn't prevent lawyers whom I deem unscrupulous from finding ways around them. The field manual, in contrast, limits the techniques that interrogators can utilize to far greater effect.

Next time, Church will explore whether Trump and Pompeo can get rid of the Army Field Manual, the most effective deterrent we have to resuming torture, whether by the military or the CIA.

Charles R. Church is a human rights lawyer living in Salisbury.

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'Just when you thought it was safe to go back in the water'

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By Charles R. Church

Part 2 of 2

Last time, Church showed why the Army Field Manual provides the most effective protection against torture, and that President Obama's Executive Order 13491 extended its reach to all U.S. interrogations, including those conducted by the CIA. But can Trump, with a pen stroke, sign a new order freeing the CIA from the manual's restraints?

Certainly Trump could rescind President Obama's order. But where would that leave Trump and Pompeo, who may have put the president up to it?

Senator John McCain, to the vast displeasure of George W. Bush, engrafted his Detainee Treatment Act (DTA) onto what became the 2006 National Defense Appropriations Act (NDAA.) Most pertinently, the DTA ordained that any person held in custody by the Defense Department shall be interrogated only by techniques approved by the Army Field Manual.

The CIA, however, was not covered by the DTA. But following completion by December 2014 of the Senate Intelligence Committee's "Study of the [CIA's] Detention and Interrogation," and its publication of its executive summary, which depicted the horrific torture inflicted on captives by the CIA (our client, Abu Zubaydah, was featured in the summary, being mentioned more than 1,000 times), senators Dianne Feinstein and John McCain sponsored an amendment to the 2016 NDAA that took care of that omission. When signed by President Obama, the thusly amended NDAA codified the interrogation reforms of Executive Order 13491, so that the CIA must also interrogate only with techniques authorized by the field manual.

No longer could the CIA be released from this requirement by a superseding executive order by Trump. Now, Trump and Pompeo would be required to persuade both houses of Congress to rescind that requirement, before Trump's pen stroke would count for anything.

Given his dwindling power (see below), I'm thinking that Trump may no longer be able to piece together a majority even in the House of Representatives, where Republicans outnumber Democrats 240 to 194 (with one vacancy) as a step toward returning our nation to torture.

And the Senate would be a far heavier lift. Without even considering whether the Democrats might filibuster so the Republicans would need a 60 vote supermajority, I don't believe Trump can even muster a majority in the Senate. Sen. McCain surely would vote nay, but who among the Republicans would back a Trump bill to bring back torture?

Consider these telltale signs that something very dire is afoot for Trump. He may no longer be able to hold onto his office. On Aug. 28, Benjamin Wittes and Jane Chong wrote on the blog Lawfare: "It's Time: Congress Needs to Open a Formal Impeachment Inquiry."

Wittes, editor in chief of Lawfare and a Senior Fellow in Governance Studies at the prestigious Brookings Institution, is quite simply the wisest person I know in the national security world. Chong is Lawfare's highly credentialed Deputy Managing Editor.

They ask "whether given everything Trump has done, said, tweeted and indeed been since his inauguration, the House has a duty, as a body, to think about its obligations under the impeachment clauses of the Constitution — that is whether the House needs to authorize the Judiciary Committee to open a formal inquiry into possible impeachment."

They arrange his possible impeachable offenses into three baskets: his abuses of power, his failures of moral leadership and his abandonment of the basic duties of his office. Anyone who is so inclined could review a few months of news clippings and do a pretty good job of filling up those baskets. While doing that, they would do well to recall that, as the admirable Justice Joseph Story explained in 1833, impeachment is not limited to "crimes of a strictly legal character."

Wittes's name may be too unfamiliar to the mainstream to convince them that Trump's in such trouble. If so, consider that Senate Majority Leader Mitch McConnell recently "mused about whether Mr. Trump will be in a position to lead the Republican Party into next year's elections and beyond." And take a look at the reply by Secretary of State Rex Tillerson when asked in an interview about Trump's response to the violence in Charlottesville: "The President speaks for himself." When's the last time you heard a cabinet member wholly disavow remarks by this chief on a matter of such importance?

Despite Pompeo's remarks in Aspen, I'm thinking that the Army Field Manual will remain the polestar for CIA interrogations, at least for now, whether he likes it or not.

Charles R. Church is a human rights lawyer living in Salisbury.

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