

Of heroes, secrets, black sites — and us

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Field Notes From A Battleground

By Charles R. Church

Part 1 of 2

This column will tell of heroes. One was a high-ranking official in the Bush administration — people who know me might raise an eyebrow here — and the others are members of the Fourth Estate. Journalists.

For me, heroes were very scarce in the Bush administration; in fact, I can only think of two, though probably there were others. Certainly, the thuggish Cheney and Rumsfeld need not apply, and the president was a nonstarter for me at any time. But the lawyer Jack Goldsmith is one of my heroes. (Alberto Mora, general counsel to the Navy during the Bush years also is my hero, but that's a story for another day).

Effective October 2003, largely on account of his sterling credentials as a conservative, Goldsmith was appointed head of the Office of Legal Counsel (OLC), the group of lawyers in the West Wing that issues opinions that bind the rest of the executive branch.

He soon began to focus on two secret OLC legal memos governing interrogation of al-Qaeda and other alleged terrorists. These would come to be known as the infamous Yoo/Bybee "torture memos." Following his close review of the memos, Goldsmith concluded that the theme of the first was clear, as stated in both the Senate Armed Services Committee Report on detention practices and quoted in Goldsmith's book, "The Terror Presidency": Violent acts aren't necessarily torture; if you do torture, you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under cover of presidential authority.

CIA interrogators and their supervisors viewed the opinion as a "golden shield," as Goldsmith also recalled in "The Terror Presidency." Though withdrawing an OLC opinion within a single presidency had no precedent in his mind, Goldsmith withdrew the torture memos. He had already withdrawn the second and decided to withdraw the first — which previously "had been vetted in the highest circles of government" — when it was leaked and began flying around the Internet.

Goldsmith had wanted to wait until he could provide replacement guidance, as he had done with the second memo, but now — six months later — his hand was forced. He knew there would be a price to pay, so he submitted his resignation when he withdrew the first memo, and the White House accepted it. I can only imagine the mixture of relief and glee in that sacred precinct.

Goldsmith's new book, "Power and Constraint," has just arrived, and this is where the heroic journalists appear. Goldsmith describes how Dana Priest, the star reporter for the Washington Post, since late 2002 had written several pieces on the CIA's covert programs for rendition and interrogation of high-value terrorist detainees. After years of working sources, she had discovered a secret CIA prison system for detaining and interrogating such al-Qaeda captives that spanned eight countries, including Eastern European democracies.

To confirm the accuracy of her story, Priest contacted the CIA, also to ask if the company had particular concerns about publication. Soon enough, new CIA Director Porter Goss greeted Priest, her executive editor Leonard Downie Jr., a soft-spoken Ohioan who describes himself as “shy” and “pretty boring,” and Managing Editor Philip Bennett, in his office overlooking the woods at Langley. Revelation of any “hypothetical” secret prisons program would gravely damage national security, he claimed. Downie promised to let Goss know “when we’re ready to publish.”

A few days later, the White House invited Downie and his boss to meet with President Bush to discuss the Priest story. He essentially made the same pitch about the hypothetical prisons. Vice President Cheney, predictably, added only that the Post would be responsible for the resulting deaths if it published the story. But for Downie, it was significant that Bush never actually asked them not to run it. Bush emphasized what for him was the most important thing, asking the Post to withhold the names of the European countries with which the United States had ongoing intelligence operations unrelated to the prisons.

“CIA Holds Terror Suspects in Secret Prisons” was the headline of the front-page article on Nov. 2, 2005. The piece described a covert prison system set up by the CIA nearly four years earlier (and hence just after 9/11) that at various times included sites in eight countries, including Thailand, Afghanistan and several (unnamed) democracies in Eastern Europe, plus a small center at Guantanamo. It also conveyed the doubts within the CIA over the legality of the program.

Goldsmith wrote further in “Power and Constraint”: The Post’s story had a big impact. It bolstered pending legislation that would bar the government from inflicting “cruel, inhuman, or degrading treatment” on any prisoner anywhere in the world. It caused outrage and recriminations among allies in Europe. It led several countries to order CIA prisons closed. And it was almost certainly an important reason...why the Supreme Court the following summer ruled that (one of) the Geneva Conventions, including its ban on “humiliating and degrading treatment,” applied in the war against al-Qaeda.

By the fall of 2006, the controversy about high-value detainees stirred by the media had led Bush to end the secret high-value detainee program. All these stories exemplified what Downie calls “accountability journalism.”

Next time, I will talk about courageous actions by the press that were essential precursors to the publication of the groundbreaking Dana Priest article on the CIA black sites.

Charles R. Church is an attorney practicing in Salisbury who for years has studied Guantanamo Bay detention, torture, habeas corpus and related issues.

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Field Notes From A Battleground

By Charles R. Church

Part 2 of 2

Last time, I described Jack Goldsmith's account of the publication of Dana Priest's explosive article on the CIA black sites around the world, including in Eastern European democracies. This week, I will discuss hugely significant precedents that paved the way for Priest and her editors to publish her information notwithstanding its secrecy and pressure by the CIA and Bush not to do so.

As Jack Goldsmith discusses in his new book, "Power and Constraint," when the government acts out of the public view — in secrecy, that is — it is more prone than usual to mistakes and excesses. In theory, Congress and the courts could help protect against the executive's self-interested and self-protective tendencies. But too often they do not.

That leaves the press. During World War II, Franklin D. Roosevelt, without irony, could call on the "patriotic press" to self-censor military information possibly helpful to the enemy. A turning point came with the May 1960 downing of the U-2 spy plane over the Soviet Union, when the Eisenhower administration was caught in multiple lies. Then came the Bay of Pigs fiasco, preceded by Kennedy's pressuring of The New York Times to tone down its reporting on the planned invasion of Cuba. The lesson that the national interest demands honest and independent national security reporting deepened with LBJ's prevarications on the Gulf of Tonkin incident, to convince Congress to approve an expansion of the Vietnam War.

The clash between the press and the federal government culminated in the publication of the Pentagon Papers, the Defense Department study of the Vietnam War that presented a darker picture than the government was peddling to the public. Daniel Ellsberg photocopied the papers and leaked them to The New York Times and later to the Washington Post. The government threatened criminal prosecutions against both papers when it learned they might publish the documents; both defied the threats and published. The government then obtained an injunction from a trial court, but the Supreme Court vacated the injunction and upheld the press's freedom, and even responsibility, to publish some government secrets free of prior restraint.

"And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and from foreign shot and shell," Justice Black stirringly intoned while concurring.

The Pentagon Papers episode, Goldsmith tells us, gave birth to accountability journalism. "The press had placed itself in direct conflict with the government over the highest matters of state despite threats of jail for its editors and possible ruin for the newspaper companies." And the papers, once published, revealed that the government had been misleading the American people.

The Pentagon Papers episode also undermined the legitimacy of the government's classified information system. Ellsberg revealed what appeared in retrospect to be unnecessary secrets. Subsequently, reporting by Bob Woodward and Carl Bernstein for the Washington Post brought down a president, provided

information to the public that motivated Congress and the courts to fulfill their constitutional roles, and solidified the press's realization that accountability journalism, even of secret government activity, and even if related to national security, was among its highest callings.

The press, of course, fell terribly short when Bush, beating the drums to deploy his engine of war to Iraq based on a great lie — that the USA and its allies must prevent Saddam from unleashing his weapons of mass destruction (WMDs) — sent our men and women over there, only to get mired in the violence among the different Muslim sects and tribal leaders that kept them there so long, and with precious little to show for their deaths, maimings and post-traumatic stress syndrome. And all-the-while depleting our nation's treasury to no account.

Accountability journalism "means holding things up to public inspection, and letting the public decide what the consequences ought to be," said Bill Keller, former executive editor of the Times. And journalists did just that throughout most of the Iraqi war.

After the WMDs failure, reporters and editors resumed "holding things up to public inspection," to great effect. Bob Woodward disclosed that Bush authorized the CIA to go after al-Qaeda with the "most sweeping and lethal covert action since the founding of the Agency in 1947." In March 2002, Rajiv Chandrasekaran and Peter Finn reported how the government since 9/11 had been doing "extraordinary renditions," transporting dozens of people suspected of links to terrorists to other countries, such as Egypt and Jordan whose intelligence services have close ties to the CIA, where they could be subjected to interrogation tactics — including torture and threats to families — that are illegal in the U.S.

Dana Priest and Barton Gellman wrote about the "stress and duress" interrogation techniques in a "brass-knuckled quest for information, often in concert with allies of dubious human rights reputation, in which the traditional lines between right and wrong, legal and inhumane, are evolving and blurred." Bob Woodward reported this boast by a senior CIA official: "The gloves are off," and the CIA can do "whatever is necessary."

But some of these stories, especially the earlier ones when the memory of 9/11 was still fresh, brought only a tepid reaction from the public. As Keller said, "[N]ewspapers are put out by human beings, and the natural human tendency is, if you're not getting traction, maybe you should try something else."

So a critical prerequisite to heroic journalism is a reading and listening public that demands the best. Ourselves. If we are apathetic, we cannot depend upon journalists always to go it alone.

Charles R. Church is an attorney practicing in Salisbury who for years has studied Guantanamo Bay detention, torture, habeas corpus and related issues.

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