

Reflections on the potential destruction of the military commissions and the fate of the 9/11 case

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IN 3 PARTS - ALL PARTS HERE INCLUDED ...

Part 1 of 3

What's most vexing and astonishing about the capital prosecutions by military commission of the five defendants in the 9/11 case and of Abd al-Rahim Al-Nashiri, who is charged with planning the lethal attack on the USS Cole, are the destructive intrusions into the complex judicial proceedings by both the FBI and, more often and far more direly, the CIA. The FBI, we have seen, installed the listening devices in fake smoke alarms in the conference rooms at Echo II at Guantanamo, where the defendants and their lawyers meet for private (they believe) conferences, but they did that before turning the facility over to the military, and prior to the cases' commencement. High-ranking military officers at Gitmo swore the devices had never been used during lawyer-client meetings, but no records confirm that. The guards did confirm, but of course they would. If any illicit monitoring of lawyer-client meetings took place, and we can never know, I would pick the CIA as the likely culprit. Please read on.

The FBI has plenty to answer for, though it never has, for seeking to recruit a member of a 9/11 defense team as a secret informant. Fortunately, the member told his chief counsel, and then all hell broke loose. That idiotic act shut down the 9/11 case for 18 months, but more about the delays at the war courts later.

Now to the CIA, where the story gets really ugly. By 2006, at least (recall that Bush announced the transfer of 14 "terrorists" held by the CIA to Guantanamo in September, 2006), the Agency was maintaining a facility on Guantanamo that a staff sergeant named Joe Hickman described as a secret detention camp. He and the private who found it observed six trailer-type structures, with small, shuttered windows, which appeared to be facilities for holding prisoners. They dubbed the place "Camp No," as in "No, it doesn't exist." Curious in the extreme, Hickman kept going back; on one occasion, he heard what sounded like screaming coming from this place that was not supposed to exist. In 2013, Camp No was revealed to be a secret CIA facility. In his book, "Murder at Camp Delta," Hickman lays out the fascinating murder mystery surrounding the

deaths of three troublesome prisoners; Camp No plays a major role in the mystery, but read the book.

In January 2013, it was discovered that the CIA had been monitoring the 9/11 case. I've said before that NGO observers and family members sit behind soundproof windows, and that words spoken in the courtroom are delayed by 40 seconds before they can be heard in the gallery. This allows time for Judge Pohl or his security advisor to cut the audio feed, if classified information is revealed in the courtroom. When the feed is interrupted, a red "hockey light" begins to shine and whirl, to signal the transgression. One day, the hockey light lit up, and the sound was cut. Pohl and his advisor peered at each other, only to learn that neither had hit the button. Unamused, Pohl said, "If some external body is turning the commission off ... then we are going to have a little meeting about who turns that light on or off ... It is the judge who controls the courtroom." And so it has been, from then on.

Who was the interloper? Judge Pohl told us, albeit indirectly. On Jan. 13, 2013, Jane Sutton reported for Reuters what was being said when the feed went silent. David Nevin, Khalid Shaikh Muhammad's (KSM) lead attorney, was speaking of a defense request to preserve the secret CIA prisons where the defendants had been interrogated and tortured before being brought to Gitmo.

After meeting privately with all the lawyers, Pohl would say only that the "Original Classification Authority" (OCA) had cut the feed. Who is the OCA for information relating to the CIA's "Rendition (of prisoners to foreign nations which could torture them for us), Detention and Interrogation Program"? You guessed it: the CIA itself. The fox has controlled all information about what took place in the henhouse — its own black sites.

Charles Church is a Salisbury, Conn.,-based human rights lawyer who travels to observe Guantanamo's military commissions under the auspices of Seton Hall Law's Center for Policy and Research. While there, Church sends dispatches describing the proceedings, and his thoughts about them, to this newspaper.

Part 2 of this series will describe further acts by the CIA to suppress evidence of the horrific torture it inflicted on prisoners at its "black sites."

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Part 2 of 3

In Part 1 of this series, Church depicted the destructive intrusions by the FBI and the CIA into the military commission proceedings in the 9/11 and U.S.S. Cole cases; this week's column will focus solely on the CIA.

Here's a surprise, not as momentous as when Alexander Butterfield appeared before the Watergate Committee to disclose that Nixon's Oval Office had been equipped with a voice-activated recording device, but still very important, as it reveals so much about the CIA's willingness to resort to desperate and highly illegal actions. A prisoner named Abu Zubaydah was the first so-called "High Value Detainee," having been captured in Pakistan in early 2002, and wounded so severely in the firefight that he nearly died. (Note: For a substantial period of time, I have been providing legal services to Mr. Zubaydah.)

He was then spirited away to a CIA black site in Thailand, where based on falsehoods the CIA peddled to the famously compliant John Yoo, DoJ, permission to torture him with the Agency's newly conceived Enhanced Interrogation Techniques ("EITs") was obtained. Its interrogators waterboarded Abu Zubaydah 83 times, and otherwise tortured him to a fare-thee-well, only to determine that the prisoner knew nothing more than what he freely had told the FBI before. Predictably, the CIA declared its EITs a great success; the Agency wanted to make sure he knew nothing more, and it did.

Now comes the surprise: Abu Zubaydah's torture had been captured on videotape. Enter the CIA's senior officer Jose Rodriguez who, even though a federal judge had ordered production of the tapes and the 9/11 Commission expressed a wish to have such materials, ordered their destruction. For how many years has Rodriguez been sentenced to prison? Answer: none, because he was never prosecuted. Why? The CIA had waited until the day after expiration of the relevant statute of limitations to disclose its crime.

As all who follow the news know, the CIA lied, tortured and otherwise broke the law while

pursuing Bush's Global War on Terror. And it has never stopped protecting its franchise, even though — it seems to this writer — the Agency may well destroy the military commissions in the process.

As the Senate Select Committee on Intelligence (SSCI) attempted to pull together the facts from more than six million pages of CIA records and publish them, the CIA fought tenaciously behind the scenes to keep the truth about its detention and interrogation program from the public, and it continues that fight today. True, in December 2014, the SSCI succeeded in publishing its 500-page Executive Summary, but that was substantially redacted. Hence, defense lawyers at Guantanamo have sought the entire 6,700-page report, which plainly contains material that is highly relevant, but the prosecution, with Brigadier General (BG) Mark Martins leading the charge, continues to resist.

On what basis? None that I can see. Why should a highly classified rating matter? The defense attorneys have been cleared to receive Top Secret material. As for a need to know, the second pillar in the wall of silence erected by the government, the full SSCI Torture Report plainly is needed by the defense for two reasons, at least.

Under the reformed (by President Obama) Military Commissions Act of 2009, evidence procured by torture or cruel, inhuman or degrading treatment may not be admitted. Further, should the defendants be convicted, evidence of the horrific torture perpetrated upon them will bear strongly on what their sentences should be, including — saliently — whether they may lawfully be executed. Yet BG Martins and his team keep resisting.

Then there's the destruction of evidence at the CIA's black sites. In a recent dispatch, I reported on the donnybrook arising from the decommissioning of one such torture chamber, just what David Nevin was speaking about when the audio feed to the gallery was cut by the CIA in 2013. (See above.) You'll recall that, in his new motion, Nevin complained bitterly that a CIA black site — a crime scene, after all — had been decommissioned secretly, despite the order Judge Pohl signed years before forbidding such action.

But in his brief, Nevin pointed to something truly scary. The prosecution had declared that “the government never had any intention of disclosing” the evidence (the actual black site), and in the future would “not disclose similar evidence (the remaining black sites) to the defense, irrespective of the sanctions [Pohl] might impose....”

Let's be clear about this. It's not BG Martins and his prosecution team who are thumbing their noses at Judge Pohl, it's the CIA, which after all owns or controls the sites. The lawyers simply are following orders, though I believe they should refuse. The Agency destroyed the video tapes of Abu Zubaydah's torture, and got away with it. This time, by decommissioning the torture sites, the CIA is destroying the best evidence of what took place there.

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Part 3 of this series will depict how the CIA is destroying the military commissions themselves.

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Reflections on the fate of the 9/11 case

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In Part 2, Church described the lengths to which the CIA was willing to go to suppress evidence of its torture of prisoners held at its "black sites." This column will speak of the dire threat the CIA poses to the military commissions themselves.

There's another way in which the CIA may be destroying the military commissions. One of the most hotly contested issues in both the 9/11 and al Nashiri cases has been Judge Pohl's order that a broad swath of documents be provided to the defense on the CIA's RDI Program. The prosecution, through BG Martins, has boasted about how it has been working 24/7 to provide the court-ordered information. But the day after I had left, Judge Pohl described how the process is going, which is very badly. The prosecution enjoys under applicable law the right to summarize highly classified evidence, rather than provide it to the defense, even though defense lawyers and their staffs have the requisite security clearances.

An overriding consideration, though, has been to try the defendants, insofar as possible, in open court, not in secret sessions. I applaud this goal. But on Monday, July 25, after I had departed, Pohl described the status of the discovery (the production of information, in this case by the prosecution) he had ordered on the RDI Program. The government had given him about 50 percent of the summaries it intended to provide the defense.

After Pohl's comparison of the summaries with the actual documents (under the prevailing legal rules, the defense has no say in this, which is a story unto itself), Pohl declared that he deemed inadequate virtually every summary provided by the prosecution, and had sent all the deficient summaries back for enhancement.

It doesn't take Stephen Hawking to discern who had determined what the summaries would provide: the CIA. After all, it's the Agency's program, personnel and conduct that stand to be revealed. The pretrial proceedings will be significantly prolonged by this stubborn defiance of Pohl's directives.

This leads to another reflection. The 9/11 case, I believe, will never be tried in a war court. Pretrial proceedings have continued for well over four years, yet the case is nowhere near being ready for trial. James Connell, lead counsel for Ammar al Baluchi, told our NGO group that his

team had calculated that the trial would begin in 2020, but this was before Judge Pohl announced how deficient the summaries of the RDI material are. So we probably should add at least another year to Connell's estimate.

Walter Ruiz, the chief attorney for Mustafa al Hawsawi, predicted many months ago that he thinks 2025 is more like it, and his estimate also predated Pohl's lamentable news on the RDI material.

Should Walid bin Attash finally succeed in ditching Cheryl Bormann as his lead counsel and Michael Schwartz as his second-in-command — and it's hard to conceive of a trial in which the client refuses to allow his chief lawyers even to sit at the counsel table, let alone talk with them — that would entail far more delay. Why? In a capital case, each defendant must have an attorney such as Bormann, well-steeped in defending cases where the client's life stands in the balance. The prediction I heard held that it would take three years to find a qualified replacement willing to dedicate so many years (with no end in sight) to the 9/11 case.

The seemingly endless parade of reasons for delay in the pretrial proceedings in both the 9/11 and the al Nashiri cases visits a special kind of torment on relatives of those who perished in the attacks. While I don't expect that any of them will "get over" their losses, their inability to bear witness to a trial of the alleged criminals and thereby close that chapter of their lives must increase their pain exponentially. According to Carol Rosenberg's July 28 report in The Miami Herald, survivors of people killed on 9/11 who had observed the most recent proceedings criticized the current focus of the court on the torture of the five defendants.

"Torture is living a life without your love one," said one. Another proclaimed: "We talk about human rights. They don't deserve human rights, because they weren't human ..." In stark contrast, chief defense lawyer Walter Ruiz spoke of Mustafa al Hawsawi's ordeal: "He continues to have to make a choice between eating and defecating, between taking nourishment and undergoing the excruciating pain of a bowel movement" as Hawsawi "continues to bleed daily" as a result of rectal abuse while in CIA custody.

As in armed combat, pain and fear lead sufferers to hate and to deny the humanity of the "others," their enemies, who when tortured feel their own pain. That's a shame, and still greater shame resides in the delays at the military commissions and the CIA's major contributions to them, which at the least have contributed to the survivors' pain and feelings of hatred.

In the meantime, nothing much goes on in the war courts, and perhaps nothing final ever will.

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