

TriCorner News

from *The Lakeville Journal*,
The Millerton News and *The Winsted Journal*

Published on *TriCornerNews* (<http://tricornernews.com>)

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The invaluable, yet scarce, Senate Torture Report

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Part 1 of 2

Recently, I traveled for the fourth time to Guantanamo Bay Naval Station to observe, once again, pre-trial proceedings in the prosecution by military commission of the 9/11 defendants, which case, as I have opined in this newspaper before, may never reach trial. Something very important happened that week, and we do not yet know the result.

All five defense teams argued a motion to safeguard the complete Senate Select Committee on Intelligence (SSCI) report on its "Study of the Central Intelligence Agency's Detention and Interrogation Program," comprised by 6,963 pages of text, and based on the SSCI's study of over 6 million CIA and other documents. Some will recall that in December 2014 the SSCI, after months of negotiation over classification issues, published its redacted (meaning portions had been blacked out) Executive Summary for the report, which itself ran to about 500 pages.

The summary changed the world's understanding (or at least that part of the world that was paying attention) of what the CIA had perpetrated during George W. Bush's so-called "War on Terror." It told the most sordid tale imaginable of the CIA's years-long deception of the White House, Congress, the Department of Justice, its own Office of Inspector General (CIA OIG, the Agency's internal watchdog), the FBI, the media and the people, and of the Agency's brutal torture of 39 (one of whom died) of the 119 captives it held in secret black sites.

But the document is merely a summary (having read it a few times, I can attest to how often it refers the reader to the full report for more complete information), and the facts contained in the full report are both highly relevant and absolutely necessary to legally cognizable defenses in the case, which may or may not carry the day. First, that the United States' conduct was so outrageous that it has lost the right to prosecute the 9/11 defendants at all. (That, I suspect, is a loser.)

Second, as to whichever of the defendants who are convicted, their torture serves to mitigate their sentences. In other words, given the horrors inflicted upon them, they may not be

executed. That's a much better bet, in my view. (Note: I recently was appointed to the habeas corpus team of a Guantanamo captive popularly known as Abu Zubaydah, and we have asked a D.C. federal district court judge to preserve a copy of the full report.)

When the summary finally was published to the world in December of 2014, Dianne Feinstein, then Chair of the SSCI, saw to distribution of the full report as well to President Obama and seven agencies in the Executive Branch, expressing the hope that it would be made available "to help make sure that this experience is never repeated."

But since the 2014 elections gave the Republicans a senatorial majority, Feinstein was supplanted as chair of the SSCI a month later by Republican Senator Richard Burr, who promptly wrote to Obama to ask that the Executive Branch agencies return their copies of the full report to the Senate. Indeed, "[i]t should not be entered into any Executive Branch system of records." Hence the full report became a political football, and most of the agencies are said never to have opened it.

Then, on May 16, 2016, Julian Hatter of The Hill reported that the CIA OIG had destroyed both its electronic copy of the full report, and a hard disk containing it. This prompted Feinstein to write CIA Director Brennan and Attorney General Lynch to urge that the OIG's copy be replaced. She closed both letters by requesting a "prompt response," which would "allay [her] concern that this was more than an 'accident.'" Nonetheless, the CIA has not sent a replacement copy to its own OIG.

A month earlier, a large group of human rights, civil liberties and media organizations wrote the National Archivist to request that he ensure the preservation of the full report. Soon, the archivist announced that he would not formally designate the torture report a "federal record," which must be preserved.

Other events, such as the CIA's 2005 destruction of the videotapes of Abu Zubaydah's interrogation/torture, lead defense lawyers to worry greatly over the fate of the SSCI Report, but a new and more blatant threat recently has appeared on the scene. President-elect Trump has declared that his administration would approve the use of waterboarding "in a heartbeat" because "only a stupid person would say it doesn't work," and "[i]f it doesn't work, they deserve it anyway, for what they're doing." Indeed, Trump said, he "would bring back a hell of a lot worse than waterboarding." Clearly then, Trump is no friend of the SSCI's report, given its sweeping condemnation of torture, including waterboarding.

Would a President Trump order that all copies held by Executive Branch agencies (copies held at the SSCI itself may be less accessible to courts) be destroyed immediately? Who can be sure? But no defense lawyer can take the chance that the most important document in the case suddenly would go missing. Indeed, David Nevin, counsel for Khalid Shaikh Muhammad, specifically requested that Judge Pohl "rule sufficiently in advance of Jan. 21 that your ruling is not overtaken by events."

Next week, Church will describe Judge Pohl's disappointing colloquy with Chief Prosecutor Mark Martins over whether the Department of Defense still has the full report, and a fascinating develop for the still undecided motion.

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. During his stay at the base, Church sent dispatches describing the events to this

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The invaluable, yet hard-to-find, Senate Torture Report

Thu, 01/12/2017 - 10:33am [Field Notes From A Battleground](#) [1] [Opinion/Viewpoint](#) [2]
By Charles Church

Part 2 of 2

Last week, Church described how the Senate Torture Report had become a political football, and the danger that all copies might disappear. This time he will deliver the finale of the argument in the Gitmo military commission over whether Judge Pohl will take custody of the full Report to prevent its disappearance, and tell of a surprising and potentially influential development.

On Dec. 7, 2016, as the defense motion asking him to preserve a copy of the full Senate Torture Report was being argued, this astonishing colloquy took place:

Judge Pohl to Chief Prosecutor Mark Martins: “Now, when you said in February [2015] that the [Department of Defense (DOD) would maintain] the status quo, does that mean that the [DOD] still has a copy of it, to your knowledge?”

Martins: (after evading the question): “[I]m not prepared to tell you.” Martins repeated this reply a second time, after more bobbing and weaving.

Pohl never put the chief prosecutor’s feet to the fire in open court, as most judges I have known would have done, to ensure that such evasions would not be repeated. The most he said in the face of Brigadier General Martins’ refusals to answer was: “General Martins, the government sometimes makes this stuff much more difficult than it needs to be.”

But according to Carol Rosenberg’s Dec. 7 report in the Miami Herald, Pohl soon issued an order requiring the government to notify him in writing by Dec. 16 “whether the [DOD] is in possession of a copy of the SSCI report.” I suspect that the answer is “yes,” so Pohl may now take possession of the full report, should he wish to. (BG Martins filed his response, but it has not yet been cleared for public consumption.)

This is a really big deal. In her January 2015 response to Burr’s attempt to recall the full report, Feinstein reminded President Obama:

“[T]he purpose of the Committee’s report is to ensure that nothing like the CIA’s detention and interrogation program...can ever happen again. The realization of that goal depends in part on

future Executive Branch decision makers having and utilizing a comprehensive record of this program, in far more detail than what we were able to provide in the now declassified Executive Summary.”

More recently, Feinstein sent to Obama another letter, asking that he declassify the full Senate Select Committee on Intelligence (SSCI) Report, but on Dec. 9, his White House counsel wrote to advise that “the Study will be preserved under the [Presidential Records Act],” and that, consistent with the authority granted under the Act, “access to classified material...should be restricted for the full twelve years allowed under the Act. At this time, we are not pursuing declassification of the full Study.”

While Feinstein expressed mixed feelings, Senator Ron Wyden, according to Politico’s Josh Gerstein on Dec. 12, was more direct: “The American people deserve the opportunity to read this history rather than see it locked away in a safe for 12 years. When the president-elect has promised to bring back torture, it is also more critical than ever that the study be made available to cleared personnel throughout the federal government who are responsible for authorizing and implementing our country’s detention and interrogation policies.” To which I say, amen.

On Dec. 28, D.C. Federal District Judge Royce C. Lamberth entered an Order in the habeas corpus case of Abd al Rahim Hussein al Nashiri (the alleged ringleader in the U.S.S. Cole bombing) directing that a copy of the full SSCI Report be turned over to the Court Security Officer for safekeeping. Just as Dante Alighieri had Virgil to lead his trek through Hell and Purgatory, Judge Pohl, who presides over a case which will determine whether five defendants live or die, now has a guide. He, though many (including me) consider a military commission a poor substitute for a federal district court (where the 9/11 defendants should have been tried in the first place, I strongly feel), has a precedent for taking custody of the full report. Let’s hope he does the right thing. The SSCI Report must not be a political football; it’s history, after all.

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