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Charles R. Church is an attorney who devotes most of his efforts to human rights issues: detention, torture, the facility at Guantanamo Bay, habeas corpus, etc.
His website is: www.churchlawllc.com
Email him at: charleschurchllc@gmail.com

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Gunfight at the CIA corral

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By Charles R. Church

Let me start with a bit of tawdry CIA history. Back in 2002, at secret “black sites,” the agency began interrogating and torturing Abd al Rahim al Nashiri, whose ongoing capital prosecution before a Guantanamo military tribunal I have reported on in my recent e-book (segments of which appeared in this paper), and Abu Zubaydah, whom I wrote about for its Sept. 14, 2012, edition in “Who, really, is Guantanamo’s abu Zubaydah?” Hundreds of hours of their interrogations were videotaped. In 2003 and 2004 the 9/11 Commission repeatedly and specifically requested documents and other information about the agency’s interrogations, and the CIA responded that it had produced or made available everything requested. Two federal court judges issued orders in 2005 to the Bush Administration to safeguard all evidence and information regarding the torture, mistreatment and abuse of detainees then at Guantanamo. Those orders were thought to be broad enough to preserve everything, but — here’s the sad part — the judges had no knowledge that the CIA maintained those “black sites” where torture was taking place, because of the well-guarded secrecy about them. A little later in 2005, the CIA destroyed the tapes. The Justice Department decided not to prosecute.

Given those events and others, can there be any wonder about why the following took place? Moving to June 2013, a heavily censored transcript reveals how bitterly the prosecution in Nashiri’s case and lead defense counsel Richard Kammen fought in a secret hearing conducted by the military judge. The hearing dealt with what information the government would be required to turn over to the defense concerning the CIA’s treatment of Nashiri during the four years the agency held him captive, for that treatment would be highly relevant during the trial and sentencing of the alleged war criminal. The Justice Department lawyer assured Judge Pohl that “many hundreds of reports” on Nashiri’s treatment while imprisoned by the CIA had been summarized and turned over to the defense. Some photos would be provided. What more could they want?

Kammen was in full cry when responding. “The CIA certainly has a history of misleading prosecutors ...(and it has) a history of misleading judges ... and I think the pattern is continuing.... [W]hat we have now ... are a series of summaries that ... we will demonstrate are false.... The summaries are false, they are misleading, they are woefully inadequate for any meaningful presentation in a capital trial.”

The struggle continues to this day. On April 14, 2014, Judge Pohl directed that the prosecution

provide what amounts to the CIA's crown jewels on Nashiri. Instead of summaries, Pohl ordered production of the underlying documents revealing in detail what the agency did to him, the identities of the people who did it, the interrogators' notes and much more.

On April 17, the Miami Herald's Carol Rosenberg reported that "the order sets the stage for a showdown between the CIA and a military judge," should the agency refuse to turn the documents over. One insider went further, saying, "It's a nuclear bomb that may shut down the case," because it covered so many of the agency's closely guarded secrets. Kammen added, "We note that the CIA has lied to at least three federal courts, the 9/11 Commission and, according to the newspapers, Congress. This demonstrated history of lying clearly obligates us to do a full investigation." On April 22, Rosenberg reported that the CIA had declined to comment on whether it would comply with Pohl's order.

That question remains open, but right now the government has asked Pohl to reconsider his order, a rare event in the legal world. On May 28, Judge Pohl heard argument on that request. In the lengthy debate, Kammen praised Pohl's bravery in breaking the CIA's "stranglehold on the truth," and even expressed concern that he would be fired. (Pohl, a retired colonel, serves as chief military commissions judge under one-year, renewable contracts; a predecessor who also served under such contracts was terminated after taking an action that displeased the Bush White House.) He likened Pohl's action to "Judge Sirica's order in the Watergate cases breaking the stranglehold on the truth that the Nixon White House was attempting to impose with its various cover-ups."

Pohl has not yet ruled on this request, and if he declines to reconsider an appeal is certain. No one can predict what the CIA will do if the order ultimately is upheld. Stay tuned, for history is being made.

Charles R. Church is an attorney practicing in Salisbury who focuses primarily on Guantánamo Bay, detention, torture, habeas corpus and related issues.

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