

THE TORTURE TAPE LIBRARY, EPISODE 51

Last week, in an attempt to claim it didn't have to turn over any of the 3,000 documents in its torture tape library (or, for that matter, the list of witnesses who had viewed the tapes), the CIA told Judge Alvin Hellerstein that they weren't going to produce any of their torture tape library to the ACLU.

There is no meaningful non-exempt information from the list of documents covered by Point 2, which identifies roughly 3,000 documents, including cables, memoranda, notes and emails, that can be produced at this time. All of the information on the list of witnesses covered by Point 3 is either classified or otherwise protected by statute. Accordingly, the CIA is not producing either list to Plaintiffs in redacted form.

On Thursday, Hellerstein reviewed a chunk of those documents and that list. After reviewing them, he has ordered the CIA to start putting together an index of what they've got and why they're refusing to turn it over.

On March 26, 2009, I reviewed, ex parte and in camera, representative documents and information produced by the CIA relating to the destroyed videotapes that are the subject of Plaintiffs' motion for contempt and sanction. I ordered the Government to create a work plan for production of this material to Plaintiffs, beginning with a Vaughn index within thirty days of my in camera review and production on a rolling basis thereafter, and to file this plan by April, 2009 for my approval.

A Vaughn index is a list of all documents

withheld in a FOIA case, with individualized descriptions of why those documents can't be turned over. Presuming this Vaughn index at least identifies the dates of the documents, we'll see how widespread discussion of the torture tapes were in 2002, when the CIA and (presumably) its contractors were torturing Abu Zubaydah, in 2003, when CIA's OIG viewed them, in 2004, when the 9/11 Commission started asking for the torture tapes, and 2005, when Jello Jay asked about them and—later—the CIA created plausible deniability for those who had warned against destroying them and destroyed them. We might see some of the recipients.

And I'm suspecting, given Judge Hellerstein's continued skepticism after having reviewed the documents, we might see some of the documents.

Note, too, that judges are already holding the government to Eric Holder's recent declaration on FOIA requiring agencies to lean towards openness. So if the CIA is making bogus claims about some of this stuff, we may well learn about that.