

THE CIA'S CHERRY-PICK

Update, July 20: As this post explains, the CIA claims that the gaps in production come from the presence of "derivative" cables that were permissibly withheld from the Vaughn Index.

In footnote 2 of his declaration, Leon Panetta explains that eight of the documents included in the Vaughn Index (Part One, Part Two) he turned over to Judge Hellerstein represent deliberative process, so can't be turned over.

As described in the attached Vaughn index, documents 28, 54, 56, 57, and 59-62 contain deliberative process privileged information; and documents 59 and 60 contain attorney-client communications and attorney work product.

Given the report that interrogators were cabling HQ on a daily basis for approvals for interrogation techniques, I was interested in which of the cables included in the index of all torture tape related documents the CIA previously identified would be labeled "deliberative process"—it's a way to identify which of the cables included actual discussion about techniques. I was particularly interested in whether any of the more remarkable cables—the 28-page cable from Field to HQ written on May 6, 2002, or the 4-page cable from HQ to Field sent on May 28, 2002—were included among these deliberative documents.

Those two cables—which, I have speculated, might be key cables in the early decision-making on torture—were not included among the selection of all the documents that CIA identified "for review for potential release." In fact, the only deliberative cable included among those that Judge Hellerstein will now review is one dated August 20, 2002, long after the CIA got formal approval to use torture techniques. (In addition, the first of the two interrogation

logs—the one dated April 13, 2002—is considered to include deliberative records, though the second one—dated August 4, 2002—does not.)

But I don't think that was an accident.

The CIA was, as I understand it, ordered to give over a selection of these. Sometimes, agencies are ordered to give over every tenth document out of a total collection, but I don't believe they were here. Sometimes, agencies will simply pull every 10th document, and explain if they deviate from that pattern. But the CIA appears to have submitted a more random selection (though, they supplied a greater percentage of the later documents talking about the torture tape destruction). By comparing the total index with the Vaughn index, though, we can get a sense of what the CIA did include. For most of the series of cables reporting to and from the field, the CIA submitted fairly regular cables—every 10, 11, or 12 cables. From June 22, 2002 through August 20, 2002, they appear to have submitted every 10 document, like clockwork (in addition to the handwritten log dated August 4). (It's impossible to exactly identify a pattern from after that because so many of the cables are the same length, though it is possible that it sticks pretty close to the every tenth cable pattern.)

But things in April—when the FBI and CIA were fighting over control of the interrogation and Abu Zubaydah was reportedly cooperating with the FBI—and May—when the small box was introduced at least two months before OLC approved its use—things are a bit more irregular. In April, for example, the CIA submitted documents 1, 12, ~~19~~22, 32, 42 or 43, and 53 (plus the handwritten log, which was document 3); that gives you gaps of ~~11, 7, 13,~~ 10, 10, 10, 10, and 10 documents (not including the log in the series). In May, CIA submitted documents 64, 65, or 66, 77 or 78, 89 or 90, document 99, 110, 123, 134, 146, document 155 or 156, ad 165; while it's harder to pin down the gaps, there is necessarily one 13-document gap early in the month, a 9-document

gap between May 8 and 11, another 13-document gap between May 14 and 17, a 12-document gap between May 20 and 24, and one 9-document gap between May 24 and 30.

In other words, whereas later in the series the CIA just provided every tenth document, for this early period, they cherry-picked what they submitted. And magically avoided any of the documents that didn't fit the pattern of length or sender and recipient of the rest of the documents. And also happened to avoid sending any cable that could be considered deliberative.

We have reports that some of these cables include detailed descriptions of interrogation methods to request approval. But none of those were turned over to Judge Hellerstein.

I said last night that these documents—the full set of all 580 documents—would show that the techniques used in practices exceeded the guidelines included in the Bybee Two memo. But there's a very good chance the most damning documents are not among the 65 the CIA selected for Hellerstein's review.

Update: To be fair to Panetta, he says the selection intentionally included some of the most sensitive documents. (Thanks to rincewind for reminding me.)

The documents at issue, however, were purposefully selected for review based on the sensitive operational information they contain. Where non-operational documents are at issue, as is the case with a portion of the documents within the scope of the recent remand order, the CIA will consider such documents for release.

Of course, we've got to trust the CIA on this point, at least for now. And from what I've seen so far, I'm not sure I do trust them.

Update: William Ockham corrected an important error in my calculations—pointing out that

document 22, not 19, was included (meaning the documents pulled from April are regular). He suggests the other irregularities may come from an algorithm that does not pull from HQ to Field or Field to Field cables, and some bugs that otherwise introduce the irregularities. The gap that still doesn't adequately explain, it seems, is the 110 to 123 to 134 gap in May, which is precisely the period I'm most interested in. But bear in mind that this might be a computer issue, and not any intentional cherry-picking from the CIA.