

WHY THE CIA WOULD WANT TO HIDE MAY 2002 FROM JUDGE HELLERSTEIN (AND THE ACLU)

Update July 20: See this post for the CIA's explanation for the gaps in May's production and the timelines. While their explanation makes them permissible to withhold, it doesn't change the underlying reasons why they may have wanted to withhold them.

I've had a couple of really weedy posts examining the CIA's response to the torture FOIA (Cherry-Pick One, Cherry-Pick Two, FOIA Exemptions). And I wanted to pull back a bit, and explain what I think they might mean.

We're getting all these documents because the CIA is trying to avoid being held in contempt for not revealing the now-destroyed torture tapes in a response to this FOIA in 2004. At that time, the CIA had to reveal the torture related documents held by its Inspector General or Office of General Counsel. When ACLU learned of the torture tape destruction, it argued that the tapes should have been included in that FOIA compliance and certainly should not have been destroyed. The CIA argued, though, that since the Inspector General had never physically had the tapes, they were not responsive to the original FOIA. Things got delayed because of the John Durham investigation into the torture tape destruction. But last September, Judge Hellerstein deferred the decision on whether the CIA had deliberately ignored his earlier orders in destroying the torture tapes.

I find the facts before me are insufficient to justify a holding of civil contempt.

[snip]

Here, I find that there has yet to be any such "clear and convincing evidence" of noncompliance on the CIA's part.

He asked the DOJ to explain why Durham's investigation prevented the production of a catalog listing:

- 1) A list identifying and describing each of the destroyed records;
- 2) A list of any summaries, transcripts, or memoranda regarding the records, and of any reconstruction of the records' contents; and
- 3) Identification of any witnesses who may have viewed the videotapes or retained custody of the videotapes before their destruction.

The government was able to get another delay because of the Durham investigation, but the FOIA reponse we're getting now is basically this long-awaited catalog, which Hellerstein will use to determine whether the CIA deliberately ignored his 2004 order in this FOIA case.

So the CIA has a couple of goals in its response to Judge Hellerstein's orders. It wants to appear as cooperative as possible, lest Hellerstein believe that the CIA was and is continuing to cover something up. At the same time, the CIA wants to hide any evidence that it would have had reason to destroy the torture tapes to cover something up. It also wants to anticipate information that is going to come out one way or another—such as the involvement of contractors in the torture—so it can reveal that information now, in controlled fashion, and appear to be cooperative with the FOIA request. It has to cooperate but—assuming some of this information might support a contempt finding—not too much.

After the John Durham stall tactic finally stopped working in March, and after the CIA

produced really redacted information on the torture tapes (thereby sort of complying with item 1 of Hellerstein's order), the CIA then submitted a list to Hellerstein of what it had that complied with items 2 and 3 on March 26. The very next day, having reviewed the materials, Hellerstein ordered the government to put together a schedule for FOIA production of this material by April 9, and production starting a month later. The government's April 9 workplan and its first Vaughn Index (which I've called Vaughn A) was an attempt to look really compliant quickly. And that's where they started getting cute. The April 9 workplan basically offered to produce:

- A "Vaughn-like" index, but not a Vaughn Index
- Information on the cables for August, but not for April through August and September through December (thereby excluding most of the contents of the destroyed torture tapes)
- Information on Abu Zubaydah but no information on Rahim al-Nashiri
- No "derivative" documents, which it is now clear would include documents generated during the IG investigation (and which therefore should have been revealed in the first round of FOIA)

The CIA was hoping—it appears—that its narrative that the torture tapes portrayed waterboarding, and that's the big reason they were sensitive, would distract Hellerstein and the ACLU and therefore allow them to hide a slew of other information: the success of the FBI before Abu

Zubaydah's torture started, the torture that started before the OLC opinions were written (and the White House's intimate involvement in approving the earlier torture), the role of contractors in the torture, the quality of intelligence they got using persuasive interrogation as compared to the quality of intelligence they got using torture, whatever happened in al-Nashiri's waterboarding that led them to stop and even admit it didn't work with him, whatever happened to Abu Zubaydah around October 11, 2002 that led them to take a picture of him, and the Inspector General's reconstruction of the Abu Zubaydah's interrogation (which should have been turned over in the first FOIA).

SHINY OBJECT!! WATERBOARDING!!!

Only, it didn't work. The ACLU called bull on April 10, the release of the torture memos on April 16 mooted many of their arguments, Hellerstein called bull on April 20, and ordered the government to come up with something a bit more responsive.

Nevertheless, when CIA submitted its first Vaughn Index on May 1, it was still, significantly, telling its shiny object story. This was compliance that focused exclusively on the two weeks after the Bybee Two memo authorized waterboarding. So it effectively revealed the degree to which the interrogators were deliberating on a daily basis with folks in Langley and DC—why not?? That deliberation might make waterboarding look more careful. It also appears that, with its personnel-related FOIA exemption, the CIA might have been admitting that others besides CIA personnel were at the torture sessions; though they appear to have avoided confessing to the role of contractors.

But per Hellerstein's April 20 order, the CIA had to submit a second round of documentation, this time covering the full range of dates that the torture tapes had captured, as well as the "derivative" information that should have been identified originally.

And in the interim period, a number of new details came out. Significantly, on May 13, Ali Soufan testified to Congress that contractors had led the interrogations. And on May 20, Ari Shapiro reported that Alberto Gonzales was approving interrogation techniques in response to cables on a nearly-daily basis. And the CIA probably has a good idea of what will be in the OPR report, due out any day.

And so we get the Vaughn Index released the other day. Panetta's declaration makes a couple of big new admissions: Contractors were present at the interrogations, and someone at NSC, rather than George Tenet, made this program a special access program. But the new materials continue to hide the following evidence that might support a contempt citation:

- Details about the interrogations from May (May overall was undersampled, particularly from May 14 through 23)
- Deliberative discussions that took place before August (which might include the approval of torture before the OLC memos)
- The degree to which torture, as practiced, exceeded the torture as authorized
- Mistakes the CIA made about Abu Zubaydah's identity
- The extent to which FBI interrogators got more and better intelligence than the CIA contractors
- Someone's—perhaps the Inspector General's—reconstruction of

the timeline concerning the torture

- Interview records from both the Inspector General's investigation or the early CIA response to revealing the torture tapes had been destroyed

Perhaps most telling, the CIA undersampled in May and did not turn over any of four timelines and six notes/outlines (which I suspect were part of the IG investigation), but included in Vaughn B two totally decontextualized descriptions of waterboarding (and mark my words—I bet the CIA will soon agree to hand those over to prove its cooperation).

SHINY OBJECT!! WATERBOARDING!!!!

The CIA still wants to pretend this is all about waterboarding. But it is increasingly clear that it is about the things CIA did in May and June, the high level authorizations for it, the success of the FBI, and the completely false claims they used to later authorize their torture.

The torture tapes were destroyed not because they showed OLC-authorized waterboarding. They were destroyed (among other reasons) because they proved that the foundation of our torture program was a lie. And the CIA is still trying to hide that fact from Judge Hellerstein.