

THE "OTHER" PROVISION OF THE RECORDS ACT

It appears the fluid and constantly evolving rationalization of the Bush Administration for their destruction of the torture tapes may be starting to congeal in an operative theory relying, at least in significant part, on a provision of the Federal Records Act allowing destruction of certain records located outside of the United States during wartime. As EW pointed out in the last post, this defense was revealed in Isikoff's December 21, 2007 Newsweek article:

But agency officials could be relying on another provision of the records law that permits an agency, during wartime, to destroy records outside the continental United States that are judged to be "prejudicial to the interests of the United States." The CIA has argued that one reason for destroying the tapes was that agency officials feared that if the videotapes were leaked they might compromise the identity of the CIA interrogators.

It is certainly a relief that we don't have some sort of rogue Administration running around destroying evidence material to a whole plethora of cases and forums, and that their decision was fully in compliance with United States law. That law would be the Federal Records Act, and the pertinent provision, as codified in 36 CFR Part 1228, reads:

a) Destruction of records outside the territorial limits of the continental United States is authorized whenever, during a state of war between the United States and any other nation or when hostile action by a foreign power

appears imminent, the head of the agency that has custody of the records determines that their retention would be prejudicial to the interest of the United States, or that they occupy space urgently needed for military purposes and are without sufficient administrative, legal, research, or other value to warrant their continued preservation (44 U.S.C. 3311).

(b) Within 6 months after the destruction of any records under this authorization, a written statement describing the character of the records and showing when and where the disposal was accomplished shall be submitted to NARA (NWML) by the agency official who directed the disposal. (ed. note: see also 44 U.S.C. 3311).

Well, hold on a minute here. Is that their final answer? Of course it's not their final answer; there is never a final answer, on anything, with the Bush Administration; just a continuing series of intentionally disingenuous obfuscations. It takes no more than a cursory inspection of the foreign war records exception to expect that the Administration will very soon be on the move again, morphing away from this version of their rationalization to the next cock and bull story.

Initially, the provision applies "during a state of war between the United States and any other nation or when hostile action by a foreign power appears imminent". To the best I can discern, there has not been a formal declaration of war against another nation by the United States Congress, the branch with the sole power of doing so under Article 1, Section 8 of the Constitution. The AUMF will be trotted out, along with the ubiquitous Article II Commander in Chief tripe, but the simple fact is the AUMF is not a formal declaration of war and Bush's Article II powers do not allow him to magically transform the AUMF into a formal declaration of

war. It is also hard to fathom any basis for the Administration to claim "action by a foreign power appears imminent" at the time the tapes were destroyed.

Secondly, the only person with the statutory authority to exercise the power to order emergency destruction of foreign locus records during a state of war is "the head of the agency that has custody of the records". In this instance, there are only two people that could plausibly be considered to fall into this definition, Porter Goss, the head of the CIA at the time, and John Negroponte, the Director of National Intelligence (DNI) at the time and who is theoretically over all the intelligence agencies, including the CIA. Negroponte not only firmly advised against destruction of the torture tapes, he felt so strongly about it that he memorialized it in writing to insure there was a record. Multiple reports indicate that Porter Goss also advised against the destruction of the torture tapes and that he is dismayed and angry they were destroyed.

Next, assuming there was a proper state of war (there was not) and the right authority ordered the destruction of the evidence tapes (they did not), were the right circumstances present permitting destruction under the provision? It is hard to imagine how a few videotapes could credibly be considered to "occupy space urgently needed for military purposes", nor can it, even remotely, be said that the tapes "are without sufficient administrative, legal, research, or other value to warrant their continued preservation". The only authorized situation remaining is where the records are "prejudicial to the interest of the United States". I will grant the contents of the torture tapes are prejudicial to the interests of the United States; but, personally, I am not very plussed with conflation of concealment of blatant and intentional commission of national and international war crimes by elected politicians, and the general interest of the country. Furthermore, these provisions are designed to

apply only to emergency situations. What emergency was there necessitating the destruction of evidence that no one knew about, kept in a safe in a third party country no one is aware of, that is under no known threat or attack by anything, some four years after the tapes were made? The only threat was that the tapes would be discovered and the heinous war crimes of this Administration become exposed and proved beyond any reasonable doubt. Not particularly compelling.

You can almost detect a pattern here eh? The next consideration is, if all the requisite elements permitting the emergency destruction of the torture tapes were met (they were not), were the proper protocols and procedures followed in effecting the destruction? That would require that:

Within 6 months after the destruction of any records under this authorization, a written statement describing the character of the records and showing when and where the disposal was accomplished shall be submitted to NARA (NWML) by the agency official who directed the disposal.

Perhaps there is such documentation and it simply has not been disclosed yet. You would think that this document, at least in a minimally redacted form, would have been trotted out to exhibit the propriety of conduct by the Administration; but we have not seen that. Time will tell, but it is a safe bet that if there was such a legitimate and fully compliant certification made to the NARA within six months of the destruction of the torture tapes, we would have heard about it.

It is almost impossible to know where the convoluted, disingenuous dog and pony show being run by the Bush Administration on the destruction of the torture tapes will end up, but if the line of argument discussed herein is what they are standing on, they are going to

need railroad cars of pixie dust to coat the
pill for anyone of common sense to swallow.