

TORTUROUS LOGIC

I agree with Jeff. Given the news that the torture tapes never entered the US, given Porter Goss' apparent command not to destroy the torture tapes "in Washington," and given the terms of the Federal Records Act...

Mansfield did not explain why the CIA didn't find the destroyed videotapes to be "records" as defined under the law. 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."

I think the CIA and the Administration stretched logic with each and every request for the torture tapes so as to claim they never were required to hand over the tapes.

We've already seen such tortured logic in the Administration response to Judge Kennedy's alarm that they had destroyed tapes that may have been responsive to an order he gave them.

Kennedy ordered the administration in June 2005 to safeguard "all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the United States Naval Base at Guantanamo Bay."

Five months later, the CIA destroyed the interrogation videos. The recordings involved suspected terrorists Abu Zubaydah and Abd al-Rahim al-Nashiri

Government lawyers told Kennedy the tapes were not covered by his court order because Zubaydah and al-Nashiri were not at the Guantanamo military prison in Cuba. The men were being held overseas in a network of secret CIA

prisons. By the time President Bush acknowledged the existence of those prisons and the prisoners were transferred to Guantanamo, the tapes had been destroyed.

And whoever pointed Isikoff to the loophole in the Records Act that tapes overseas can be destroyed would presumably believe that negated the ACLU FOIA request for records on detainees held in US custody overseas.

When word of mistreatment of detainees surfaced, the ACLU filed a Freedom of Information Act request targeting the CIA and others on October 7, 2003 and May 25, 2004, seeking records concerning the treatment of all detainees apprehended after September 11, 2001 and held in U.S. custody abroad. This, of course, would mean not only in Guantanamo but in the secret prisons in Eastern Europe operated by the CIA.

Not surprisingly, the government stiffed the request, so the ACLU filed a lawsuit in June 2004 in the U.S. District Court for the Southern District of New York. The case ended up in the courtroom of Judge Alvin K. Hellerstein. On September 15, 2004, Judge Hellerstein ordered the CIA and other government departments to "produce or identify" all responsive documents by October 15, 2004.

[snip]

The Court's Order required the CIA to "produce or identify all responsive documents." Those not produced had to be identified. Classified documents were to be "identified in camera [that is, only to the court] on a log produced to the court." Recall, too, that the FOIA request sought information on the handling of all but a few detainees, who

were within the United States.

It is well- and long-established law that a court order of this nature requires that the party preserve all information possessed that is responsive to the request. Thus, the CIA was obligated to preserve the tapes even if they were hell-bent on fighting in court to deny them to the ACLU. And as this litigation proceeded, Judge Hellerstein's later orders only served to reinforce that obligation, as a string of precedents makes clear.

On its face, it appears to be really ridiculous logic, but perhaps they're arguing that these weren't records under the Records Act, and therefore they can ignore Judge Hellerstein's order to keep them.

Which leaves Leonie Brinkema's two inquiries about records of the interrogations of those Moussaoui wished to interview. It does seem possible that, using this tortured logic, the CIA believed they had to destroy the tapes so they could say on November 14, 2005, that they didn't "have" any such tapes.