CIA STICKS WITH ITS WATERBOARDING SHINY OBJECT STRATEGY

A month ago, I argued that the CIA was deploying a waterboarding "shiny object" strategy in its attempt to hide the details of the torture program that they otherwise eliminated by destroying the torture tapes—particularly, that torture started before OLC approved it, and that Abu Zubaydah had cooperated without torture, meaning their entire premise for torture was false.

> 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).
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> SHINY OBJECT!! WATERBOARDING!!!

They submitted a filing in the case today that

sticks with that same shiny object strategy. Of particular note, there's a long paragraph that seems to be written for Mary personally. Mary always reminds us that you can't use classification to hide an example of crime. The CIA responds, as if to Mary, that they couldn't be hiding a crime because they already revealed all this stuff.

> To the extent that plaintiffs argue that the intelligence methods in these documents are illegal and outside the scope of the agency's authority, and thus are not properly classified, the interrogation and detention methods addressed in the documents were, until January 2009, within the CIA's authority. See Executive Order 13491, 74 Fed. Reg. 4,893 (Jan. 22, 2009) (terminating CIA terrorist and detention interrogation program). Moreover, Section 1.7(a) of the Executive Order does not bar the Government from classifying information that might contain evidence of illegality, but rather bars the Government from classifying otherwise unclassified information "in order to"— i.e., for the purpose of—concealing violations of law. 68 Fed. Reg. at 15318. Here, the details of the EITs have already been released in the context of the OLC memoranda. Thus, the CIA's classification of these operational documents was not intended to conceal any illegal activity, as the activity itself has already been disclosed.

They made this argument even after repeating, several times, Leon Panetta's all-but admission that the techniques in practice exceeded the techniques as authorized.

> As the Court knows, on April 16, 2009, the President of the United States declassified and released in large part Department of Justice, [OLC] memoranda

> analyzing the legality of specific [EITs]. As the Court also knows, some of the operational documents currently at issue contain descriptions of EITs being applied during specific overseas interrogations. These descriptions, however, are of EITs as applied in actual operations, and are of a qualitatively different nature that then EIT descriptions in the abstract contained in the OLC memoranda. As discussed below and in my classified declaration, I have determined that information . . . concerning application of the EITs must continued to be classified TOP SECRET, and withheld from disclosure in its entirety under FOIA Exemptions b(1) and b(3).

That of course doesn't make sense! They can't logically argue that the techniques have already been exposed, and therefore obviously they're not claiming they're still classified to hide evidence of a crime, but then say they have to keep the techniques as practiced hidden, because …

Because, we all know, the techniques as practiced **are** evidence of a crime.

And then, of course, there's the problem of timing and the representations made in the OLC memos. If the documents in question show—as they almost certainly do—that CIA was engaging in torture before the OLC memos were written, or if the CIA documents show—as they almost certainly do—that the claims made in the OLC memos were false, then the fact that the OLC memos later went on to approve the torture based on false assumptions means that their claim that this was authorized until January 2009 fall apart temporally (it wasn't approved yet) and logically (and not given what we know about Abu Zubaydah).

The brief then goes onto list a bunch of cases in which judges ruled there was no evidence that

the agency was trying to hide a crime, and conclude, all pat like, that given the presumption, generally, of good faith, there's no evidence in this case that CIA had an improper motive for keeping this stuff classified.

> For all of these reasons, there is no evidence that the CIA had an improper motive in classifying the operational documents currently at issue before the Court. Accordingly, the CIA properly withheld these operational documents in full under Exemption 1.

As a gentle reminder, this litigation is about whether the CIA should be held in contempt because **they destroyed the videos showing these activities**!! Destruction that a Special Counsel has spent 18 months, thus far, investigating.

But, nonetheless, the CIA insists that there's no bit of evidence that the CIA is trying to hide a crime.

This whole argument is falling apart, and that's even before ACLU picks it apart in their response brief (due in a couple of weeks).

But at least they responded (ha!) to Mary's biggest objection.