

US judge denies request for hearings on CIA torture tapes

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A federal judge on Wednesday denied a motion for an examination into whether the Bush administration violated a court order when the CIA destroyed videotapes depicting torture in 2005. The move closes off one avenue for an inquiry outside of the official whitewash that has been initiated by the Department of Justice.

The decision was issued by Judge Henry Kennedy of the US District Court for the District of Columbia. Kennedy had given an order in June 2005, five months before the videotapes were destroyed, requiring the government to preserve all “evidence and information regarding the torture, mistreatment, and abuse of detainees now at the United States Naval Base at Guantánamo Bay, Cuba.”

The videotapes destroyed by the CIA recorded hundreds of hours of the agency’s 2002 interrogation of alleged Al Qaeda members Abu Zubaydah and Abd al-Rahim al-Nashiri. The tapes were secretly destroyed in November 2005, shortly after the existence of the CIA’s system of international prisons was exposed to the public. The action was taken despite several relevant pending court cases, including one before Kennedy involving eleven Yemeni prisoners held at Guantánamo Bay.

The CIA admitted last month that it had destroyed the videotapes. The methods used on Zubaydah and al-Nashiri included waterboarding, a notorious torture technique.

Lawyers for the Yemeni prisoners filed a motion asking Kennedy to investigate whether the action by the CIA violated the June 2005 order. In a preliminary hearing on the motion last month, the government argued that the videotapes in question are not relevant to the case because the prisoners were not at Guantánamo Bay at the time. They were transferred to Guantánamo in late 2006 from secret overseas CIA detention facilities that were not public when the court issued its order. The Justice Department also argued that any court action would

interfere with the government’s own self-investigation.

David Remes, a lawyer for the prisoners, argued against the government last month. “We have a smoking gun, as it were, with respect to the government’s destruction of potentially relevant evidence,” he told Kennedy. “The Justice Department may have sanctioned the destruction of these videotapes. Now they are asking the court to stay out, on the grounds that it is investigating the destruction of these videotapes.”

Remes noted that the government’s demand to allow it to investigate itself is a case of “the fox in charge of the henhouse.”

“The revelation of the CIA’s destruction [of the tapes] raises serious questions about whether the government has complied with the court’s order ... and its more general obligations,” Remes said. He noted that the government was obliged to protect all relevant evidence even if it did not fall under the specific remit of a court order. Indeed, the government argued at one point in the case that no court order to preserve evidence was necessary because it was aware of its general legal obligation not to destroy anything that could be relevant.

Reyes also argued that the fact that the government had destroyed some videotapes was an indication that it was likely that other evidence had also been destroyed or suppressed.

On Wednesday, Kennedy—who was appointed to the district court by Bill Clinton in 1997—issued a ruling accepting the government’s arguments in the case, noting that the order was specifically directed to prisoners held at Guantánamo Bay.

On a technicality, Kennedy rejected the claim by lawyers for the prisoners that a hearing was necessary because the government had a more general obligation to preserve all evidence relating to the case. He said that this specific claim was not included in the written motion requesting a hearing and therefore could not be acted

upon.

Kennedy acknowledged that his decision was influenced “by the assurances of the Department of Justice that its preliminary inquiry—now a criminal investigation—into the destruction of the videotapes by the CIA will include the issue of whether their destruction was inconsistent with or violated any legal obligations, including those arising out of civil matters such as [this court’s] Order of June 2005.”

Responding to Remes’ statement that an investigation by the government could not be credible, Kennedy replied, “There is no reason to disregard the Department of Justice’s assurances.... This presumption is especially warranted with respect to the newly-appointed Attorney General and Department of Justice lawyers.” Here Kennedy was referring to the fact that the investigation is being carried out under the authority of Attorney General Michael Mukasey, who replaced Alberto Gonzales in November.

In fact, there is every reason to believe that the criminal investigation by the Justice Department will be a whitewash. Mukasey announced the appointment last week of John Durham to head the investigation. This was presented by the media and by Democrats as a move to place an outsider in charge of the investigation, since Durham is from Connecticut and not Washington.

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In fact, Durham will have none of the powers of a special prosecutor or independent investigator. The criminal investigation will remain entirely under the control of the Justice Department and the Bush administration—that is, the principal suspects in the crime.

Remes had suggested that a judicial inquiry would involve testimony from senior lawyers at the White House and Justice Department—something that the administration is desperate to avoid. Last month, the *New York Times* reported that at least four administration lawyers—including then White House Counsel Alberto Gonzales and Vice President Dick Cheney’s chief lawyer, David Addington—were involved in several discussions between 2003 and 2005 on plans to destroy the tapes.

Kennedy’s decision may bolster the government as it seeks to block judicial inquiries in separate cases. The American Civil Liberties Union has asked a different federal judge to find the CIA in contempt of court for destroying the tapes. In May 2004, the ACLU had obtained an order from the US District Court for the Southern District of New York for the CIA to turn over or

account for all documents relating to the treatment of detainees in its custody, not only those held at Guantánamo Bay.

In a separate matter, lawyers for Jose Rodriguez, the former head of clandestine operations at the CIA, have sent a letter to the House Intelligence Committee saying that Rodriguez will not testify in scheduled hearings without a grant of immunity. According to press reports, Rodriguez, who recently retired from the CIA, was the individual directly responsible for ordering the destruction of the tapes.

The Bush administration is counting on Democrats in Congress to keep tightly contained any investigations into the destruction of the tapes. The January 16 hearings before the House Intelligence Committee—the only scheduled hearings so far announced—will be closed, meaning that any information will be kept from public view. In addition to Rodriguez, CIA acting General Counsel John Rizzo is scheduled to appear before the committee.

A grant of immunity to Rodriguez could affect any future prosecution, and the Democrats may use this to justify delaying any formal hearings involving Rodriguez or other officials involved. Silvestre Reyes, the Democratic chairman of the House Intelligence Committee, has so far declined to comment on the demand for immunity. No Democrats have suggested that Bush administration officials and lawyers should be subpoenaed in the investigation.

Whether or not Rodriguez testifies, no serious investigation will take place in the Democratic-controlled congressional committees, since such an investigation would have to examine the complicity of leading Democrats in the initial policy of torture and the subsequent cover-up and destruction of the videotapes.



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