THE CIA CONTINUES TO COVER UP BUSH'S AUTHORIZATION OF TORTURE

Reading the unredacted sections of this ex parte hearing on the ACLU's torture FOIA leads me to suspect the CIA is trying to keep hidden all mention of Bush's September 17, 2001 Memorandum of Notification authorizing a range of counterterrorism activities.

Take a look, first of all, at the discussion about Judge Alvin Hellerstein's problems treating something that is redacted in the "second and fourth" OLC memos as an Exemption 3 sources and methods withholding. He objected, apparently, because the redacted information was not a method, but instead the source of authority.

> Judge Carney: Judge Hellerstein rejected the characterization of that as a method, and said instead this is a source of authority.
>
> [snip]
>
> JUDGE CARNEY: I have a follow up, if I may.
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> So if I understand the government's position, your position Is the material redacted from the second and fourth OLC memos was properly exempt under Exemption 1, and that Judge Hellerstein's ruling then was somewhat incomplete in that he rejected and demanded that you use an alternative characterization under—he rejected it under Exemption 3. He was saying this was, a source of authority, not a method.
>
> [snip]

> MS. LA MORTE: I don't recall an expressed ruling in the transcript about Exemption 1. I think what Judge Hellerstein's thought process was, was that this was a source of authority, and that's it, not an activity, not a method.

Now, we know what the source of authority for the torture program was thanks to reporting on it—it was purportedly authorized by Bush's September 17, 2001 Memorandum of Notification. Here's how the NYT described it as early as 2006.

> According to accounts by three former intelligence officials, the C.I.A. understood that the legal foundation for its role had been spelled out in a sweeping classified directive signed by Mr. Bush on Sept. 17, 2001. The directive, known as a memorandum of notification, authorized the C.I.A. for the first time to capture, detain and interrogate terrorism suspects, providing the foundation for what became its secret prison system.

LaMorte's descriptions introducing these particular OLC redactions make it fairly clear that the authorization in question is the one that authorized the capture and detention of top Al Qaeda figures—that is, the September 17 MON.

> Ms. La Morte: [In response to a question about sources and methods redactions] That's absolutely correct. So, for example, in the OLC memos, [1.5 lines redacted] So that program was a program where the CIA was authorized to capture international terrorists abroad, detain them in foreign countries, and interrogate them using not only standard methods but enhanced interrogation techniques.

> But that detention, that CIA detention and interrogation program, was a program that [3 paragraphs redacted]

I love how she makes a point of calling this a "CIA detention and interrogation" program; we know that the finding that authorized the program actually didn't lay out the interrogation program. She seems awfully concerned about insisting that the MON authorized not just capture and detention, but also interrogation; I'll explain a likely source of her concern in a follow-up post.

She goes on to suggest that if these passages in the OLC memos were revealed, it would amount to the first time this content—presumably the Presidential MON—were revealed.

> And that's important because here, the references to [half line redacted] contained in the OLC memos reveals for the first time the existence and the scope of [1.5 lines redacted] That has never before been acknowledged, and would be acknowledged for the first time simply by revealing [few words redacted] in the OLC memos.

I'll rip this claim to shreds in a subsequent post. But for the moment I'd like to point to what I think are the redactions in question.

As noted above, Judge Carney said these redactions are in the second and fourth OLC memos. As part of the same exchange, Judge Richard Wesley makes it clear they are in one of the March 10 and the March 30 memos.

Page 29 of the March 10, 2005 Techniques memo includes this passage:

> Interrogators (and other personnel deployed as part of this program) are required to review and acknowledge the applicable interrogation guidelines. See Confinement Guidelines at 2;

> Interrogation Guidelines at 2 ("The Director, DCI Counterterrorist Center shall ensure that all personnel directly engaged in the interrogation of persons detained pursuant to the authorities set forth in [half line redacted]

And in addition to the large redactions on page 4 and 5 of the March 30, 2005 CAT memo—which appear to provide general background on the torture program and therefore might address authorization—page 7 includes a reference to the same Tenet Guidelines.

> Any interrogation plan that involves the use of enhanced techniques must be reviewed and approved by "the Director, DCI Counterterrorist Center, with the concurrence of the Chief, CTC Legal Group." George J. Tenet, Director of Central Intelligence, Guidelines on Interrogations Conducted Purusant to the [half line redacted].

Here's the Guidelines on Interrogation in question. You will be thoroughly unsurprised the authorities referenced in the title, as well as most of the paragraph that lays out those authorities, are redacted.

As I noted, I will have a follow-up post or two on this one. But it appears that amid the big argument whether waterboarding is an intelligence method or not is one the CIA is fighting just as aggressively: whether or not it has to reveal the already widely-reported fact that George Bush unilaterally authorized all this torture on September 17, 2001.

Update: Okay, having now figured out where the Hellerstein objections appear, I can confirm that that's what the CIA is trying to cover up. During the October 29, 2009 hearing on these redactions, AUSA Sean Lane and Judge Hellerstein had this exchange.

> MR. LANE: Correct, your Honor. They both

> address what the government ties been calling "the Intelligence method" withheld from the two OLC memos, and the Court has been referring to as "The source of the CIA's authority." That's probably an appropriate segue to get into that issue.
>
> THE COURT: I'll say a word which will illustrate it in the redactions themselves. I think the government calls these "methods of interrogation" because part of the method is to seek authority from a higher source. And I've called these "source of authority" because I think they're less a matter of methodology end more an aspect of authorization.
>
> I'm not comfortable with calling these "methods," The statute authorizes classification with regard to methods of interrogation. It does not say anything about sources of authority for interrogation, and that's one of the tensions between the position expressed by the government and the rulings of the Court.

AUSA Heather McShain then takes Hellerstein through a line by line discussion of the redactions in question. The first comes on page 5 of the Techniques memo. The only redaction on that page is another reference to the Tenet Guidlines, again with the language following "pursuant to" redacted. While much of the discussion is redacted, Hellerstein does state that redacting this—under the guise of a "method"—is misleading.

> The government lawyers received instructions that that phrase also would be covered by their need to redact. I reject that. I rule against the government on that particular point. (2.5 lines redacted) I would think, cause the descriptions to be misleading.

> Actually, there could not be anything other In that context than [few words redacted] Because at some point, the source of authority has to be identified, and it could not [1.5 line redacted]
>
> I further think that there can be no real compromise of security by noting that [few words redacted] that is involved in all of this,

Hellerstein then suggests a substitution for the redacted language, but Lane says even that is unacceptable.

> So, I then put to the government whether they would like the document, if my ruling is adhered to, to be presented publicly in unredacted form on this page, or would the redaction to be kept, and the phrase [few words redacted] substituted. I leave It to them to choose which of those two.
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> MR, LANE: Your Honor, the government would take the position that it wants the information redacted, and is not willing to insert the phrase [few words redacted] But it is certainly conscious of the Court's ruling.

McShain then points to the redaction on page 29—the one I noted above—as another example of the same problem.

The next redaction discussed is the long redaction on page 4 of the CAT memo (also noted above); Hellerstein reads an entire substitute paragraph into the record on that point. Though ultimately he defers to the government's wish that it be redacted.

The discussion also makes clear—as I have noted previously—that there's a reference to the IG report in that long redaction. The IG Report, incidentally, has two paragraphs that pertain to

authority, both entirely redacted, on page 11. I'd bet money this redaction includes an excerpt from those redacted passages. Which seems to be confirmed by Lane's careful self-correction in this exchange.

> THE COURT: I think you should look at the IG report and see if there are references in the public document that reference [half line redacted]
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> MR. LANE; I can represent there are no references, public references [few words redacted] in the IG report.

Next, there's an exchange about the lengthy redaction on page 5, on which Hellerstein already ceded to the government's wishes.

Finally, there's the last redaction discussed—the reference to Tenet's Interrogation Guidelines I noted above. In this exchange, the government gets stroppy when Hellerstein justifies his order requiring substitute language.

> So I defer to the redaction, ruling that a phrase of equivalence and neutrality should be put inside, which I believe is my authority under the C!SA, Confidential information Securities Act, Where the Court is given the ability to summarize and create equivalences. That's a procedure that's done where classified information has to be introduced at trial, end there is a process by which the Court reviews that with the intelligence officials and tries to create neutral summaries that can be admitted, providing the content and the substance that has to be disclosed without compromising classified information.
>
> MS. McSHAIN: Your Honor, i believe that applies to criminal cases.
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> THE COURT: it does. And civil cases,

> possibly. But I adopt it for FOIA,

While all this doesn't confirm precisely how the redacted passages refer to the authority on which this torture program is based, it does make it crystal clear that the CIA objected—and continues to object—to Judge Hellerstein's demand that the CIA at least release a summary of that authority, as well as his judgment that the authority on which torture is based does not constitute a source or method.