

THE MEMORANDUM OF NOTIFICATION THE CIA PRETENDS HAS NEVER BEEN ACKNOWLEDGED

"We don't do that sort of thing," [Glenn Carle responded to a CIA Counterterrorism Center Deputy about "going beyond SERE" with a detainee].

"We do now," Wilmington's voice was flat. The conversation remained quiet.

"What about E012333? We've never done that sort of thing. The Agency'd never do that. We'd need a finding, at least."

[snip]

"We have it." Wilmington's manner brightened a little. "We have a letter from the president. We can do whatever we need to do. We're covered."

—Glenn Carle, *The Interrogator: An Education*, approved by CIA's Publication Review Board prior to its summer 2011 publication

Yesterday, I described how the CIA appears to be refusing to release via FOIA any mention—or even a substitution mention—of references to the September 17, 2001 Presidential Memorandum of Notification the government claims authorizes torture and a bunch of other activities.

In this post I'd like to deal with AUSA Tara LaMorte's March 9, 2012 claim that what I believe to be the MON has never been acknowledged before.

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.

Now, as it happens, the CIA made an extensive declaration about the MON in a statement from Marilyn Dorn, the CIA's Information Review Officer, back in 2007. The description of it—item 61—starts on page 34.

The declaration is actually pretty funny. ACLU had asked for any declarations signed by the President authorizing the torture program. There is none. So in her declaration, Dorn as much as said this MON—which doesn't mention interrogation—was the MON in question.

Item No. 61 requested a "Directive signed by President Bush that grants CIA, the authority to set up detention facilities outside the United States and/or outlining interrogation methods that may be used against Detainees." The CIA did not locate a document signed by President Bush outlining interrogation methods that may be used against detainees. The CIA did locate one document signed by President Bush that pertains to the CIA's authorization to set up detention facilities outside the United States. The document responsive to Item No. 61 is a 14-page memorandum dated 17 September 2001 from President Bush to the Director of the CIA pertaining to the CIA's authorization to detain terrorists.

So in response to ACLU's FOIA, which basically said, "give us the legally-required MON that authorized torture," Dorn said, "we don't have one, but here's what we've been using for all these years." That's pretty significant acknowledgment of what kind of authorization underlies the torture program.

Dorn's declaration goes on to provide some detail about the memo.

This 14-page document consists of a 12-page notification memorandum and an attached two-page cover memorandum. The 12-page notification memorandum is a memorandum from the President to members of the NSC regarding a clandestine intelligence activity. The two-page cover memorandum is a transmittal memorandum from the Executive Secretary of the NSC to the Director of the CIA.

The 12-page memorandum pertains to the CIA's authorization to detain terrorists. The memorandum discusses the approval of the clandestine intelligence activity and related analysis and description. The memorandum also discusses other matters not relevant to Plaintiffs' general or specific FOIA requests.

Now, just as a reminder, the redactions the CIA is now fighting to retain are repetitions of a half-line phrase taken from the title of a George Tenet memo. The redactions in question are not paragraph-long descriptions of the program (Judge Alvin Hellerstein has already agreed to the government's request to keep those two paragraphs redacted). They're just a short phrase. About the only thing not included in Dorn's description—but which, if I'm right that this is the MON, probably appears on the memo and possibly in this title—is the term of art “Memorandum of Notification.”

Though there is one more, potentially very significant point. Dorn repeatedly calls this a “clandestine intelligence activity,” not a “covert operation.” That's rather funny, because one of the numerous times a CIA figure has already implicitly revealed a finding must exist came when, on April 16, 2009, Michael Hayden stated that the interrogation program had started as a covert op (I wrote about the

implications of that here, though the YouTube has been lost to the Toobz demons). There are important distinctions between clandestine and covert programs, notably pertaining to whether we plan to deny our involvement in an activity and whether congressional notification—notification just like this memo—is required. Michael Hayden, in what really constitutes the beginning of an acknowledgment that this authorization had to have existed, says it was covert. Dorn says it was clandestine.

But Hayden isn't the only former top level CIA official who has acknowledged this MON, authorizing covert—not clandestine—activities existed. John Rizzo—who was the CIA lawyer most involved in the torture program for most of its existence—provided extensive details about how (he claims) Congress was informed about it.

A few days after the attacks, President Bush signed a top-secret directive to CIA authorizing an unprecedented array of covert actions against Al Qaeda and its leadership. Like almost every such authorization issued by presidents over the previous quarter-century, this one was provided to the intelligence committees of the House and Senate as well as the defense subcommittees of the House and Senate appropriations committees. However, the White House directed that details about the most ambitious, sensitive and potentially explosive new program authorized by the President—the capture, incommunicado detention and aggressive interrogation of senior Al Qaeda operatives—could only be shared with the leaders of the House and Senate, plus the chair and ranking member of the two intelligence committees.

As always, CIA dutifully followed White House orders, so for the next five years we only told those select

members—euphemistically dubbed the “Gang of 8”—about the program as it developed and expanded. Only they were briefed on CIA’s secret detention facilities overseas and the employment of so-called “enhanced interrogation techniques” (EITs), including the waterboarding of high-value detainees like Abu Zubaydah and Khalid Sheik Mohammad.

While used only rarely in the past, the “Gang of 8” notification process is explicitly authorized in the congressional oversight provisions of the National Security Act for covert actions of “extraordinary” sensitivity. It was an entirely lawful way to proceed to notify Congress about the EIT program. Yet I am convinced it proved to have disastrous consequences for CIA.

[snip]

Meanwhile, other than the chair and ranking member, the two intelligence committees would be kept in the dark for the first five years of the program, as was every other member of Congress. In effect, they were given a pass on any oversight and responsibility for the program, as the attacks about what the Agency was doing escalated in the media. And to what end, all this extraordinary secrecy? Over those five years, many of the details about the program were leaking out, drip by drip, from elsewhere in the Government.

There’s a lot in this passage, and on many counts (according to their own records, CIA briefed the Gang of Four, not the Gang of Eight, for example) it’s inaccurate. But let’s start with the larger question. Sure, Rizzo was reportedly under investigation for his leaks about the drone program. So if pressed, the CIA could presumably claim this was unauthorized disclosure, as were the anonymous leaking by

“three former intelligence officials” to outlets like the NYT acknowledging the MON.

Still, if I’m right and a mention of the MON is what this FOIA squabble is all about, it’s pretty breathtaking for LaMorte to suggest this has never been acknowledged, when the key lawyer involved in the process lays out the Agency’s (demonstrably inaccurate) version of the authorization process involved.

Maybe I’m completely wrong and the many reports—including the internal conversation Carle described—of the authorization behind this program are inaccurate. Maybe these redactions aren’t hiding President Bush’s personal authorization of the torture program.

But if I’m right, CIA figures have repeatedly acknowledged the MON and all this redaction fight serves to hide is written record implicating the President.