2ND CIRCUIT: PRESIDENT CAN DECLARE PROOF THAT PRESIDENT AUTHORIZED TORTURE SECRET

As I showed in a series of posts several weeks ago, the Obama Administration appealed Judge Alvin Hellerstein's order to release a reference to—or at least a summary of it—the President's September 17, 2001 "Gloves Come Off" Memorandum of Notification the government used to authorize the torture program and a whole slew of other things. (post 1, post 2, post 3, post 4, post 5, post 6, post 7, post 8) The 2nd Circuit just sided with the government, finding that the MON constituted an intelligence activity that could be classified under EO 12,958.

> The Government contends that the information redacted from the OLC memoranda may be withheld from disclosure under either FOIA Exemption 1 or 3. In our view, Exemption 1 resolves the matter easily.4 Exemption 1 permits the Government to withhold information "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" if that information has been "properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). The Government contends that the redacted information was properly classified under Executive Order No. 12,958, as amended, which authorized the classification of information concerning "intelligence activities (including special activities), intelligence sources or methods, or cryptology."
>
> [snip]

> Based on our ex parte and in camera review of the unredacted OLC memoranda and the Government's classified declarations, we agree with the Government that the redacted information was properly classified because it pertains to an intelligence activity.

Of particular note, the Circuit held that letting Americans know who and how the torture program was authorized would reveal the existence and scope of a still-ongoing program.

> We give substantial weight to the Government's declarations, which establish that disclosing the redacted portions of the OLC memoranda would reveal the existence and scope of a highly classified, active intelligence activity.

Though it did suggest that the parts of the program put at jeopardy would be the other activities authorized by the MON—things like targeted killings and use of SWIFT and the "purchasing" of some Middle East intelligence services.

> It is true that the Government has disclosed significant aspects of the CIA's discontinued detention and interrogation program, but its declarations explain in great detail how the withheld information pertains to intelligence activities unrelated to the discontinued program.

Note, though: this passage is as close as the opinion comes to addressing my point—that the government already acknowledged the existence of the MON in its Vaughn Index in this case (not to mention via John Rizzo's blabbing about it). Which is to say the court didn't acknowledge it at all.

The CIA has already revealed the existence of

this MON. The only thing that keeping it secret does is shield President Bush for all the torture committed in his name.