

ANDY CARD LOL: BUSH CAN'T PARDON HIMSELF FOR TORTURE (BUT OBAMA HAS)

As part of the discussion in his book explaining how the CIA shifted from torture to killing, Mark Mazzetti tells the story of how the CIA balked at engaging in further torture after the Detainee Treatment Act.

After President Bush signed the bill into law, then-CIA Director Porter Goss wrote the White House saying the CIA would refuse to torture unless and until they got a guarantee they wouldn't be prosecuted for doing it. In response, the Bush Administration sent Andy Card to the CIA to try to calm them down.

Card drove out to Langley intending to soothe the fears at CIA headquarters, but his visit was a disaster. Inside a packed conference room, Card thanked the assembled CIA officers for their service and their hard work but refused to make any firm declarations that agency officers wouldn't be criminally liable for participating in the detention-and-interrogation program.

The room became restless. Prodded by his chief of staff, Patrick Murray, Porter Goss interrupted Card.

"Can you assure these people that the politicians will not walk away from the people who carried out this program?" Goss asked. Card didn't answer the question directly. Instead, he tried to crack a joke.

"Let me put it this way," he said. "Every morning I knock on the door of the Oval Office, walk in, and say, 'Pardon me, Mr. President.' And of

course, the only person the president can't pardon is himself."

Card giggled after he said this, but his joke landed with a thud. The White House chief of staff, when asked whether President Bush would protect CIA officers from legal scrutiny, had suggested that the most they might be able to rely on is a presidential pardon after the indictments and convictions were handed down. (127-128)

Goss effectively repeated a request the CIA had made, unsuccessfully, as early as July 13, 2002 (when, it should be said, Goss was ostensibly in charge of overseeing the program at the House Intelligence Committee, though there's no reason to believe he knew about the earlier request): for an Administration guarantee that everyone involved in the torture program would be shielded from criminal consequences for kidnapping and torturing.

And in response, Card implied to these CIA officers and executives two things:

- President Bush would pardon anyone convicted of crimes related to torture
- Bush, himself, was ultimately exposed to prosecution for those crimes as well (all the more so, since he couldn't pardon his own crimes)

Now, Card wouldn't have even tried such a joke unless he knew his audience knew that the torture program was based on a Presidential Finding – what we know to be the September 17, 2001 Gloves Come Off Memorandum of Notification.

There's fairly clear evidence that CIA's officers did know about it.

George Tenet had made that clear on every single page of his January 2003 Guidelines on Interrogations, which at least some CIA interrogators had to sign. And Glenn Carle was told "We have a letter from the president. We can do whatever we need to do. We're covered," as he was being sent off to interrogate Pacha Wazir, who would be tortured at the Salt Pit.

Of course, by the time Card made that joke in (presumably) early 2006, it was becoming clear the Administration wouldn't hold up its end of that bargain. When the torture shit hit the fan in 2004, the White House was silent about the President's role in ordering the program and the White House's role in authorizing individual treatment in the months before OLC wrote a memo sanctioning the torture had already taken place. And while the signing statement to the DTA was perhaps Bush's clearest indication that he believed he could order torture even after Congress had said it was illegal, an anonymous Administration source was invoking the exceptional "ticking time bomb" scenario at the same time they were asking the CIA to sustain its torture program more generally.

Moreover, even as this fight was brewing, the only CIA person to be prosecuted for torture-related crime, David Passaro, was attempting to obtain a slew of documents laying out how CIA's chain of command, including the President, had authorized torture. His discovery request should have returned the Gloves Come Off MON (which, in addition to authorizing torture, also reportedly authorizes the Afghan Counterterrorism Pursuit Teams – which Passaro had been helping to set up – to engage in lethal force), Tenet's Guidelines, the bullet point document that presented CIA's claim that its bases overseas were outside US jurisdiction, and many more documents that would have sanctioned many if not all the actions he was convicted for. Passaro got none of those documents. Nor did Passaro get the pardon Card jokingly offering up (though that was not yet clear when Card made his ill-fated joke).

Nevertheless, even though invoking the names of Bush, Tenet, and Cofer Black didn't help Passaro, people tied to CIA's torture program would continue to make Bush's authorization clear. Jonathan Fredman described his role in the torture program as "provid[ing] legal advice to the Director of CTC about proposed and ongoing operations conducted pursuant to written Presidential direction to CIA following 9/11" in his 2008 letter disavowing some deeply incriminating comments made in 2002 that, by 2008, directly pertained to issues being criminally investigated. By 2011 (again, when some of the torture was still being investigated), John Rizzo was publicly explaining that "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," including "the capture, incommunicado detention and aggressive interrogation of senior Al Qaeda operatives" (though Rizzo noted regretfully that only the Gang of Eight – though it was actually the Gang of Four – had been informed of the torture program – though that claim, too, is false).

Ultimately, though, Card's joke that a President can't pardon himself has proven false, sort of.

Sometime in fall 2009, President Obama's National Security Advisor James Jones took the highly unusual step of getting involved in a FOIA battle, ACLU's FOIA for torture documents. The declaration Jones submitted was part of an ultimately successful attempt to claim that the Gloves Come Off MON specifically – and presumably, the existence of Presidential Findings more generally – must remain classified. As a result, the Second Circuit judged President Bush's role in personally directing CIA to engage in torture to be classified, in spite of the CIA's widespread acknowledgment of Bush's role.

And here's the ultimate punchline: Not only did Obama's unusual efforts succeed in hiding Bush's

role in authorizing torture, but – because the Gloves Come Off MON also authorizes CIA's drone and/or targeted killing program – Obama also succeeded in hiding the President's role in authorizing CIA's drone strikes.

President Bush and, even more so, Obama, may well have ensured DOJ didn't prosecute torturers and drone assassins for any crimes (with the exception of Passaro). But so long as the President gets to guard the secrets, the notion that Presidential exposure will really protect the people doing the kidnapping, torture, and killing from legal liability itself seems risky.