

# DID SOMEBODY IMPROPERLY MAKE TORTURE A SPECIAL ACCESS PROGRAM?

I wanted to take one last look at the Panetta declaration, this time with respect to what it says about classifying torture (also see Mary's long comment and pmorlan's comment on this topic).

## **NSC Officials Made This a Special Access Program, Not Director of CIA**

Panetta tells a funny story about how (but not when) the torture program became a special access program.

Section 6.1(kk) of the Executive Order defines a "special access program" as "a program established for a special class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level." Section 4.5 of the Order specifies the U.S. Government officials who may create a special access program. This section further provides that for special access programs pertaining to intelligence activities (including special activities, but not including military operations, strategic, and tactical programs), or intelligence sources or methods, this function **shall** be exercised by the Director of the CIA.

[snip]

Officials at the National Security Council, (NSC) determined that in light of the extraordinary circumstances affecting the vital interests of the United States and the sensitivity of the activities contemplated in the CIA

terrorist detention and interrogation program, it was essential to limit access to the information in the program. NSC officials established a special access program governing access to information relating to the CIA terrorist detention and interrogation program. As the executive agent for implementing the terrorist detention and interrogation program, the CIA is responsible for limiting access to such information in accordance with the NSC's direction. [my emphasis]

See the funny bit? The first paragraph says the Director of the CIA "shall" "exercise" the function of creating special access programs pertaining to intelligence. But then the very next paragraph says "NSC officials established a special access program." One paragraph says the Director of CIA has to do it, but the next paragraph admits someone else did it.

And in case you were wondering whether the EO was really serious about the Director of CIA having to make the SAP, here's the language from the EO:

Unless otherwise authorized by the President, only the Secretaries of State, Defense, and Energy, and the Director of Central Intelligence, or the principal deputy of each, may create a special access program. For special access programs pertaining to intelligence activities (including special activities, but not including military operational, strategic, and tactical programs), or intelligence sources or methods, this function shall be exercised by the Director of Central Intelligence.

What do you want to bet that the "NSC Officials" who made this a SAP were not the Secretaries of State, Defense, or Energy—or their Deputies?

Mind you, the passage does say, "unless otherwise authorized by the President," and this E0 is the famous source of the Fourth Branch's claims that he should be treated just like the President for the purposes of this E0, so if Dick Cheney happened to tell his Deputy, Scooter Libby, that it was time to make this a super secret program to keep it away from people like Colin Powell, I'm sure the Fourth Branch's lawyer, David Addington, would have a legal excuse ready at hand.

So, for the moment, let's just note that there's something funny going on with who made torture a special access program.

### **TOP SECRET Torture Becomes Special Access After the Fact**

Now, let's talk about the funny things going on with when torture became a special access program. Bybee One—the memo generally authorizing torture—was not classified at all. Bybee Two—the memo authorizing specific techniques—was classified TOP SECRET, but had no markings for a special access program. It appears that when these memos were written, the torture program was not yet a special access program.

The 2003 Yoo memo—written to authorize torture by DOD—is a special case, since it's not part of the CIA program. It was classified SECRET. Yet it's special, too, because of the funny treatment it got. As Bill Leonard testified,

the OLC memo did not contain the identity of the official who designated this information as classified in the first instance, even though this is a fundamental requirement of the President's classification system. In addition, the memo contained neither declassification instructions nor a concise reason for the classification, likewise basic requirements.

There's more more—such as Leonard's observation

that the memo, which breaks all the EO's rules on classification, was completed within a week of the EO that governs classification.

Finally, there are the 2005 memos—the Bradbury Memos (Techniques, Combined, CAT). All are classified TOP SECRET and all include what I understand to be redacted compartment information (the redacted word between TOP SECRET and NOFORN). In other words, it appears that this program did not start out as a special access program, but it became one, at the direction of "NSC Officials" some time between 2002 and 2005.

### **Cables Marked as SECRET Become TOP SECRET**

Then there's the last bit, wherein cables originally classified as SECRET apparently have become TOP SECRET.

In his declaration, Panetta notes that some of the documents in the declaration were not marked properly:

Many of the operational communications were originally marked as SECRET in our communications database even though they should have been marked as TOP SECRET, and some of the miscellaneous documents were not properly marked. While we are not altering original electronic copies, this error is being corrected for copies printed for review in this case.

Given that Panetta uses the word "many," I assume this means more than just the one operational cable from HQ to Field, dated November 30, 2002, that is marked SECRET on the CIA's list of documents (I believe the other documents marked SECRET are what Panetta treats as "miscellaneous" documents). So, first of all, there's the funny detail that the CIA has been representing these documents to be TOP SECRET to Judge Hellerstein since at least May 1, yet they're only now getting around to telling him (now that they're turning some over for his review) that they were originally actually

marked SECRET.

But here's another funny detail. Similar cables from 2004 (see documents 54 and 55) were also marked SECRET (though some in the same series—particularly those from HQ to Field—were marked Top Secret). Now I have no way of knowing that these cables are exactly analogous (though I suspect they include discussions about whether to torture Hassan Ghul), but they do pertain to torture and detention.

So did they just discover all of these cables from the field should have been marked TOP SECRET from the start? Or did the rules change, once the program was designated—by people in NSC, not CIA—that it should be a special access program? Or is the SECRET designation a more recent phenomenon, one tied to the FOIA?

There's a lot that's funny about the classification of this program. But it sure looks like they were making up the classifications—like the program itself—as they went along.