

HARMAN'S LETTER

TPMM has a copy of Jane Harman's letter to then CIA General Counsel Scott Muller and his reply (h/t BayStateLiberal). As Paul Kiel notes, Muller blows off Harman's warning not to dispose of the Zubaydah tape.

You discussed the fact that there is videotape of Abu Zubaydah following his capture that will be destroyed after the Inspector General finishes his inquiry. I would urge the Agency to reconsider that plan. Even if the videotape does not constitute an official record that must be preserved under the law, the videotape would be the best proof that the written record is accurate, if such record is called into question in the future. The fact of destruction would reflect badly on the Agency.

Muller simply doesn't acknowledge her advice in his return letter.

But even without a response, Harman's advice is instructive. It reveals that—at least in February 2003—CIA premised the destruction of the torture tapes on the completion of Helgerson's IG inquiry into interrogation methods. That confirms my earlier suspicions that the torture tapes were intimately connected with the IG inquiry—and makes the May 2004 White House discussion of whether or not to destroy the tapes all the more damning. After all, they can't very well deny that the IG reported that the tapes showed methods that may have been illegal if they claimed the torture tape destruction tied to the inquiry itself? So once the report came out, they would be bound to keep the tapes since they would have verified or refuted the IG report.

Also note, Harman mentions only Zubaydah, not al-Nashiri. Did Muller just neglect to mention the latter AQ detainee? Or are we getting a

somewhat fickle depiction of what tapes were kept?

Just as interesting is the partial blow-off that Muller gives Harman on the issue of the policy wisdom of torturing detainees, as distinct from the legal implications. She asks,

It is also the case, however, that what was described raises profound policy questions and I am concerned about whether these have been as rigorously examined as the legal questions. I would like to know what kind of policy review took place and what questions were examined. In particular, I would like to know whether the most senior levels of the White House have determined that these practices are consistent with the principles and policies of the United States. Have enhanced techniques been authorized and approved by the President? [my emphasis]

A very good question indeed. Particularly pertinent given the approval process described by Harman:

At the briefing you assured us that the [roughly 16 character redaction] approved by the Attorney General have been subject to an extensive review by lawyers at the Central Intelligence Agency, the Department of Justice and the National Security Council and found to be within the law.

She names AG Ashcroft, lawyers at the CIA (including, presumably, Muller himself), DOJ (those pesky OLC lawyers) and National Security Council (Bellinger). Absolutely no mention of two people I guarantee you were intimately involved: David Addington and Alberto Gonzales (and probably Tim Flanigan).

In response to Harman's question about the White House and specifically the President, Muller

offers this full blow-off:

As we informed both you and the leadership of the Intelligence Committees last September, a number of Executive Branch lawyers including lawyers from the Department of Justice participated in the determination that, in the appropriate circumstances, use of these techniques is fully consistent with US law. While I do not think it appropriate for me to comment on issues that are a matter of policy, much less the nature and extent of Executive Branch policy deliberations, I think it would be fair to assume that policy as well as legal matters have been addressed within the Executive Branch.
[my emphasis]

It seems to me a perfectly fair question: this may (emphasis on may) be legal, but is the President really saying it's a good idea? Unfortunately, given the confusion about the sub-fourth branches within the Executive Branch, Muller obscures the issue.