

THE WSJ'S CURIOUS PICTURE OF CONGRESS AND TORTURE

I was overly optimistic about the head cold fog I'm in today. But a couple of details from the WSJ editorial Christy linked to yesterday are stuck in my craw.

The editorial is an attempt to warn Congressional Democrats against pushing for a (as the WSJ calls it) "Truth Commission" to investigate the Bush Administration's torture policies.

In particular, at [Panetta's and Bair's] nomination hearings they're likely to be asked to support a "truth commission" on the Bush Administration's terrorist interrogation policies. We hope they have the good sense to resist. And if they need any reason to push back, they could start by noting the Members of Congress who would be on the witness list to raise their right hands.

It then lists the Democrats it believes would serve as witnesses in such an investigation: it names Pelosi specifically, it deals with Jane Harman's public objections to torture, and also invokes Intelligence Committee leadership and—after 2006—membership more generally.

Now, I'll come back to this individualized focus in a second. But here's the paragraph that has really got me thinking.

The real — the only — point of this "truth" exercise is to smear Bush Administration officials and coax foreign prosecutors into indicting them if Mr. Obama's Justice Department refuses. The House and Senate Intelligence Committees already possess the relevant facts, and Senator Carl

Levin and his staff have spent two-and-a-half years looking at mountains of documents – with nothing to show for it.

Carl Levin, the editorial claims, spent two-and-a-half years looking at documents, with nothing to show for it.

What a remarkable claim, given that the Executive Summary of that not-quite-two-year investigation (since Levin took over as SASC Chair in 2007—the WSJ can't even get its dates right) lists this as its first conclusion:

On February 7, 2002, President George W. Bush made a written determination that Common Article 3 of the Geneva Conventions, which would have afforded minimum standards for humane treatment, did not apply to al Qaeda or Taliban detainees. Following the President's determination, techniques such as waterboarding, nudity, and stress positions, used in SERE training to simulate tactics used by enemies that refuse to follow the Geneva Conventions, were authorized for use in interrogations of detainees in U.S. custody.

And this as unlucky conclusion 13:

Secretary of Defense Donald Rumsfeld's authorization of aggressive interrogation techniques for use at Guantanamo Bay was a direct cause of detainee abuse there. Secretary Rumsfeld's December 2, 2002 approval of Mr. Haynes's recommendation that most of the techniques contained in GTMO's October 11, 2002 request be authorized, influenced and contributed to the use of abusive techniques, including military working dogs, forced nudity, and stress positions, in Afghanistan and Iraq.

According to the WSJ, proving that Bush and Rummy's actions led directly to torture equates to "nothing to show for it."

But I'm even more amused by the WSJ's claims given Levin's statements to Rachel Maddow on December 17 (linked above).

LEVIN: What I think is our role to do is to bring out the facts which we have to state our conclusions, which we have, which is where the origin of these techniques began. And then to turn over to the Justice Department of the next administration – because clearly this Justice Department is not willing to take an objective look – to turn over to the next Justice Department all the facts that we can, and we have put together, and get our report, the rest of it declassified.

But then it seems to me **it is appropriate that there be an outside commission** appointed to take this out of politics, that it would have the clear subpoena authority **to get to the parts of this which are not yet clear, and that is the role of the CIA.**

We looked at the role of the Department of Defense, but the role of the CIA has not yet been looked at, and let an outside commission reach the kind of conclusions which then may or may not lead to indictments or to civil action. But it is not our role, it's not appropriate for us to make those kinds of – reach those kinds of conclusions.
[my emphasis]

Shortly after releasing the conclusions of the "nothing to show for it" investigation, Levin said three things: that Obama's DOJ should take the conclusions of the report and consider them objectively, that SASC should declassify the balance of its report (meaning that some of the

"nothing to show for it" claim can be attributed to BushCo's unwillingness to declassify embarrassing information), and that "an outside commission" should "get to the parts of this which are not yet clear, and that is the role of the CIA." And those actions, Levin notes, "may or may not lead to indictments or to civil action."

Sure doesn't sound like a "nothing to show for it" report to me.

But Levin's statement is significant for a few more reasons. After all, he emphasizes that CIA's role in this has not been looked at.

As a reminder, in 2006 when Bush admitted to the torture program, Carl Levin was a senior member of the Senate Intelligence Committee. Now, as the Chair of SASC, he's an Ex Officio member. Levin **was at those briefings** that the WSJ reports all SSCI members started getting in 2006. But he says the CIA's role in this has not been looked at.

So the WSJ looks at an investigation that—by design—looked solely at torture emanating out of DOD's chain of command, and says that it found nothing to show for it. The guy in charge of that investigation says the report specifically leaves out CIA's role. And, since that same guy attended the briefing for the entire SSCI membership in 2006, he either said that knowing what was included in that confidential briefings—or having reason to believe that briefing was incomplete. And, finally, Levin advocates "an outside commission"—precisely the kind the WSJ opposes—to get to those parts which have not been revealed.

Boy, invoking Levin's investigation sure doesn't help the WSJ's case.

Now, back to the WSJ's invocation of specific Democrats. The WSJ names Bob Graham and Jello Jay (Jello Jay took over from Graham at SSCI in 2003; the WSJ does not mention Reyes, who took over HPSCI in 2007) as having been briefed between 2003 and 2006. But, as I said, it

focuses primarily on Pelosi and Harman.

There's a weird detail about this to begin with. Since BushCo routinely broke the law and only briefed Intelligence Committee leadership (and not Congressional leadership) on these things, Pelosi was only getting briefings through 2002, when she was Ranking Member on HPSCI. The WSJ does date the briefings back to 2002.

According to our sources and media reports we've corroborated, the classified briefings began in the spring of 2002 and dealt with the interrogation of Abu Zubaydah, a high-value al Qaeda operative captured in Pakistan.

But then, the timing of the briefings starts to get fuzzy.

In succeeding months and years, more than 30 Congressional sessions were specifically devoted to the interrogation program and its methods, including waterboarding and other aggressive techniques designed to squeeze intelligence out of hardened detainees like Zubaydah.

Followed by a clear timeline again, but this time one that excludes Pelosi.

The briefings were first available to the Chairmen and ranking Members of the Intelligence Committees. From 2003 through 2006, that gang of four included Democrats Bob Graham and John D. Rockefeller in the Senate and Jane Harman in the House, as well as Republicans Porter Goss, Peter Hoekstra, Richard Shelby and Pat Roberts.

In other words, the WSJ curiously includes—and then promptly excludes—Pelosi from participation in the substantive briefings (Graham should be excluded as well, since Jello Jay took over in

2003). That seems to be an admission, on the WSJ's part, that Pelosi didn't get the same detailed briefing about methods her successors got—a view reinforced by Pelosi's own description of the one briefing she got.

On one occasion, in the fall of 2002, I was briefed on interrogation techniques the Administration was considering using in the future. The Administration advised that legal counsel for the both the CIA and the Department of Justice had concluded that the techniques were legal.

I had no further briefings on the techniques. Several months later, my successor as Ranking Member of the House Intelligence Committee, Jane Harman, was briefed more extensively and advised the techniques had in fact been employed. It was my understanding at that time that Congresswoman Harman filed a letter in early 2003 to the CIA to protest the use of such techniques, a protest with which I concurred.

Given the WSJ's fuzzy sentence—the one that suggests "in succeeding months" Congress was briefed on techniques "including waterboarding," I'd say even the WSJ is not claiming that Pelosi was in the more substantive briefings in which torture was discussed.

Which brings us to Harman's objection, which the WSJ calls "equivocal."

Ms. Harman did send a one-page classified letter in February 2003 listing her equivocal objections to the interrogation program. She made her letter public in January 2008 after the CIA revealed that it had destroyed some interrogation videotapes. After lauding the CIA's efforts "in the current threat environment," she noted that "what was described raises profound policy

questions and I am concerned about whether these have been as rigorously examined as the legal questions." Ms. Harman also vaguely wondered whether "these practices are consistent with the principles and policies of the United States," but she did not condemn them as either torture or illegal.

But now compare their cherry-picked quotations from Harman's letter with the full text of that letter.

Last week's briefing brought home to me the difficult challenges faced by the Central Intelligence Agency in the current threat environment. I realize we are at a time when the balance between security and liberty must be constantly evaluated and recalibrated in order to protect our nation and its people from catastrophic terrorist attack and I thus appreciate the obvious effort that you and your Office have made to address the tough questions. At the briefing you assured us that the [redacted] 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.

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?

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.

I look forward to your response.

Obviously, there's a reason why Harman didn't focus on the legal issues: because Scott Muller had done so in his presentation, and had emphasized that DOJ, NSC, and CIA lawyers had all bought off on the techniques. Inexcusable or not, now look at what the WSJ specifically excludes: the questions Harman had posed regarding high level approval by the White House—up to and including George Bush.

Here's Muller's non-answer to that question.

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.

That is, he dodged her question entirely, emphasizing again the legal review that had taken place, but not George Bush's personal policy review.

And Harman's question is precisely the issue before us now, the one that would be investigated by an independent commission (note, even the WSJ uses the word "policy" in describing the commission).

In other words, to make its case that Congress is implicated in torture, the WSJ mischaracterizes the SASC report (and Levin's response to being briefed at SSCI) and hides Levin's call for precisely the independent investigation WSJ opposes; it implicates Pelosi when its own timeline doesn't implicate her; and it cherry-picks Harman's letter to hide the fact that she was asking—in 2002—precisely the questions that remain to be answered.

Which leaves Bob Graham, who is no longer in Congress and who presumably got the same fuzzy Fall 2002 briefing Pelosi got.

And, finally, (it had to come to this) Jello Jay. Who, not incidentally, may be the only Democrat mentioned in the editorial who actually gets to ask Bair and Panetta questions at their confirmation hearings (I'm double checking on whether Levin gets to ask questions or not; I'm assuming, given his squawking the other day about Panetta, that Jello Jay will remain on SSCI even while moving to Appropriations and ceding the Chair at SSCI).

The WSJ didn't waste this entire editorial solely to threaten Jello Jay not to ask Leon Panetta for a Truth Commission, did it? Because this swiss cheese of an editorial surely won't dissuade someone like Russ Feingold from asking such questions. In fact, why direct these questions to members of SSCI—those who will ask Bair and Panetta questions—in the first place? Last I heard, a Truth Commission was more likely to come out of HJC. And frankly, most of the members of HJC don't give a rat's ass about the

threats WSJ makes about Jello Jay (though they may well have Pelosi to contend with over the nature of their investigation).

Don't get me wrong. I have no doubt that Jello Jay, especially, and Harman and Pelosi, to a much lesser degree, are implicated in approving the torture program. But even the WSJ poses this as a policy question that—though they hide the proof that exists—we know was a question Harman asked directly. But what the WSJ is doing here is mischaracterizing all but Jello Jay's implication in those policies (as far as we know). The whole thing smacks of flailing desperation once you unpack the false claims included in the editorial.¹