

WHAT JANE MAYER TELLS US ABOUT WARRANTLESS WIRETAPPING

Jane Mayer's [excellent piece](#) on Obama's Executive Orders banning torture is about just that—the end of the torture regime. (Incidentally, kudos to Greg Craig, [whom I beat up](#) yesterday, for giving his first interview to Mayer.) But it offers some useful insight on a debate [we've been having over the last couple of days](#)—whether or not Obama could have intervened in the al-Haramain trial (and other pending litigation on warrantless wiretapping) in the same way he intervened in the pending habeas petitions.

First, off, Mayer confirms a point I made—that Obama was not about to take on the most politically charged legal decisions in his first day in office.

Moreover, Craig noted in his first White House interview that the reforms were not finished yet and that Obama had deliberately postponed several of the hardest legal questions. Craig said that, as he talked with the president before the signing ceremony, Obama was “very clear in his own mind about what he wanted to accomplish, and what he wanted to leave open for further consultation with experts.”

Obviously, one of those questions is how to approach legal consequences for those who ordered torture—or warrantless wiretapping. The EOs Obama signed last week don't commit him to an approach on that score. Furthermore, he seems inclined to insulate himself from such decisions by putting them in the hands of Eric Holder, to make it a prosecutorial decision. Though Holder

has intimated he'd hold both the architects of our torture regime and of our warrantless wiretapping responsible (lucky for him, he could do it all in a giant 2-for-1 deal), I'm not holding my breath on that score. But we won't know what he'll do until he becomes Attorney General.

That said, Mayer makes it clear just how much lobbying has gone into Obama's evolving policy on torture. She describes a meeting that must have taken place in December 2007 or January 2008 with a bunch of officers—including four star Generals—at which the officers lobbied Obama to end our torture regime. That high-level lobbying continued up until last month. Mayer specifically describes the role of retired Marine General Chuck Krulak who promised to "fly cover" for the Obama Administration after they pushed this through.

Who, might I ask, is doing similar lobbying to restore civil liberties for Americans?

Oh, I know there has been similar lobbying—on the part of civil liberties groups, high profile individuals, and DFH bloggers like you and me. But do we have a Chuck Krulak who will take on those who insist the restoration of our civil liberties (and the prosecution of those who took those liberties away) will be big gift to Osama bin Laden?

And frankly, if there hasn't been this kind of high level lobbying, what guarantee do we have that Obama is as cognizant of the proceedings before Vaughn Walker as he was of [the timing of al-Marri's case](#)?

And finally, Mayer's piece raises the question of who is arguing against the efficacy of widespread wiretapping and data mining? She describes a meeting at which high level intelligence advisors confirmed what we all know—that ending torture will not affect our ability to collect intelligence at all.

During the transition period, unknown to the public, Obama's legal, intelligence,

and national-security advisers visited Langley for two long sessions with current and former intelligence-community members. They debated whether a ban on brutal interrogation practices would hurt their ability to gather intelligence, and the advisers asked the intelligence veterans to prepare a cost-benefit analysis. The conclusions may surprise defenders of harsh interrogation tactics. "There was unanimity among Obama's expert advisers," Craig said, "that to change the practices would not in any material way affect the collection of intelligence."

It's not that we can't make a similar argument about efficacy. Almost as soon as reports of the program came out, [reports](#) of the thousands of hours wasted on "[Pizza Hut](#)" leads came out. The US doesn't have the means to adequately sort through all the data they're gathering, and they certainly don't have algorithms that are effective at picking out the terrorists from the haystacks.

But who is making that argument with us?

And it goes without saying that the telecom lobby—which has made a bucketload of money illegally spying on Americans—will be hyping the efficacy of doing so on its part.

All of which goes to show that—even for the noted efforts with Obama's own facebook infrastructure—we probably don't have the political might yet that is behind the fight against torture. That may mean we'll just have to wait until Obama gets around to it, or it may mean we will lose the fight. But we need to be cognizant of what has worked to get Obama's opposition to torture where it is.