

DOES DIANNE FEINSTEIN REALIZE DOJ HAS A BIG EXCEPTION FOR NATIONAL SECURITY INTERROGATIONS?

On the day on which her tenure as Chair of the Senate Intelligence Committee ended – and with it, a significant chunk of her power to effect any change – Dianne Feinstein released a letter she sent last week to President Obama with recommendations on how to “make sure that the United States never again engages in actions that you have acknowledged were torture..”

I’ll deal with the substance of the recommendations later. But for now I wanted to look at one specific recommendation: that the government videotape national security interrogations.

8. Recommendation: The Attorney General and DNI should issue a new directive to require that all national security interrogations are videotaped, based on the May 12, 2014 Department of Justice requirement.

Rationale: Creating and retaining a video record of interrogations will ensure that there is an objective record of key investigations and interactions with individuals who are held in U.S. custody. It will also provide federal authorities clear and indisputable records of important statements and confessions made by individuals who have been detained by the U.S. government.

Now, as Roll Call pointed out, Rush Holt already tried to get intelligence interrogations videotaped in 2010’s Intelligence Authorization but after DOD balked, it was not passed by –

among others – SSCI Chair Dianne Feinstein.

But there's another problem with DiFi's recommendation.

She seems to suggest that DOJ guidelines currently "require" "all national security interrogations" to be videotaped.

Here's what the DOJ guidelines – rolled out last year – actually say.

This policy establishes a presumption that the [FBI, DEA, ATF, and USMS] will electronically record statements made in their custody in the circumstances set forth below.

This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply.

[snip]

Exceptions to the presumption.

[snip]

Public Safety and National Security Exception. Recording is not prohibited in any of the circumstances covered by this exception and the decision whether or not to record should whenever possible be the subject of consultation between the agent and the prosecutor. There is no presumption of electronic recording where questioning is done for the purpose of gathering public safety information under *New York v. Quarles*. The presumption of recording likewise does not apply to those limited circumstances where questioning is undertaken to gather national security-related intelligence or questioning concerning intelligence, sources, or methods, the public disclosure of which would cause damage to national security.

That is, not only doesn't DOJ *require* interrogations to be videotaped, but it excludes public safety and national security interrogations from even presumptive recording.

I suspect (and hope) that Senate Judiciary Committee member Dianne Feinstein knows this, that she has (at a time when she no longer has power to make this happen) suggested something that not only won't happen, but doesn't happen. Indeed, as someone who – back when she had the authority of SSCI Chair – capitulated most times an agency invoked “sources and methods” to refuse to do obvious record keeping, I suspect she knows how unlikely it would be for DOJ not only to reverse its presumption exception but for other agencies to adopt DOJ's stance too. Even if she knows that, nevertheless, interrogations should all be recorded.

But the government is not about to do that.