

JANE HARMAN V. JELLO JAY: COMPARE AND CONTRAST

Jane Harman explained her response to the warrantless wiretap program over at TPMCafe. I'm interested in it not so much to determine whether Eric Lichtblau or she is right about whether she "switched her view" on the program (I think Harman is actually too sensitive to the charge; as she tells it, she did drastically change her view, but not because of the publicity of Lichtblau's reporting, but because of the new information she learned from it; though after writing this post, I'm a little sympathetic to Lichtblau's claim). Rather, I'm interested in the contrast Harman's narrative presents with what we know of Jello Jay's evolving views toward the illegal wiretapping program. After all, Harman and Jello Jay apparently learned of the program in the same briefing (Harman had just replaced Pelosi as Ranking Member on HPSCI; Jello Jay had replaced Graham as the top Democrat on SSCI). But the two have apparently taken dramatically different trajectories in their positions on the program, and the comparison offers an instructive view on oversight.

The First Harman/Jello Jay Briefing: January 29, 2003

Harman provides this description of the January 29, 2003 she and Jello Jay received (along with Pat Roberts, then SSCI Chair, and Porter Goss, then HPSCI Chair):

When I became Ranking Member of the House Intelligence Committee in 2003, I was included for the first time in highly classified briefings on the operational details of **an NSA effort to track al Qaeda communications using unique access points inside the US telecommunications infrastructure.** The

so-called "**Gang of Eight**" (selected on the basis of our committee or leadership positions) was told that if the terrorists found out about our capability, they would stop using those communications channels and valuable intelligence would dry up (which had happened before).

This program was so highly classified that I could discuss it with no one, not even my colleagues on the Intelligence Committee or the committee's professional staff. (See p. 169 of the Lichtblau book.) And **I was assured that it complied with the law and that the senior-most officials in the Justice Department conducted a full legal review every 45-60 days.**

At that point, then, she and Jello Jay appear to have learned that:

- The US was tracking Al Qaeda communication via US-based access points
- The program was legal and was reviewed regularly by top Justice Department officials

If Harman's description is accurate, it suggests the Administration gave a very distorted view of the program. Yes, they were accessing Al Qaeda communication via US access points. But to do so, they gained access to **all** of US telecom traffic. And, yes, they were accessing Al Qaeda communications. But the means by which they determined that these were Al Qaeda communications—and not just a bunch of people ordering falafels from the same place—was grossly inadequate.

Similarly, yes, the senior-**most** official at DOJ (John Ashcroft) **signed off** on the program every

45-60 days. And Robert Mueller was telling people that Bush—not Ashcroft—had signed off on the program. But the only real review of the program by that point had been a typically shoddy John Yoo rubber stamp. Ashcroft hadn't even been able to share details of the program with his aides to obtain their legal opinion with which to conduct a meaningful legal review. As Lichtblau reports,

Mr. Ashcroft complained to associates at the time that the White House, in getting his signature for the surveillance program, "just shoved it in front of me and told me to sign it."

And the Administration wouldn't even read Larry Thompson, then Deputy Attorney General, into the program. So the claim that senior-most officials (plural) had **reviewed** the program was an out-and-out lie.

One more note about this initial briefing (and all others up until the March 10, 2004 briefing). Harman claims the "Gang of Eight" was informed. At least according to the record provided by then-DNI John Negroponte, this is incorrect. Nancy Pelosi, while still Ranking Member of HPSCI, got briefed on the program. But the Administration did not brief the full Gang of Eight. And besides, as Mary points out, the Administration should have been briefing the full intelligence committees, not just the Gang of Eight.

So even though the Administration was deliberately misleading the Intelligence Committee leadership, there were still warning signs that the Administration was not complying with the law (though they pretty consistently briefed only Intelligence Committee leadership on their law-breaking).

The Second Harman/Jello Jay Briefing: July 17, 2003

We don't, yet, have Jello Jay's account of that first briefing, but we do know what he thought

after receiving the second one he and Harman received, on July 17, 2003. The timing of that second briefing was rather important. As I've shown, the Senate was in the middle of a successful effort (save for Bush's signing statement) to strip all funding from data mining programs targeting American citizens; the day after the briefing, the Senate voted unanimously to block TIA funding. So in addition to being troubled by some of the same things Harman expressed difficulty with—particularly the inability to consult with any aides on the program—Jello Jay noted that the program seemed to violate the intent of the law the Senate was in the process of passing. Here's the letter Jello Jay wrote, after this second briefing, to memorialize his concerns.

July 17, 2003

Dear Mr. Vice President,

I am writing to reiterate my concern regarding the sensitive intelligence issues we discussed today with the DCI, DIRNSA, and Chairman Roberts and our House Intelligence Committee counterparts.

Clearly the activities we discussed raise profound oversight issues. As you know, I am neither a technician or an attorney. **Given the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse these activities.**

As I reflected on the meeting today, and the future we face, John Poindexter's TIA project sprung to mind, exacerbating my concern regarding the direction the Administration is moving with regard to security, technology, and surveillance.

Without more information and the ability to draw on any independent legal or technical expertise, I simply cannot

satisfy lingering concerns raised by the briefing we received.

I am retaining a copy of this letter in a sealed envelope in the secure spaces of the Senate Intelligence Committee to ensure that I have a record of this communication. [my emphasis]

While the wording is a little—shall we say—wobbly, the intent is still clear. Jello Jay was withholding his approval of the program, not just because he could not, fairly, approve it, but because it seemed disturbingly similar to the data mining program that Congress was in the process of making illegal.

Now, Harman records none of these concerns in her account—not even the concern, or the awareness, that the Administration was engaging in data mining. Which leads me to add one thing to the sound list of suggestions Marty Lederman offered to make Congressional intelligence oversight more meaningful—given the severe restrictions on information sharing the Administration imposed, don't you think leaders of the Committees could at least talk to **each other**?!?!?! Jello Jay had some pretty clear concerns about the program at the time—concerns that rise to the level of defying the will of Congress. But Harman appears to have had (or at least claims to have had) none of that awareness.

The Third Harman/Jello Jay Briefing: March 10, 2004

As I've described before, the Administration then skipped a briefing that should have occurred given its regular pattern of briefing—even according to its own limited briefing approach, it should have briefed the Congressional leaders in January 2004, after the Administration had ignored Congress' demands not to continue data mining. Instead, the next briefing did not occur until March 10, 2004, on the day of the famous hospital confrontation.

The was the first time full Gang of Eight received a briefing, and they got one specifically because the Administration wanted legislative approval to continue the wiretap program in the absence of approval from John Ashcroft or Jim Comey; barring legislative approval, they wanted permission to go forward without it.

Mr. Gonzales, in an acrimonious hearing before the Senate Judiciary Committee, said that hours before the hospital confrontation, the White House had summoned Congressional leaders to an emergency meeting to discuss ways to head off a revolt at the Justice Department against the security agency program.

Mr. Gonzales said that he and Andrew H. Card Jr., then White House chief of staff, had tried to obtain Mr. Ashcroft's approval as a last resort, after the lawmakers rejected emergency legislation but recommended that the program should continue despite the Justice Department's opposition.

Now, the record on how Harman and Jello Jay responded to these requests is not entirely clear. Jello Jay accused Gonzales of lying about what happened in the meeting.

Senator John D. Rockefeller IV, who attended the 2004 meeting as the top Democrat on the Senate Intelligence Committee, called Mr. Gonzales's account "untruthful." Mr. Rockefeller said he believed Mr. Gonzales was deliberately misleading Congress about the showdown over the N.S.A. program inside the Bush administration.

And Pelosi made it clear that she did not support the program going forward over Comey's objections.

Speaker Nancy Pelosi of California, who attended the 2004 White House meeting as House Democratic minority leader, said through a spokesman that she did not dispute that the majority of those present supported continuing the intelligence activity. But Ms. Pelosi said she dissented and supported Mr. Comey's objections at the meeting, said the spokesman, Brendan Daly.

If Pelosi agrees "a majority" of the eight people who attended the briefing approved its going forward, and Jello Jay claims he made his objections clear, it suggests that Harman approved of continuing the program, even though, by all appearances, she had learned of Comey's objections. Now, I don't know that for a fact—and unlike her colleagues, Harman has neither confirmed nor denied whether she approved that the program go ahead. But I am puzzled by her insistence that no one in the Gang of Eight was informed that the Administration was bypassing FISA.

The Gang of Eight was not told – nor did it occur to me – that the Administration was violating FISA, despite Congress' clear legislative intent when FISA was passed that it was the "exclusive means" for monitoring the communications of Americans connected to foreign intelligence.

If, as Pelosi suggests, the March 10 briefing included some reference to Comey's objections, wouldn't you at least begin to wonder about whether the Administration was breaking the law?

**The Fourth and Fifth Harman/Jello Jay Briefings:
February 3, 2005 and September 14, 2005**

There is no record of either of the fourth or fifth briefings Harman and Jello Jay attended, both of them in 2005. Though once again, I wonder whether they noticed that there was a

break in the normal briefing pattern—there should have been a briefing in September or October 2004. This, of course, is right during the time when the Administration likely first learned that Risen and Lichtblau might write a story on the illegal wiretap program.

The Sixth Harman/Jello Jay Briefings: January 11 and January 20, 2006

Up until the program became public in December 2005, it appears that Jello Jay took a more active oversight role than Harman, objecting in writing on at least one occasion, and recognizing that the program probably violated the intent of Congress.

But all that appears to have changed after Risen and Lichtblau published their story on December 16, 2005. As Harman describes, she immediately started calling for more oversight—only to be stymied by Dick Cheney.

The New York Times story ran on December 16, 2005. The next day, President Bush publicly confirmed the program's existence in his weekend radio address. That day, a Saturday, I did two things: I tried to get our full Committee briefed and I consulted experts on the law.

I tracked down NSA Director Michael Hayden, who was shopping for holiday presents in Annapolis, and asked him to brief the full Intelligence Committee later that day. **He said yes, provided the White House signed off. Bush Chief of Staff Andy Card at first agreed, but called me back an hour later saying the briefing was off.** (It was months before the White House briefed additional Members of the Intelligence Committees. **I even spoke with Vice-President Cheney about the need for a full Committee briefing, but he turned me down flat.** Finally, on the eve of Gen. Hayden's confirmation hearing to be Deputy

Director of National Intelligence, the Administration agreed to brief all committee Members.)

Additionally, as the President had disclosed the program, I was finally free to consult constitutional experts on the legal issues it raised. My call to a former CIA general counsel that Saturday provided the first inkling that the program was in not compliance with FISA but was conducted pursuant to claims of "inherent" executive power. To this day, I have not been shown the memoranda produced by the Office of Legal Counsel to support the basis for the program! [my emphasis; incidentally, I wonder if that "former CIA general counsel" was Scott Muller, who would have known of the program, and who also opposed destroying the torture tapes]

Jello Jay has given no public account of his response to the revelation of the program. But where he once opposed the program as potentially violating Congressional intent, he has become a champion of the Administration's cause, going so far recently as to publicly boast of "victory" in the Senate.

"I think we will prevail," Rockefeller said on Wednesday, adding that he hoped the Senate will finish the bill by next week. The FISA legislation expires in February, and both President Bush and GOP congressional leaders have demanded that new legislation be in place by that time.

"It's a pretty bad idea to appear cocky," Rockefeller noted. "I am not pessimistic."

Which makes me all the more curious about the two briefings the Administration gave in January 2006, after the program (and the real urgency of

the hospital confrontation) became public. The Administration held two sets of briefings after the program became public. One, including the Republican members of the Gang of Eight (then Denny Hastert, Bill Frist, Crazy Pete Hoekstra, and Pat Roberts) plus Jello Jay on January 11, 2006. And one, with the remaining three members of the Gang of Eight (then Pelosi, Reid, and Harman), along with Roberts again. Why have Roberts attend both briefings if the content of the two was the same? Is it possible that the Administration held two **different** briefings, one with those it found reliable (the Republicans and Jello Jay) and one with those it found unreliable (the Democrats, babysat by Pat Roberts)? Did Dick Cheney, miffed that the up to then reliably-complacent Harman was demanding committee-wide briefings, insist that she get the same briefing as those who had already objected to the program? Did the Administration continue to keep secrets from the Democrats who opposed the program?

Obviously, I don't know, though Harman's account of her 180 degree turn, once she realized the program was illegal, certainly raises interesting questions about those two briefings.

And curiously, at least through May 2006 (Harman would continue as Ranking Member of HPSCI for another seven months after Negroponte's briefing list ends), Jane Harman and Jello Jay never received a briefing on the illegal wiretap program together again.