

MICHAEL MUKASEY'S TORTURE APOLOGIES

After the Osama bin Laden killing, Michael Mukasey rather shamelessly took the lead in claiming torture had some role in finding OBL.

I thought then that the sheer volume of the torture apologists' wails suggested that John Durham's torture investigation might actually move forward in some way.

But I was particularly struck by Mukasey's prominence. Unlike most of the other torture apologists, Mukasey was not complicit with the torture itself, but merely with the cover-up.

With that in mind, I wanted to return to the discussion in Mukasey and Mark Filip's letter on the OPR report, particularly their argument against the OPR report's recommendation that DOJ review the prosecution declinations. It's interesting, first of all, because Mukasey and Filip initially lump the recommendation for review in among the list of issues they claim OPR has made errors on.

Nonetheless, we are concerned that the current proposed findings of professional misconduct, recommendation for reconsideration of prosecutorial declinations, and request that the Department review certain memoranda signed by Steven Bradbury, are based on factual errors, legal analysis by commentators and scholars with unstated potential biases, unsupported speculation about the motives of Messrs. Bybee and Y00, and a misunderstanding of certain significant Department of Justice and Executive Branch interagency practices.

But in their section on the recommendation for review, Mukasey and Filip don't describe any errors.

The Draft Report recommends that “the Department reexamine certain declinations of prosecution regarding incidents of detainee abuse referred to the Department by the CIA OIG.” [Id at 9.] As the Draft Report itself recognizes, the question whether to prosecute matters addressed in the CIA OIG report has been addressed independently by two sets of prosecutors, first in the Counterterrorism Section (then located in the Criminal Division) and later in the U.S. Attorney’s Office for the Eastern District of Virginia. In both cases, the declinations were based on a variety of prosecutorial considerations, many of which seemingly would be unaffected by any information in the Draft Report and most of which seemingly would have been known to prosecutors at the time of their decisions. 11 Indeed, prosecutors in the Eastern District of Virginia made their decision to decline prosecution in 2005, well after the 2002 Bybee Memo had been withdrawn by the Department. In addition, if and when OPR’s report is finalized (whether with or without any professional misconduct referrals), the prosecutors could be given access to it, and could re-evaluate their decisions as they saw fit. In light of these facts, we believe it is unnecessary for OPR to recommend reconsideration.

Mukasey and Filip do suggest the OPR report might be ignoring the “variety of prosecutorial considerations” that guided the original declination decision. Except they admit that OPR has discussed some of them in its report.

11 Some of these considerations are discussed in classified portions of the Draft Report.

But aside from that, the opposition to the recommendation to revisit the declination decisions seems to lie in the risk that a different prosecutor—not one of the ones involved in the 2003 or 2005 declinations—would review the cases. Just make the report available, Mukasey and Filip suggest, and let one of the prosecutors who has already wrestled with it choose to read the review and determine whether a reconsideration is merited (never mind the fact that some of the key prosecutors—people like Paul McNulty—were no longer in government).

That by itself is notable.

All the more so considering what happened afterwards: Eric Holder had John Durham, the independent prosecutor that Mukasey himself selected to investigate the torture tape destruction, review the declinations.

All of which makes me wonder whether Mukasey is such a shrill torture apologist not just because he had to agree not to investigate torture to get his swank AG gig. But also because he bears responsibility for picking Durham in the first place.