

SJC MUKASEY HEARING, FOUR

Cardin: Sorry I'm late, Junior Senator from VT was babbling on.

[That's okay, Bernie gets all the time he wants.]

Cardin: thanks for communicating. Waterboarding cannot be justified. If we try to justify it, it'll be hard to defend American interests. I believe clarity is needed. It's very difficult for us on Helsinki commission to explain what we're doing.

Cardin: Immunity, I'd urge you to the precedent of giving retroactive immunity of further abuses, whether it would have a permanent damage on role of courts in protecting civil liberties of American people. We need to preserve the rights of our courts. I'd urge you to take a look at this to see if accommodation.

Cardin: Third point, sunset, you're urging against. The Senate has a six year sunset, House two year, I have an amendment for four year sunset, I believe next administration needs to have a position on this.

Cardin: It's important to keep Congress engaged in this to give whoever is engaged in FISA more cover.

Cardin: Election issues and Civil Rights, not enough attention. If 2006 is any indication, there will be efforts made to suppress minority voting. We've seen in past elections fraudulent material to intimidate minority voting. How will you make sure such things do not go unchallenged. We have a bill that would strengthen DOJ role. I would hope you'd give fair warning that such tactics will be challenged.

MM: Monitors to make sure there is access to ballots. Also a memo indicating that their sensitivities have to be heightened, and also

bringing prosecutions that might be perceived as a prosecution to affect an election. Want to make sure it's based ONLY on the facts of the investigation, not the timing of the election.

[Are you saying it was done in the past, Mike?]

Cardin: If your office finds activity where someone says they'll be arrested if they vote if they've got unpaid tickets.

MM: You and I have discussed statements that are clearly fraud. This is a matter of opinion about one candidate or another. We are going to make every effort to make sure that does not happen.

Cardin: One more comment about Civil Rights. Head is subject to confirmation. I ask you to give your personal attention to Civil Rights division to return it to its historic role to protect rights of minorities.

MM: We observed the 50th Anniversary of Civil Rights division, that has become emblematic of division, met with nominee, unit chiefs, to encourage them in historic interest.

Whitehouse: I'll put it in form of letter. Has to do with Office of Legal Counsel, has been legal compass, some of the declassified sections of opinions, give me cause to worry that it has become hothouse of ideological opinions protected by shield classification.

[Pixie Dust!]

Leahy: I realize some of these we may have to discuss in classified section. We've read of disarray in OLC. Perhaps that's something we can meet privately.

MM: I know that when you comment when there's no question. A book that you've referred to says that regardless of what you think or don't think, nobody ever believed they were violating the law or intended to violate the law.

Leahy: I'm not suggesting they were breaking the law. I'm suggesting that opinions shouldn't be ideological. I want to make sure that someone

looks at law.

Leahy: One other area: Nat Hentoff, Durham's lack of independence. Durham to DAG to AG, thereby will not be autonomous. Fein, who served in Reagan DOJ, raised similar questions is that AG is still entrusted to invoke state secrets to determine what evidence to give prosecutor. I read those articles—why wasn't he given authority SC PatFitz was given?

MM: There is a regulation regarding when you appoint SC and when you don't. To suggest every time a big case comes up, that there is a conflict does something pernicious.

Leahy: you say there may have been a conflict with CIA Leak, but not on this.

MM: I don't want to tell DOJ "we don't have faith in you."

Leahy: raises the question of what the conflict was in USA ED VA.

MM: Possible facts.

Durbin: Are you familiar with Jim Comey?

MM: Yes. He had occasion to be before me as a lawyer and as USA. I've had occasion to take counsel from him, to talk about DOJ.

Durbin: You respect his judgment?

MM: Yes.

Durbin: Let me ask about Bradbury. Before you said you didn't know about him. You're probably familiar that he's been involved in some of the most controversial opinions in DOJ. It has raised questions about his fitness to serve in OLC. When Comey was asked about these memoranda, he said DOJ would be ashamed if the opinions became public. You said he was a fine lawyer. I'd last to ask you whether you've reviewed all his opinions.

MM: I've reviewed some of them. You asked about Comey. I also have come to know Bradbury. Had some limited contact before confirmation. To say

that Jim Comey has good judgment is not to say he is inevitable about every judgment or the judgment about one document is a permanent scar to the author of that document.

Durbin: Interrogation and warrantless wiretapping. Have you reviewed those opinions?

MM: Reviewed his opinion about the current program. Did you happen to review the opinion where he spoke of combined effects which authorized CIA to use multiple techniques.

Durbin: AG approved this over objection of Comey, who said DOJ would be ashamed if opinion became public.

MM: If the opinion that I reviewed is dated in 2007. So I don't think the timing works out.

Durbin: Could I ask you if you would consider reviewing that opinion and perhaps get back to me if you believe he is a man of good judgment.

MM: I will look at it again.

Durbin: You said you would review it, he appears to be serving in violation of Vacancies Reform Act. Do you feel like he is effective head of Legal Counsel at this point?

MM: I have dealt with him in this context.

Durbin: The time has lapsed, that violates spirit of law. He appears to be serving in violation of law. I will ask you again if you have read Bradbury's opinions. I expect his nomination will depend on your review of his opinions.

MM: Those opinions would be considered principally whether they relate to current programs.

Durbin: I don't think that's adequate. Some of those opinions have been disavowed.

MM: His opinion was not a bad opinion.

Durbin: It deserves your close scrutiny.

Leahy: Mr. AG. I appreciate that you have kept

in touch on a number of issues. We're still not getting enough clarity on a lot of opinions. Our system depends on the law being public. Quotes from letters from generals rejecting waterboarding. I'm afraid that when the Admin doesn't declare waterboarding off limits, it undermines our moral authority of the US. We see repressive regimes pointing to the US. At Davos, I heard from a number of friends of ours wondering why we can't declare it to be illegal. It's unfortunate reflection of our law and values that AG cannot say waterboarding of American is illegal. Oversight makes govts work better, something that Grassley has said. Accountability moments. I think that while we want accountability, we're short on it. We want this DOJ to be the best in the world, we'll work with you to make it that.

MM: Yesterday you and I had conversation in which I said that in spite of our disagreements that we could continue to work together. It has been. That allows me to do my job.

Leahy: I will work with you on those things that will make it better.