

SJC MUKASEY HEARING, PART THREE

Leahy: Updates people in the stimulus package, and 15-day extension. So that's why not everyone is here right now.

"Box Turtle" Cornyn: Office of Government Information Services, FOIA reform. Concerns about moving that office to DOJ, or somewhere else. I wanted to let you know I have reservations. My opinion is that the legislation forecloses moving the office.

"Box Turtle": FISA reform. 15-day extension is kicking the can down the road. Let me just talk about this in human terms. Talked to the father of soldiers who had been kidnapped by Al Qaeda. And his father says if we had an easy FISA law, his son might be alive. Do you think we need to make it easier for people to go through FISA?

[Shorter Box Turtle: I'm going to pretend, once again, that FISA forced a delay of wiretapping, when in fact it was just DOJ disorganization.]

MM: You put a human face on the problem we're trying to prevent from recurring. We want to lower the burden on the govt in all its presentations to FISA just to make sure that what gets approved are procedures. I hope that DOJ acted with all the speed it could act.

[Interesting dodge by Mukasey, not agreeing that DOJ moved as fast as it could.]

"Box Turtle": I'm okay with a relative basis for torture.

MM: There are clearly circumstances where waterboarding is illegal. I'm not going to get into an abstract discussion of when it'd be legal. Nor am I going to call into question what people do or have done, when it's not necessary to do so.

Whitehouse: In your analytical stance in your letter, you have assumed the role of a corporate

counsel to the Executive Branch. You have taken steps to make sure nothing illegal has happened, but you are unwilling to look back and dredge up anything that may be a problem. That's not a proper stance, you are also a prosecutor, Prosecutors do look back, dredge up the past, in order to do justice. It's the mission statement of the DOJ to seek just punishment of those guilty of illegal behavior. Duty of USG, whose interest is that justice shall be done. The president has said we will investigate all acts of torture, you have said if someone is guilty of violating the law. [Cites code on torture] You are the sole prosecuting authority for that statute, the DOJ.

MM: Yes, DOJ is.

Whitehouse: You have two hats. In the prosecutor hat, could you tell me in what way there is an absence of concrete facts about waterboarding to even look to see whether this statute should apply.

MM: There is no divided loyalty.

Whitehouse: Let's talk about the two duties when it comes to being an independent prosecutor.

MM: One of the many questions wrt past conduct is what authorizations were given. My analysis has only tangentially to do with that. Because I can't say "your authorization is good only as long as the tenure of the person who gave it."

[Shorter Mukasey: I can't prosecuting people for relying on the Yoo Memo]

Whitehouse: the message you send otherwise is, "I was only following orders" is alright.

MM: No, it didn't work at Nuremberg.

Whitehouse: Has there been an analysis of whether or not any national of the US is in violation of torture statute.

MM: I start investigations after some indication that someone might have improper authorization.

Whitehouse: The destruction of the taping of

torture is a criminal issue. But whether the underlying criminal act is not entitled to investigation.

MM: The way that started is that we were told there was destruction. Preliminary inquiry found that some statute may have been violated. We were required to and did a criminal investigation.

Whitehouse: Shouldn't that be applied in this case.

MM: You elided one point when you said there was evidence of an interrogation.

Whitehouse: you said there was evidence of a destruction. There isn't a principal distinction between the two.

MM: Head of CIA said someone destroyed a tape without proper authorization. Probability of crime.

Whitehouse: I don't see how that solves the Nuremberg problem. If the reason that you're given is that it appears that the interrogators were following orders.

MM: No, you're assuming that what was on the tapes.

Whitehouse: I'm not assuming any such thing. There should be somebody that investigates this. If what you're telling me is that this hasn't been investigated, it seems to me there is a split standard.

MM: The investigation may disclose what was on the tapes.

[Well why not bring up the CIA OIG report which found that the torture was cruel and inhuman.

Schumer: Good and bad, you're what I expected. Worked on politicization, but your opinion on waterboarding is different than most of the American people. Given that waterboarding is repulsive to you, do you support a ban on waterboarding, whether by statute or executive order?

MM: As a matter of principle, I try to avoid the blank canvass over past or future laws on which to paint my morality. The question is a question on which other people own a substantial part of the answer, namely the people who gather intelligence, who explain our position abroad. One of the things I'd like to do as the junior member of the assemblage I've just made, is to ask them.

Schumer: That answer's not up to what I expect of you. I know you'd like to hear from a lot of people, one of your roles as AG is as an advisor on policy. I find it hard to understand how you personally would not be able to say that something is repugnant should be outlawed. I'm asking you, there's a statute that's likely to get to the President's desk. I'm asking you in terms of the advice you'd give the President, should it be outlawed.

MM: I don't want to trivialize the question so I'll refrain from telling you all the other things that I find repugnant. I want to be able to analyze it, I want to imagine all the facts and circumstances in which it'll arise.

Schumer: You were talking about a standard with Durbin. You didn't say that to us, you said, it's repugnant. I just find it, you have an opportunity to be something of a leader. You are going to be asked whether we should pass a law. We have an opportunity to pass a law.

MM: I haven't done all the things I have to do.

Schumer: I can't tell you how profoundly disappointed I am.

Haggis Specter: Stephen Bradbury. I want to give you my endorsement of Mr. Bradbury. I've had considerable interaction with him. I think he's a first rate lawyer. I hope he'll be confirmed by the Senate.

[Shorter Haggis: I'm still Haggis, don't worry]

Haggis: Reporter shield and McNulty memorandum attorney client privilege. I'd appreciate if we

can get your opinion bc we're going to be moving forward on shield and attorney-client. Shield, very strong support. Letter to Grassley: 88 subpoenas, I'd like to have Grassley's letter matter of record. It all comes down to Judy Judy Judy, and it was disclosed that it was Richard Armitage, so I'm wondering what was done.

Haggis: On subject of McNulty memorandum. Govts conduct shocking conscience. When you start with two propositions, commonwealth has burden of proof. And Constitutional right to counsel and involves privilege. Why should there be inducement to secure waivers.

MM: I don't condone any coercion to waive attorney-client privilege.

[Does this mean you will stop wiretapping conversations between attorneys and their clients, as DOJ has done with CCR?]

Haggis: Investigation into subprime problems. Please prioritize that. With your administration can we take a new look at those contempt citations. Those individuals are just the messengers. Leahy and I have been trying to work out a formula where we could question Miers and others. If we could come to terms on the transcript that we might be able to unlock the controversy. The transcript issue is indispensable more for protection of witness than anything else. Would you be willing to revisit this? You'd say contempt to USA of DC would not be authorized.

MM: Opinions going back many administration immune when privilege invoked otherwise serious separation of powers issues. Long been deferred or avoided by accommodation.

Haggis: isn't that a matter for the Courts, not for the executive. It ought to be a judicial determination. Not a decision for the executive giving immunity for himself.

MM: It's my understanding that if they have an order.

Haggis: where does that immunity come from?
Executive order?

MM: It has been recognized in Constitution,
though it's not mentioned, just as congressional
oversight is not mentioned.

Haggis: Can we find an accomodation?

MM: I'd be willing to find an accommodation. I'm
not going to overturn long-standing opinions.

Haggis: There's no long-standing rule about a
transcript.

MM: I don't know that.

Haggis: You don't know that? How can that be a
long-standing rule against transcript.

MM: Different than Congressional oversight.
Senior Presidential aides.

Haggis: But the President has offered to make
them available.

Leahy: When you look into this, you'll find that
at least one of the witnesses who testified,
also said she had never discussed this matter
with the President, never had discussion with
those who were going to discuss with the
President. We found Executive Privilege to be a
tad broad. I don't want to use the word cover-
up, but it's the first thing that came to me.
It's also the second thing that came to me.

Leahy: Torture tapes. Say we found a backup tape
(you often find a backup tape), how do we
determine whether there was a crime, if you
refuse to state an opinion.

MM: John Durham is doing an investigation.

Leahy: Why'd USA ED VA recuse?

MM: Over issues relating to a case he had and
that he generally has a relationship with the
CIA bc they're located in district.

Leahy: How do we determine whether others have a
conflict.

MM: They are. When people appear in ED VA, they have to be members of bar.

Leahy: In recusal request, did he lay out why he was recusing.

MM: Facts were teased out that made us consider the recusal.

Leahy: Can you assure us that the people working with Durham won't have conflict.

MM: They won't have the same conflict.

Leahy: We sent a letter, asking when and how did attorneys first become aware of torture tapes? Do you have an answer?

MM: No, I don't.

Leahy: Did they ever view any of these tapes?

MM: I don't know that. What was done within department is not something I would disclose if I knew it.

Leahy: wouldn't that be fairly important. It would mean DOJ was looking at torture tapes prior to their destruction.

MM: I didn't say I wouldn't review them, I said I wouldn't disclose that here.

Leahy: Well, perhaps you should get together with Haggis and I.

MM: Discussion of whether they viewed it is separate.

Leahy: Was anyone asked about advisability to destroy the tape.

MM: I've seen a report on that. I've seen no evidence that anyone in department saw the tapes [this may be wrong, he may have said "discussed destroying tapes"]

MM: I became aware when I picked up WaPo.

Leahy: Makes joke that they would be more likely to find things if they just marked the NYT secret. Plus, they'd get a crossword puzzle.

Leahy: Did you have communication between DOJ and WH? Was there any communication between DOJ and WH about that?

MM: Durham will look at.

Leahy: And when he's finished, would you have problem with him testifying.

MM: USAs have not testified as to pending cases, I don't see a reason to make an exception here.

Leahy: We may come back to that if we're unable to find these other answers. You doubtless heard about how WH, even though they're required to maintain emails, now say they've destroyed many over period of two years.

MM: I saw a story that there are emails that should have been there but aren't.

Leahy: Also that they were using RNC server. If they were not following the law on maintaining records, laws are fairly clear, you may recall that Congress asked extensive questions about that in last Admin. Is that something department would look into.

MM: I'd need to know circumstances under which not retained.

Leahy: Law is clear that records have to be retained, but they were lost. Does that raise any questions.

MM: That's something I'd like to know more about.

Grassley: Whistleblowers exposed many scandals in FBI crimelab. Youssef another whistleblower, FBI requires neither language skills or knowledge of Arabic culture. Sounds too much like history where FBI didn't think scientists had to be in charge of labs. You said this would be among your highest priorities to familiarize yourself with Youssef. Youssef provided a October 11, 2007 letter to your office, describing threats against those trying to hire experts. I'd like to have that letter included in record. What action has your office taken to

investigation.

MM: Youssef's letter is in litigation.

Grassley: Will you seek an independent review?

MM: I think we ought to wait for the progress of that litigation, which raises that and other issues.

Grassley: We've got someone in FBI saying our terrorism threats are being weakened and we're going to wait for a court.

MM: FBI has been improving counter-terrorism, a process in which I'm actively involved and Director involved.

Grassley: Youssef also involved in exigent letters. Where terror letters were used. Counsel said her office did not know of the letters. IG report, a division of counsel's office knew as early as 2004. The committee requested all emails related to exigent letters last year, we have received one small batch of heavily redacted documents. When are these coming.

MM: I'll find out about review of documents. My understanding is that there were changes in the oversight. Problem was lack of oversight.

[Gosh, then don't you think you ought to support oversight of FISA]

Grassley: Will DOJ pursue employers who knowingly hire illegal aliens.

MM: Yes.

Grassley: Prouty, fundraisers for terrorist organizations. FBI provided briefings, FBI's background investigation failed to find sham marriage and overstay of visa, bro-in-law had Hezbollah ties. FBI will be reinvestigating background of all agents from foreign countries. How many will be investigated? Will all non-native born agents be re-examined.

MM: I can't tell you how many. I believe it was more than just reliance on Prouty having become citizen.

Grassley: Hanssen. FBI resisted dedicating a unit to internal security. Finally did this years after Hanssen case. How long until this unit up and running?

MM: Will discuss with director.

Leahy: Thanks, Grassley.

Whitehouse: Process question. In terms of advisory responsibilities, not going to investigate. You've disclosed waterboarding not part of CIA interrogation regime. Still leaves open torture statute whether there are concrete facts or circumstances, given that that evaporates, whatever it is it is. I'm trying to determine if that is taking place (the analysis), if you're waiting for Durham's investigation to look more into what happened. Or if there has been a policy determination made, that bc there has been a claim of authority, there will be no investigation. What is the process for coming to this decision.

MM: Facts come to the attention to the Department that warrant investigation. As of now, investigation into destruction of tapes, if what was on the tapes was barred by torture statute.

Whitehouse: Couldn't you and I engage in discussion that would at least give cause for discussion.

MM: It would not be concrete discussion.

Whitehouse: In a classified setting it may or may not an "if."

[Booyah]

[Long pause]

MM: Not entirely true what that suggests.

[Let me traslate, Mike. Whitehouse has seen evidence of torture. And he's happily to examine that in a classified setting. Are you man enough for that??]

Whitehouse: I'm trying to not disclose

classified information. I don't think it's fair to say that nobody has any basis from anywhere. If that's not enough to raise the first red flag, I don't know what on earth that could be. Where do we stand, anybody who has a public view says there's something that might merit investigation.

Whitehouse: no Nuremberg defense built into criminal statute. If you were going to apply it, you'd want to say, what here's what took place. You're telling me that nothing in that process bc the certification obviates any investigation regardless of what the facts are.

MM: My position is that there is an ongoing investigation, I'm not going to speculate on what was authorized.

Whitehouse: The investigation has nothing to do with the underlying interrogation.

MM: Depends on Durham.

Whitehouse: Let's hypothesize.

MM: Let's not. It's a question of telling agents out there that we're investigating CIA based on speculation of what happened.

Whitehouse: I would like to thank you for the re-erection of the firewall between DOJ and WH. Manner in which it was done was excellent. Sorry that we seem to be at loggerheads again on this subject.

MM: This is a good faith exchange. I appreciate that you said.

Kisses all around, Whitehouse and MM make up.

Leahy: I don't expect an answer here. FOIA, required the office of government information services, which is national archives and record admin, ombudsmen, all those things we talked about, **2009 budget for Administration, attempt to move it into DOJ**. Law says to keep it in archives. Those taking notes of our conversation. Would you please look at that.