

MUKASEY OVERSIGHT: HJC EDITION, PART TWO

Delahunt: You said if an opinion was rendered, that would insulate him from any consequences.

MM: We could not investigate or prosecute somebody for acting in reliance on a justice department opinion.

Delahunt: If that opinion was inaccurate and in fact violated a section of US Criminal Code, that reliance is in effect an immunity from any criminal culpability.

MM: Immunity connoted culpability.

Delahunt: This is brand new legal theory.

MM: Disclosure of waterboarding was part of CIA interrogation and permitted by DOJ opinion, would and should bar investigation of people who relied on that opinion.

Delahunt: Let's concede that waterboarding is in contravention of international obligation. If opinion rendered that amounted to malpractice, whoever employed that technique, simply by relying on that opinion would be legally barred from criminal investigation.

MM: If you're talking about legal mistake, there is an inquiry regarding whether properly rendered opinions or didn't. But yes, that bars the person who relied on that opinion from being investigated.

Delahunt: I find that a new legal doctrine. The law is the law.

MM: If it comes to pass that somebody at a later date that the opinion should have been different the person who relied on the opinion cannot be investigated.

Delahunt: Is there a legal precedent.

MM: There is practical consideration. I can't cite you a case.

Sanchez: Deferred and non-prosecution agreements wrt federal prosecutions.

MM: Increasing use of monitors is something we noticed before the publicity. We have asked AG Advisory Group about the numbers, but what to do. Can't tell you when we'll get back to you on numbers.

Sanchez: Do you support full disclosure of all deferred prosecutions.

MM: Want to hear from AG AG, on confidentiality agreements serve or disserve these agreements.

[Interesting he wouldn't say right away he'd maintain confidentiality—that's why corporations enter into these agreements, which is precisely the problem.]

Sanchez: Actions of Christopher Christie. Christie selected his past superior, Ashcroft. Do you think this process has fostered the appearance of cronyism.

MM: Without getting into labels like cronyism. Whether it involves from process of selecting from a group.

Sanchez: Do you think Ashcroft's agreement was excessive?

MM: I don't know the details.

Sanchez: The lack of any oversight wrt deferred prosecution agreements. Plea bargains go before a judge. Deferred prosecutions neither party ever sees inside of courtroom. Are you concerned that this creates two systems of justice?

MM: Prosecutors proceed under guidelines set by department.

Sanchez: No judicial review.

MM: Not mistaken that not all of them are reviewed. Decision whether to charge or not charge has always been an executive decision.

Sanchez: Will submit questions.

Cohen: You represent US of A. Does that also

include Congress? In a contempt situation would you not be representing Congress?

MM: If a statute says it must go forward it must go forward.

Cohen: So if Congress votes to hold in contempt, you will prosecute.

MM: Great deal of authority cannot go forward because of President's order.

MM: Separation of powers, In response to an order that that not go forward, that would not go forward.

Cohen: So if Congress votes, you would not go forward with Contempt.

MM: I would examine what happens when it happens. Longstanding authority says senior advisors cannot be prosecuted for contempt.

Cohen: Shouldn't testify or shouldn't appear?

MM: The latter I believe.

Cohen: Would you think it would be more appropriate to have counsel appear. One thing is asserting immunity, another is the action of not responding and coming to Congressional committee. That's a separate action. You don't have to appear and assert your privilege?

MM: WRT only to senior advisors to President, not have to appear.

MM: I have had [a large number] of conversations about politicization.

Cohen: Any memos?

MM: I can't think of any, if I can find them, I'll provide them.

Schiff: Happy to have new leadership, but very concerned about your statements on torture. I don't think this can be delegated to an attorney in OLC to decide whether this is or is not legal. Shouldn't AG investigate to see whether law broken, notwithstanding that an attorney thinks it doesn't, then the AG comes before the

American people to say what happens. To abdicate, to say that bc of opinion of OLC wrote an opinion, you can't investigate. Why not investigate.

MM: Only signal for opening of investigation.
Cannot signal opening of investigation.

Schiff: Are you saying that if you believe that the law was violated, you lack power to open investigation.

MM: If presented in concrete terms, I can take steps going forward. Comment that you made that is very portentous, that needs to be corrected. American troops fight in uniform.

[both talking over each other]

Schiff: It's my time, I'd like to ask a question. I'm not trying to make equivalent our troops and AQ. Don't even get there Mr. AG. But if we don't establish a bright line, it makes us hard to argue to other countries. Why doesn't AG have the power to investigate?

MM: We have a bright line, we bar torture.

Schiff: You've said that if you were being waterboarded you would consider torture. Does it depend on who is being tortured?

MM: It would seem like torture to me. I would not use my own tastes and preferences.

Hank Johnson: TPMuckraker removed from press release distribution list. Has there been a change?

MM: Not familiar with how the distrib list is arrived at. All the press releases are on our website.

Johnson: Any orgs taken off list.

MM: Do not know.

Johnson: It was not you that made this decision.

MM: Not aware until called to my attention in letter from Chair.

Johnson: Won't declare waterboarding illegal bc it'll tell our enemies what to expect. Would it be lawful to use rack and screws?

MM: There is a line of hypotheticals that would get to indication to enemy, that is the only reason I won't get into hypotheticals. Program has gone through OLC opinions. Waterboarding once part of program, is no longer.

[Admitting this has really sunk MM's stated reason for not engaging in hypotheticals, since he's now happy to tell the enemies that we don't do waterboarding.]

Johnson: Under what circumstances would it be appropriate for a foreign nation to waterboard?

Johnson: CIA tapes investigation. Will you inquire into legality of underlying interrogations.

MM: Entirely in hands of John Durham. Career prosecutor, compiled enviable record before I got here.

Johnson: Guarantees that he's not acting to please you?

MM: Reports to DAG.

Weiner: Copps program—was that a success?

Artur Davis: Political influence over prosecutions. 3 instances in which committee received sworn testimony on political prosecutions. In AL, a woman who happens to be a Republican testified under oath, she alleged that she was present during conversation in which Republican political operatives discussed possibility of prosecuting governor of AL. Any circumstance in which it would be appropriate for Senator to call USA about investigation?

MM: Can't conceive of one.

Davis: How much would it concern you if all three of these statements were true. Given that, what steps have you taken to determine whether the claims are accurate.

MM: Case involving AL lawyer is before circuit court.

Davis: Not basis for appeal. What steps have you taken to see if these improprieties have happened.

MM: Limited to the people on the other end of the telephone call.

Davis: Why not. If this happened in the past, General. Given that two of those allegations have been repeated before Senate. What steps have you taken to determine if they've occurred. Has OPR conducted a review...

Conyers: Appreciation. Lengthy appearance.