

# AG HOLDER OVERSIGHT HEARING, TWO

You can follow along on the Committee stream or CSPAN3.

Durbin: No complaints that Bush decided to try Moussaoui in Article III Court. Can you tell me what distinction might be.

Holder: Learned a lot from Moussaoui trial. Determinations made about best forum for particular case. Best interest of American people.

Durbin: Mukasey: I was in awe of our system. We are a nation of law.

Durbin probably shouldn't be arguing that Moussaoui was 20th hijacker, so long as al-Qahtani is unresolved.

Durbin: SCOTUS decisions in Hamdan and Congress, to come into conformance with requirements. Only 3 successfully tried in military tribunals. Are you not also aware of procedure that some will challenge this new decision.

Holder: Distinct possibility. That is something we will not have to deal with in bringing KSM in NYC. Question of legitimacy not a problem at all.

Durbin: Very close parallel. MCs have procedures not ruled upon by SCOTUS. I think those are things that should be made part of this record.

Durbin: Thompson IL which would be Gitmo North. New perimeter fence, if indeed most secured facility in America. Never had escape from SuperMax. 35 terrorists in IL.

Cornyn: [Has no voice, apologizes] Do you acknowledge legitimacy of MCs?

Holder: Absolutely. Legitimized them.

Cornyn: So your decision to try in Article III not compelled by any law.

Holder: Judgment, discretion, experience, interaction with Sec Def, all of that went into determination.

Cornyn: Does POTUS agree?

Holder: Have not had direct conversation with him, but consistent with his archives speech.

Cornyn: Miranda rights on battlefield?

Holder: misreporting. A very small number have been read miranda warnings after military lawyers, civ lawyers, some reason to give mirandas.

Cornyn: You support miranda rights to some suspected terrorists.

Holder: I defer to people in field. It gives us another option.

Cornyn: Should KSM have been read miaranda.

Holder; There's no need, we don't need his statements.

Cornyn: It'll be a judge at trial or appellate level.

Holder: Yup. Confident that way in which this will be structured, needful miranda warnings, there is no need.

Cornyn: He did ask for lawyer, when he was detained.

Holder: I do remember that.

Cornyn: He's getting his wish.

[WTF are they so worried about him getting THIS wish, but so pissed that Holder is not allowing him to get his wish to be martyred.]

Cornyn: Risks of KSM not being prosecuted bc didn't get his rights.

Holder: No one can say with certainty. As I look at facts, detention of him. Evidence. I'm very confident that miranda issues not going to be part.

Cornyn: You won't make that decision. Isn't it the fact that you won't make decision on miranda.

Holder: I hope that judge takes into account very real need for security.

Cornyn: If judge orders KSM to be released?

Holder: Hard to imagine set of circumstances if he were acquitted he would be released into US. Other things we have capacity to do.

Cornyn: You can't hold someone indefinitely.

Holder: You can certainly hold people in matters pending.

Leahy: Might say only half-facetiously a lot of people in NY might like him to be released on streets of NY, he might not want to be released.

Cardin: Confidence in trial of this terrorist. Advantages of trying terrorist in Article III. Established process, used before. Credibility of our system. Our ability to showcase using American values. A lot of positive reasons to use Article III courts. Particularly the history of ignoring our own laws. F-up on Kohl's point. Closing of Gitmo. Feingold's point, informed decisions to classify.

Cardin: Cybersecurity. May be able to prevent 80% of attacks. We have to do better than that. How high a priority on this issue.

Holder: Need help of Congress. Have to be partners dealing with 21st century issue.

Cardin: Section on civil rights. Applauding you to continue to make civil rights priority. Voting rights, military personnel on absentee ballots, native americans, redistricting. To protect American rights of voting.

Coburn: Letter about OKs freedmen.

Coburn: Terrorists serving lengthy sentences. How many picked up in Afghanistan. How many interrogated by CIA.

Holder: Will answer those questions.

Coburn: Recovery board. Submitted reports that were fraudulent. Plan to prosecute that fraudulent behavior?

Holder: Yes, one of the things we mentioned yesterday, misuse of recovery act funds. Fraud connected to it. partners at Treas and SEC, that is one of the priority areas.

Coburn; Going to be big. Over \$50 billion. At least oversight. Hate crimes issue. Murder of some of recruiters in AR. Have you given any thoughts, especially in light of Ft. Hood.

Holder: Hate crimes bill says such actions are potential hate crimes. Mandatory min Sessions introduced. Deals with set of facts you're talking about.

Coburn: VRA. Kingston NC. In fact, in NC, only 9/550 localities hold election on partisan basis. 7/9 minority voted to eliminate, Civil Rights reversed. Would like to hear comments about that. How you justify reversing that, when majority think it's prudent.

Holder: Written response.

Coburn: Really concerned. Drug abuse. Significant power of marijuana use to lead to other drug use. Federal crime to use or distribute it. Did you personally approve. Dramatic break?

Holder: it's a break, logical break, given limited resources, the use of marijuana in way state laws prescribes, for medical purposes, directive indicated that we are not blind, to extent people using to do things not consistent for state law, the federal law is still there. A number of factors that are set out. Mexican cartels make most of their money from importation of marijuana into US.

Coburn: 95% of people in CA who have license for marijuana don't have a real illness, they have a desire to smoke marijuana.

Coburn: #1 risk for our kids not obesity, it's use of marijuana.

Whitehouse: Klobuchar was here first.

[What a gentleman]

Klobuchar. Thank you Sen Whitehouse. You mentioned tragedy at Ft. Hood. One of several Senators who went to memorial service. Waiting in line for physical ready to deploy. Family huddled next to that picture. Interested in thorough investigation, get results not only for strong prosecution. Make sure doesn't happen again.

Holder: Obama unequivocal direction to find out what happened.

Klobuchar: Bread and butter. So many questions understandably about trial. Diligent citizens caught Moussaoui. First of all, focus on security. Mayor and police chief. Interested in getting these guys. Conviction rate is 90%.

Holder: 94%

Klobuchar: NY

Holder: Lawyers from EDVA and SDNY. NY has tried these cases before. Hardened detention facility. Means by which person can go from jail to court house. Marshalls service report.

Holder: Medicaid fraud. People who were once engaged in drug dealing, moving into this area, safer and easier. Determined to put an end to that. Sebelius and I giving particular attention. Already announced arrests in variety of cities.

Franken: Pick up on rape kit matter that both Chair and Klobuchar brought up. Important to realize, pro law enforcement. Protects innocents, brings victims closure. What's gone wrong with this?

Holder: Don't know why it has not worked.

Franken: 5% of world's pop and 25% prisoners. So many drug problems and mental health. We're

essentially sending kids who are in possession of drugs, sending them to crime school. 2/3 come back within 3 years. More than a third of MN have drug courts. Offenders in drug courts 10X more likely to continue treatment.

Holder: Supported with budgets. Support data driven analysis (recidivism v treatment). On this basis will be formulating policy.

Franken: Might I suggest increase of drug rehab in prison. Lot of people who should be in prison. It'd be nice if while in there they got treatment. One thing on health care fraud. I'd like to see those people in prison. Those folks might belong there more than people that are simply addicted to drugs. Trafficking in women. Trafficking of native american women, and international trafficking, trafficked into this country. Because some of these cases are sent to ICE, have a disincentive to report these crimes. That's something that needs to be looked at.

Holder: Paying particular attention to plight of women on reservations. If you look at levels of violence that young girls and women subjected to. Simply unacceptable. President followed up on. Intl trafficking something we need to look at as well, to extent that that prevents enforcement in trafficking.

Whitehouse: React to two things. One is, inadvertently disparaging tone about federal prosecutors. I hope it is inadvertent, having had some experience in that world, I'm extremely proud, I've had prosecutors go to court in body armor, have to explain why security system bc of threats. They are among the best lawyers in our country. I didn't like the tone I was detecting. One in favor of prosecutorial independence. To extent that you get criticized that your decision is unpopular, the implication is that prosecutors should seek to make decisions that meet with popular opinion, popular opinion a very dangerous bellweather. It gets worse when you move from popular opinion to legislative opinion. Very significant reasons why I as prosecutor didn't want to hear from legislators.

Very good reasons why isolated from these opinions. Nobody should not react that a prosecutor should not listen to threats. A prosecutor should not make decision on legislative opinion, TO make it worse is to make prosecutorial decision by talk show opinion. Want to stand by principles that have worked for hundreds of years. People like us—Senator—have no business attempting to influence prosecutors decision. In article III courts, tens of thousands. Everything leaves trail of precedent. MCs still have unreliability. Either new territory, or modeling on Article III, so you might as well be in Article III court.

Holder: Thank you for support in favor of career people. To extent that anyone has any question about determination of people in DOJ. These people are among best of best. No question KSM will try to exploit same way he did MCs. Could be in other places making a lot more money, do it quite well. MCs much better than they were. A legitimate place in which we can try some of these defendants. No question that in terms of experience Article III have experience.

Whitehouse: 3 Qs for record. Drug enforcement, e-prescribing. Timing on that determination? People in bankruptcy, harshly treated under law, new trustee? When is OPR going to put out its report in OLC?

Holder: The report is completed. Being reviewed now, last stages, a career prosecutor has to review report. At end of month report should be issued. Longer than anticipated bc of the amount of time we gave to lawyers representing subjects of report. Had to react those those responses. Report is complete being reviewed by last person.

Specter: I love Judy Miller!!

Specter: We are working hard to craft health care bill. Medicare and Medicaid fraud enormously consequential. So many cases result in fines. Adds to cost of doing business. Jail sentences are deterrent. Would you submit to

committee an act to plan to see to it that there are jail sentences as matter of active govt policy.

Specter: Two-pronged approach to violent crime.

Specter: Distinction between trying people in Article III and MCs. Preliminarily support Whitehouse comment. As I take a look at protocol. As you look at interest, very similar, Yemen as opposed to NYC not all that important. Article III courts quite a testimony to our criminal justice system. What standards to try terrorist in one place rather than other.

Holder: Evidentiary questions, location can be a problem.

Specter: less evidence than necessary.

Holder: Admissibility. If there are probs in one forum than another.

Specter: Can you give me an example.

Holder; The kind of interrogation might lead you to want to use one forum as opposed to another. Might be questions of techniques, one forum might be more hospitable than another. No one should read into that. We will not use evidence derived from torture. Possibility that some techniques better received in one forum.

Leahy AG Holder's fourth appearance. Republicans more rounds. American public, having been told that terrorists will gain access to classified material. Some of those same protections adopted into MCs. Concerns I have that MCs have repeatedly been overturned by SCOTUS. Federal courts have 200 years of precedent.

Kyl: Media shield discussion. Indicated address at more length. Did you ask Gates about shield law?

Holder: Conversation, but not lengthy one.

Kyl: Gates opposed

Holder: Previous bill.



Kyl: Propose we talk to people who expressed opinion. Did you talk to Mueller?

Holder: Different opinion wrt prior leg.

Kyl: Expressed as recently as September opinion still the same. Fitz recommended that law would include other provision, only if govt prevailed would info be turned over. Would you be open to provision like that. That clearly is one that both you and I and Fitz think is reasonable.

Holder: Bill as it exists is compromise

Kyl: Compromise between journalists, you and Democrats.

Holder: Graham cosponsor.

Kyl: none of us opposed.

Holder: Views letter: satisfactory to use in law enforcement.

Kyl: Did not comment on new absolute privilege. On privilege extending to protect those who violate federal law by leaking info. That act of leaking would be subject to privilege. Letter did not express itself.

Holder: I didn't see absolute privilege to leak.

Holder: I didn't mean to be flip about turning over names of previous conflicts. I don't know if ethical concerns wrt atty client privilege. I didn't mean to say I was not taking seriously.

Kyl: I suspect you and Grassley will have more conversations.

Cornyn: Fup on question that Specter asked about evidence in deciding which forum. Is it your position that it'll be easier to get evidence of guilt in Article III court than it would be in MC.

Holder; I'm not sure I view it that way as opposed to what evidence would be used, as opposed to how Military prosecutors would prosecute case.

Cornyn: you wouldn't try case where it'd be

harder to get conviction.

Cornyn: Marshall's report on all venues. Judge could transfer. What other venues?

Holder: Two districts: SDNY and EDVA.

Cornyn: Those are the only two. When detainees come to US, immigration status?

Holder: Not immigration expert. Confident that given they would be here under supervision of being charged in federal court, we would be able to detain them, as we would be able to anyone charged with such serious.

Cornyn: Any claim of asylum bc of CAT?

Cornyn: Not immigration expert. One can be paroled solely for this purpose. Can't imagine situation in which paroled into US.

Cornyn: Your position will not be conferred rights they did not have.

Holder: My expertise more on DOJ side, we can detain them and prevent them from walking streets of US.

Cornyn: Will you look into it, whether if detainee claims immigration status by virtue of presence, will allow them to get administration proceedings.

Cornyn: If detainees is acquitted. What basis you could detain?

Holder: Initial determination for detention of, would last beyond mistrial. Trial, hung jury, I suppose defense could move to have bail changed. It's hard to imagine a judge would change status between time of hung jury and next trial.

Cornyn: You cannot indefinitely detain someone. Are you concerned that judge may say you've made an election to try as criminal and you're bound by that, and you cannot revert to law of war.

Holder: No, I'm not. Under congressional provisions, and laws of war, we have ability—cannot indefinitely detain—but can

detain for lawful reasons. I think very unlikely.

Cornyn: I hope you're right.

Klobuchar: Would never want to muzzle Graham.

Graham: I wish more people felt that way. Preventative detention. America's not a better place for letting them go.

Holder: Agree in general. Pursuant to laws of war. Dialing into due process. I think we should involve Congress in crafting law of war detention appropriately.

Graham: These are not easy decisions. Preventative detention only known in military law. Any theory in civilian law. Speedy trial rights.

Holder: Can detain someone that there's going to be trial.

Graham: under military law can detain if in fact part of military force. My problem with what we're doing. In Afghanistan if we capture an AQ member. Under your rationale, decision of criminal or MC, would not be known at point of capture.

Holder: these determinations have been made now, and have been made.

Graham: No one ever envisioned that terrorist captured on battlefield would end up in civilian court. Look forward on what we can do on preventative detention.

Sessions: I would just say Mr AG. If a police officer stops someone and gun in holster. I can't imagine someone captured on battlefield, not being considered custody. Eventually he conceded. Intelligence way to go forward.

Holder: we have a great deal of flexibility. Do not think MCs illegitimate forum. Presumption of Article III.

Sessions: If presumption is cases tried in civilian courts, don't know why soldier isn't

instructed to give miranda. Hostility by president toward MCs. For example soon after taking office suspended MCs and issued order suspending MCs.

Holder: That doesn't indicate hostility toward MCs rather than desire to perfect them.

Sessions. SCOTUS raised some concerns. Congress did some things that make it clear to me that for these, reliable hearsay, don't have to bring people off the battlefield. You have to have real high reason to do that in normal civilian trial. MCs go on the record in camera, protect sources and methods. I don't think there's any doubt about that. General Mukasey has expressed concerns. Your predecessor. NYC focus for mischief in form of murder. I don't think that's irresponsible.

Holder: Do believe can protect sources and methods in Article III courts. Great respect for Mukasey. I think great AG. Only thing he didn't have at Dept was gift of time. But I disagree with him about NY. NY is a target for AQ. I'm not at all certain that bringing of these trials makes it greater risk. One of the things I read was WSJ article Mukasey wrote, and asking people to respond to things he wrote.

Klobuchar: Asked about evidence, miranda. Could you go through notion that that's one of considerations.

Holder: One of things we look at is the admissibility issue. Where can we get admitted evidence needed to be most successful. People in field have been making determinations for some time. Thousands who have come into custody. Only small number have been given mirandas.

Klobuchar: Evidence you couldn't share with us. Could you expand on that.

Holder: There is really, from my perspective, very compelling evidence that will not be revealed until trial setting or pre-trial setting. At some point, AUSA will reveal evidence that I'm talking about, compelling, not

tainted, will prove to be decisive in this case.

Klobuchar: Unified in wanting to give tools to give your work. Morale in DOJ.

Holder; Make people believe in mission, some of things identified in IG reports, that's not the way this department will be run. I served as line atty in DOJ under Republican and Democratic Ag, that's what I tried to reassure them. Only expected to do job, No litmus test. Confirmation of remaining AAGs.

Dawn Johnsen!!!

Klobuchar: Done before thanksgiving?

Holder: Tomorrow;

Klobuchar: Six pending before this committee.

Sessions: 9/11 victims. When word of letter got out 3000 firefighters joined us to add their names.

Holder: A lot of people opposed. All I can do is look at the evidence, look at the law, and make best decision possible and I hope people understand that.

Klobuchar: Thank for respect from those in gallery, I know you don't all agree with all decisions here, but thank you for the respect. Holder, we all hope you put best people on case, that they get penalties.