

HOLDER TESTIFIES BEFORE SENATE JUDICIARY COMMITTEE

The Committee feed is screwy right now, but cspan.org is carrying it. Pat Leahy will not be there today; he's at a funeral. I don't know if Herb Kohl (who will act as Chair) had an opening statement or not. But Jefferson Beauregard Sessions is up now whining about civilian trials.

(Incidentally, at 10, the House Judiciary Committee will have Glenn Fine and Valerie Caproni talking about the Exigent Letter IG Report. I'll do my best to keep my eye on that too.)

Sessions apparently doesn't know there was a hearing last week in a military commission, which basically consisted of everyone looking at each other and admitting that MCs have no rules right now.

Here's Holder's statement.

Holder: 19 USA nominees and 17 Marshal nominees pending.

Holder now listing all the terrorists prosecuted in civilian courts.

Use every tool available. Includes both civilian and military commissions. Referred 6 cases to military commissions. It would seriously weaken national security not to have civilian trials.

9/11 Commission trial. No decision yet.

Kohl: Review of 240 detainees. In your testimony did not mention if and when you plan to close Gitmo. Update?

Holder: Still intention to close Gitmo. Once was bipartisan support for closing it. Both men who ran for President last year supported closing Gitmo. Will close as soon as we can.

Holder basically says they intend to use Thompson to hold people indefinitely.

Kohl raises Holder's comment about reading Miranda rights to Osama bin Laden.

Kohl: Do you still believe civilian trials are better? When can this decision be made.

Holder: Reviewing decision. NY is not off the table. Have to take into consideration concerns raised by local community. Expect to be able to make determination in a number of weeks.

Sessions: Admin had been slow in making those nominations. I think if you look at where delays are are lack of nominations. You said 9/11 would be tried in NY. Caused quite a bit of controversy. I understand now WH suggesting that would be tried in NY. Makes me uncomfortable having politicians discussing where it'll be tried. What is your position. Are you uneasy that WH is leaking statements about where it will take place.

Holder: Not sure if there have been leaks. National Security Team deciding. SecDef, SoS, Intelligence Community. Meet w/President every Tuesday. This is a trial that is unique. It does involve national security concerns.

Sessions: There is a venue problem.

Holder: You're obviously a former US Attorney. If possibility that we move the trial, what would the possible venues be. What I will say is that SDNY is much larger place than simply Manhattan. Trying case in other venues beyond NY.

Sessions, after having said he doesn't want pols to decide where to have trials, is now criticizing Holder for making the decision w/o listening to Sessions.

Holder: Not many differences between civ and MC, biggest difference is interlocutory appeals. Much of other enhancements reflect what judges do on civ side.

Sesssions: when you try someone in civ court, lawyer, Miranda, discovery, when you hold them in MC, don't have to charge them at all, POW, until over. They may be tried if you choose to try them.

Holder: Decisions based on what is best. Whole variety of concepts and things that have to be taken into consideration. Case by case basis, being most effective in particular trial.

DiFi: Degree to which this dialogue has escalated is unhealthy. Dems did not do to Bush following 9/11 wrt decision-making. I find it reprehensible. Best interest of the people of this nation, served by Admin, and the President having maximum flexibility as to which venue these defendants will be tried. I have never seen anything quite like this. It doesn't matter that MCs which have been fraught w/controversy have convicted 3, two of whom are out. Doesn't matter that Zazi will plead guilty. I was mayor in the wake of a major assassination. I know what happens in a city w/major scar tissue. Indefinite detention?

Holder: People we decide should be held under laws of war, judge has ability to see whether detention appropriate. We have won some cases, we have not been successful with others. Some of people ordered released by judges have been released. We use that power with thought of keeping American people safe. If you look at number of people at Gitmo, number of people we would seek to detain relatively small.

DiFi: Children subject to detention. We've had no response to that.

Hatch: Why revise prosecutorial guidelines on marijuana. Specific intention of making dangerous drugs illegal. Not WH's vision of how controlled substances act should be enforced. Impending deadline of Adam Walsh Act.

Hatch wants more obscenity prosecutions.

Hatch: Undiebomber. You alone made this decision.

Between Hatch and Sessions, they should have practiced how to say "Abdulmutallab's" name. Woe betide them if we get around to talking about Anwar al-Awlaki, that's even harder to pronounce.

Holder: Decision has been shown to be the right one. The information that he has since provided as result of his decision to cooperate.

Feingold: Well aware of my support for federal trials. Continued strength. I have a statement that discusses that, asked to be place in record. COPs.

Here's what Feingold's statement for the record said about the 9/11 trials:

As members of this committee are aware, I strongly support the decision to try Khalid Sheikh Mohammed and other 9/11 plotters in our federal criminal courts. We have a great track record of successfully trying and convicting terrorists in civilian courts. The military commission system is largely untested, and these cases could easily get bogged down in years of legal challenges. The best way to bring these terrorists to justice swiftly is through our civilian courts. It has been nine years since 9/11, and it is inexcusable that these men have not yet been brought to justice for what they did.

Whatever one might think of using the military commission system, it is simply not yet ready to start handling prosecutions. The Military Commissions Act requires that the Secretary of Defense issue rules to govern those proceedings, and that has not yet happened. It hardly seems possible to start using military commissions without the rule book. The military commission system is also the subject of a constitutional challenge in the D.C. Circuit that is at only the beginning

stages of litigation, and anyone charged in a military commission prosecution could bring yet another legal challenge to the system itself before any trial begins. In fact, when a military commission defendant named Salim Ahmed Hamdan challenged a prior version of the military commission system, his case wound up in the Supreme Court after years of litigation. It strikes me as not only possible, but very likely, that the first few military commission trials will be subjected to legal challenges, and that any trials would not begin for several years.

The federal criminal system, on the other hand, is available now. It has been tested for literally hundreds of years, and we know it works because hundreds of people are sitting in federal prison today after being convicted of terrorism crimes in our federal courts. We know that our federal judges and prosecutors have the experience needed to take on these cases because they've done it, again and again. Indeed, the Department has achieved significant successes in the Zazi and Headley cases just in the past few months. Both were serious terrorism cases, and in both cases the Department used the criminal justice system to obtain intelligence and ultimately guilty pleas. So I support the Attorney General's decision and believe it is the best decision for the security of this country.

Grassley: Thanks for anti-trust hearings on Ag. [Feingold also raised this.] People who represented detainees. Your staff refuses to give information, but DOJ managed to verify for Fox News. Call into integrity of employees of department. I agree w/department's view that personal attacks inappropriate. Inquiry seeks to

understand who is advising you on these issues.

Holder: I know that your request comes from good place. Hesitance I had has been borne out. Drag their reputations through the mud. Reprehensible ads used to question their patriotism. I'm not going to be a part of that effort. Their names are out there, it has been placed in public record. I will not allow good decent lawyers, done what John Adams did, done what our Chief Justice has said is what is good.

Grassley: Request from this committee. Recently said that attorneys representing unpopular people patriots, doubt you'd say same about those representing mafia. Does not keep central database of recusals. You know large lawfirms have conflict committees to ensure that rules are followed. Why shouldn't DOJ have some centralized system of conflicts as private firms have.

Holder: Legitimate concern.

Grassley: FOI. Presidential Memoranda on FOI.FY 2009, Agencies cited FOI exceptions more than FY2008. B5 used 70,000 times, compared to 47,000 times in 2008.

Durbin: Courageous position to take, and the right one, SCOTUS ruled that detainees had right to habeas, Bush admin, right to counsel. Inspiration in Fox news. If anyone decides to represent Gitmo detainee, can't be trusted. If legal representation or possible inclinations toward one party or another, where does it end? You're standing up for a fundamental principle that does go back to John Adams. Men and women who've had the courage to stand up. I hope the record will reflect, it was Bush Admin that said Gitmo detainees had right to counsel. Miranda warnings. A lot of question about using Article III Courts, for fear of Miranda warnings. Policy of Bush?

Holder: I think a good case can be made that once people get Miranda information can flow. Especially in terrorism cases, and the lengthy sentences in Article III hearings.

Durbin: Richard Reid. How long after he was detained by Bush DOJ was it before given Miranda.

Holder: A few minutes.

Durbin: Five minutes.

Durbin: Those who are arguing that we have to shift to MC side would have to explain why we'd put aside this history of success.

Holder: Article III court can plead guilty to capital offense.

Lindsey Graham: President Obama has said we're at war with al Qaeda. Some people don't believe in that. Times when Article III court would be superior. Financier, more charging capabilities.

Holder confirms 48 detainees slotted for indefinite detention.

Lindsey: Lindsey now complaining that Robertson supported Slahi's habeas petition. If presumption should follow al Qaeda, once you're a member, presumption that you're still a member of al Qaeda. One reason why Congress needs to be more involved.

Lindsey: If you send new detainees to Afghanistan, you're going to bring down Afghan government.

Schumer: Want to reaffirm how difficult it would be to have trial in densely populated area.

Holder: It has not been ruled out. Would take into consideration.

Cardin [who calls it "Guantanamo"]: Asks about making review for indefinite detention transparent so international community can see it. Holder says he's working w/interagency, and also Graham.

Cardin: If we don't put sunlight on it, if we don't engaged intl community, this war's not going to end anytime soon.

Holder: need to deal with it on symbolic level.

Of course, what remains unsaid is that the REASON why Abu Zubaydah and al-Qahtani can't be tried is because we tortured them into insanity.

Cornyn: Financial crisis, border, healthcare fraud. Criminal prosecution can be deterrent . One thing that's been missing is show trials.

Holder: Madoff, other ponzi.

Cornyn: Who is coordinating investigation?

Holder: Me, financial task force.

Franken: Merger of Comcast and NBC. Want to delve into it a little bit. Concerned because I see potential of consolidation of media that is very frightening. Want the best for NBC. If this goes through, will Verizon and AT&T buy studios? Are we going to be seeing situation where 5 companies own all information we get. Very dangerous situation. Familiar with FinSyn in early 90s. Remember that basically networks prohibited from owning own programs, during testimony that all networks said why would we buy our own programs [heh] we're in the business of getting ratings. Right now we have this incredible concentration, reduced competition for independent producers. Comcast, yes, it's a vertical integration, but also horizontal, both have sports programming,

Holder: If determination were made that it would violate anti-trust. Not at liberty to talk about much. Ongoing investigation, one that antitrust div that has shown itself to be appropriately aggressive.

Franken: Varney previous DOJ anti-trust, significant conditions. Skeptical but still open to imposing conditions. I have problems with imposing conditions. Hard to enforce them. Almost inevitably expire after a few years. Make sure that DOJ conditions would actually have enough teeth, and long enough life, would really impose real conditions to prevent very thing I'm fearing.

Holder: Take myself away from NBC Comcast. A

wide range of things that can be done.

Franken: Can affect cable bill.

Holder: Now I'm concerned.

Franken: The way to Holder is through his pocketbook.

Klobuchar: Commend on Petters case, Ponzi.

Klobuchar: Cybercrime.

Whitehouse: Associate myself with remarks DiFi made. Emblems of American Justice, admired and revered around the world, justifiably take great pride. Blindfold and balance, not torch and pitchfork. Values of Article III courts, experiential base. Prosecutors can know how it's going to play out. Hundreds of Article III terror prosecutions. Of the MC, a number were plea agreements.

Holder: I think that's correct.

Whitehouse: Raises Goldsmith statement talking about novel legal issues that might render MCs ineffectual. Legislature has no proper business in exercise of prosecutorial discretion.

Holder: Letter from me and SecDef, inherently Executive Branch function.

Whitehouse: Graham's remarks, flexible pragmatic and aggressive. A good one.

Specter: Oppty to test warrantless wiretaps unconstitutional.

Holder: We have not decided. Protection of sources and methods. A determination as to what we're going to do has not been made. We are considering our options. I haven't made up my mind yet. We have to see what the impact will be on this case, wrt program that ended in 2007, 2006, to the extent that the support of congress is the way in which Exec branch should operate. When we work w/Congress to set up these programs. When we look at requirements under FISA. We will have to consider what our options are and understand what the ramifications are.

Specter: I'd urge you to get a decision. I've filed a bill to compel SCOTUS to decide it.

Specter: Miranda warnings. All it means is that statements made by subject of interrogation cannot be admitted into evidence. When you dealt w/someone like Christmas day bomber, caught red handed, didn't need confession. I would hope they not be given.

Holder: Intelligence. I think we have to have flexibility. They did not give Miranda warnings in initial interaction. Gathering of intelligence of critical importance.

Sessions, to Specter: Good to see you in that [Chair's] chair, except it's on the other side of the aisle.

Specter: This is not on an aisle.

Sessions: Yes, it's in the middle of the room.

Holder: If bin Laden were captured, I can see no reason why he'd be given Miranda warnings. Concern with Miranda warnings only whether that information would be excluded. We have sufficient information.

Sessions: With Abdulmutallab, as a result of not giving Miranda, may create many defenses that would not otherwise exist. Rule would simply be that you expect these terrorist individuals be taken into military custody. We've done that a number of times.

Sessions keeps interrupting Holder.

Holder: FBI agents, had presence of mind, understand did not have to give him Miranda warnings.

Oops, Lindsey just said this: Obviously, we're not torturing these people but we'll have the authority to do that.

He means authority to interrogate, but didn't say it.

Graham: What additional rights would a person have if transferred to Thomsen?

Holder: We don't know yet.

Graham: Congress could give some direction. I think Lamberth has been very open about Congress needs to help. Have you been reading those?

Holder laughs.

Holder: yes, I have to read them.

Graham: We're in a dilemma as a nation. GB has changed their rules to allow people to be held up to 1 year. We have the right here, if you're an enemy combatant, law of war takes over.

Graham wants to make have non-arbitrary indefinite detention, even after govt loses habeas case.

Lindsey: 59% of American people opposed to closing Gitmo. Why?>

Holder: politicization and misinformation.

Lindsey: Alternate theory, a lot of people worried that we don't have a coherent policy. I think it would be helpful to focus not only on our allies, but also on Americans. Tell them we'll keep them secure. We've got to assure American people that we've got an enduring system. Let's park some of the rhetoric.

Holder: Point you last made a good one, incumbent on people like myself, what our intentions are and to explain to them, ways I have not done, so degree of assurance, that in addition to whatever I have mentioned, factors you have mentioned is why approval has dropped.