

THE JOINT INQUIRY AND MUKASEY'S CALL

Alright. Glenn has me intrigued by Michael Mukasey's story about an intercept that—if it had been disseminated—might have prevented 9/11. So I'm going to flog it for a couple more posts. As a reminder, here's the story that Mukasey has apparently heard, Zelikow doesn't recognize, and Conyers has not heard.

And before 9/11, that's the call that we didn't know about. We knew that there has been a call from someplace that was known to be a safe house in Afghanistan and we knew that it came to the United States. We didn't know precisely where it went.

As I pointed out in this comment, Mukasey tells a similar (thought not exactly the same) story in his and Mike McConnell's letter to Harry Reid listing which FISA amendments would have incurred a veto threat (I think this story was also actually used in the debate in the Senate, though that's going to have to wait for a later post).

The Joint Inquiry has learned that one of the future hijackers communicated with a known terrorist facility in the Middle East while he was living the United States. The Intelligence Community did not identify the domestic origin of those communications prior to September 11, 2001, so that additional FBI investigative efforts could be coordinated.

Before moving on, note the key difference here: Mukasey's weepy story has the person in the US **receiving** a call from an Afghan safe house. The Joint Inquiry was told the US person **called** the known terrorist facility. That may have import as we move forward—but for now, just keep in

mind that little discrepancy.

Also note the reference is somewhat vague. When did this intercept come in? Which hijacker did it involve? Did the Joint Inquiry see the intercept itself, or did they just "learn" about it, as the passage implies?

To see if I could clarify those issues, I decided to look at the Joint Inquiry to see precisely what it said about this intercept that could have prevented 9/11 (see page 36 of the PDF). From the context, it is clear the members and staffers from both intelligence committees—who conducted this inquiry—believed that the NSA **had all the legal authority it needed to collect this intercept.**

[There were also gaps between NSA's coverage of foreign communications and the FBI's coverage of domestic communications that suggest a lack of sufficient attention to the domestic threat. Prior to September 11, neither agency focused on the importance of identifying and then ensuring coverage of communications between the United States and suspected terrorist-associated facilities abroad [half line redaction]. **Consistent with its focus on communications abroad, NSA adopted a policy that avoided intercepting the communications between individuals in the United States and foreign countries].**

NSA adopted this policy **even though the collection of such communications is within its mission and it would have been possible for NSA to obtain FISA Court authorization for such collection.** NSA Director Hayden testified to the Joint Inquiry that NSA did not want to be perceived as targeting individuals in the United States and believed that the FBI was instead responsible for conducting such surveillance. NSA did not, however, develop a plan with the

FBI to collect and to ensure the dissemination of any relevant foreign intelligence to appropriate domestic agencies. This further evidences the slow response of the Intelligence Community to the developing transnational threat.

[The Joint Inquiry has learned that one of the future hijackers communicated with a known terrorist facility in the Middle East while he was living in the United States. The Intelligence Community did not identify the domestic origin of those communications prior to September 11, 2001 so that additional FBI investigative efforts could be coordinated. Despite this country's substantial advantages, there was insufficient focus on what many would have thought was among the most critically important kinds of terrorist-related communications, at least in terms of protecting the Homeland]. [my emphasis]

In other words, the Joint Inquiry, working with whatever information they had about this intercept, believed that the NSA simply chose not to pursue this intercept, not that it didn't have the legal authority to do so. Which, if it's true, is a pretty shoddy excuse, given that we know John Bolton was able to get plenty of information on US persons from the NSA. I guess whatever purpose Bolton had for getting those names was more important than counter-terrorism.

So if the Joint Inquiry had a complete understanding of this intercept, then it's clear that Mukasey is (as Bush officials have done at least twice in the past) conflated intercepts that **could** or **were** legally collected under FISA with those that would have been prevented by FISA.

But I'm not sure whether the Joint Inquiry had a full understanding of this intercept. First of

all, I can't find any more detailed description of what this call was—even in the Mihdhar discussions, which Zelikow raised as the closest thing to what Mukasey described (and the 9/11 report describes the communication of Nawaf al-Hazmi, who had been in San Diego with Mihdahr, at length). The closest thing is this description:

In addition, the FBI acquired toll records that five or six hijackers communicated extensively abroad after they arrived in the United States. The Intelligence Community had no information prior to September 11, 2001 regarding these communications, and, as a result, does not know what clues they may have contained].

If this is a reference to the call, it means that as of December 2002, when the Joint Inquiry finished its report, the Intelligence Community had not yet (if it has, ever) analyzed the content of these calls. It suggests that these calls—as opposed to what Mukasey appears to be talking about—came from phone bills, as opposed to intercepts. And if it got those phone bills, presumably they were US based phone bills, meaning once they got those bills, the IC knew precisely where the phone call went.

That doesn't rule out that these communications included the call Mukasey was talking about. The context of the the passage in the letter to Reid—in which Mukasey used it to object to Feingold's "significant purpose" amendment designed to prevent reverse targeting—suggests the problem with the intercept was more than just a content-based analysis, since it wouldn't make sense to object to Feingold's amendment if you weren't trying to get other data about contacts in the US with suspect targets overseas, otherwise you could simply pass the amendment.

So it's possible that Mukasey's complaint refers more specifically to pen data than to content of

the calls. It's possible he's really arguing that if the FBI had just been able to match the US-based call data with the phone number for the known Afghan safe house, it would have served as a red flag for investigators, regardless of the content of the call.

Though there's one more reason to believe the Joint Inquiry may not have gotten all the details regarding this call. In the section listing complaints about cooperation, the report lists the difficulties the Inquiry had with getting data from NSA.

CIA and NSA Documents: CIA took the position that so-called "operational cables" from the field and certain other documents it deemed to be sensitive could be subject to Joint Inquiry review at CIA Headquarters, but that no copies could be brought to the Joint Inquiry's office. **NSA adopted a similar position concerning its transcripts and disseminated intelligence reports** and, ultimately, **almost all other materials**. This prevented the incorporation of the original documents in the Inquiry's central records where they could be drawn upon effectively for research and reference purposes. Both agencies did, however, allow verbatim notes to be made and removed to Inquiry offices. This consumed many hours and slowed the Inquiry's progress. Both agencies then agreed to allow copies to be removed from their premises if the Joint Inquiry agreed to allow them to be stored by the agencies at the end of the Inquiry, and even provided a draft of an agreement that would recognize this. When the Inquiry later agreed in principle and responded with a revised draft, however, the agencies decided that such an agreement was no longer desirable and returned to their original positions.

[my emphasis]

The Joint Inquiry got almost all materials from NSA, but not all. Now, just before this section, the report complains about reluctance to turn over operational details. That reluctance might relate to the fact that, in 2002, NSA was engaged in spying activities that only four people on the two committees knew anything about, and none of the staffers. (Which is likely a problem with all the extensive NSA discussions in the Joint Inquiry report—while the NSA was briefing the Joint Inquiry about its capabilities, it was keeping a significant change in its capabilities secret.)

In any case, it's ultimately not clear whether the Joint Inquiry—and therefore both intelligence committees in Congress—learned any significant detail about the call Mukasey describes, at least not before 2002. If they did, though, they clearly have a dramatically different understanding of why NSA didn't fully access that call than Mukasey currently does. And if the Joint Inquiry was told all the details about that call, then Mukasey is, once again, claiming FISA prevented NSA from doing something that it in fact did not prevent.