AT SOME POINT, LANNY BREUER IS RESPONSIBLE FOR WILLIAM WELCH'S "JUDGMENT"

Shane Harris has a long profile of William Welch, the thuggish prosecutor in charge of Obama's persecution of whistleblowers. One of the things he did for the profile is review all of Welch's cases as an AUSA; he found three of them that, while not major, exhibit the same kind of abuses he has committed on the national stage.

> *The Washingtonian* reviewed every case that Welch worked on when he was an assistant US Attorney in Springfield, from 1995 until 2006. It was during those years that Welch earned his chops as a prosecutor. His biggest victories were in a string of city corruption cases that became his steppingstone to the Public Integrity Section at Justice.
>
> Most of Welch's cases in Springfield appear routine. But some raise questions. In three cases, defense attorneys filed motions claiming Welch hadn't turned over exculpatory evidence, sometimes after a judge had directed him to do so. One attorney accused Welch of mounting a vindictive prosecution against a woman who had refused to cooperate with one of his investigations. One suspected Welch of trying to prevent a witness favorable to the defense from testifying—an allegation that would surface against the prosecution years later in the Stevens case. (None of these complaints resulted in a case's being overturned.)

Perhaps the most telling part of the profile,

though, is DOJ Criminal Division head Lanny Breuer's effusive praise for the out-of-control prosecutor he put in charge of leak investigations.

> Breuer, a prominent Washington attorney who once defended former national-security adviser Sandy Berger against charges that he'd stolen classified documents, looks to be Welch's biggest fan. "Bill is absolutely tenacious," Breuer says. "He'll follow every fact and research every legal issue, and he will be absolutely dispassionate in his conclusions."
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> Breuer sees Welch's doggedness as an asset in the Obama administration's efforts to stop national-security leaks, which rests on a complicated—some say dubious—interpretation of the Espionage Act. The administration has used the law to prosecute five people in leak-related cases, more than all previous administrations combined.
>
> Breuer doesn't seem bothered that his lead prosecutor is under investigation. "The fact there's an allegation in and of itself is insufficient" to keep him from prosecuting, Breuer says. "In my mind, it would be absolutely unjust and crazy at this stage not to continue to let Bill Welch be the great prosecutor he is." Breuer adds, "I've grown to very much rely on his judgment, his acumen, his intellect, and his sense of justice, which I think is terrific."

What Harris doesn't mention in his article—I'm sure the publication schedule made it impossible—is the speech Breuer made yesterday to a bunch of prosecutors in Sun Valley. (h/t BLT) Breuer, you see, is miffed that defense attorneys are calling prosecutorial abuse what it is.

> As I and others have detailed elsewhere, the Justice Department has taken a series of far-reaching steps in the past two years to ensure that all federal prosecutors consistently meet their disclosure obligations. These measures – such as providing guidance to federal prosecutors on gathering and reviewing discoverable information and making timely disclosure to defendants, or instituting a requirement that all federal prosecutors take annual discovery training – are important steps forward. And I think it's fair to say that, as a Department, we are in a better place today than we were two-and-a-half years ago. And I suspect that is true for many DA's offices across the country as well.
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> Certain defense lawyers nevertheless continue to want to try and turn honest mistakes into instances of misconduct. This kind of gamesmanship is unfortunate. The steps we have taken go further than what the Supreme Court requires. And they go well beyond what any prior Administration has done. That's a fact. Do we need to remain vigilant? Absolutely. At the same time, together, we cannot – and I know we will not – shy away from taking hard cases, or otherwise shrink from our obligation to investigate and prosecute criminal activity without fear or favor, because of the possibility that an opportunistic defense lawyer will try and make hay out of an honest mistake.

The time frame Breuer mentions—the two years during which DOJ has supposedly cleaned up its act—maps to the Ted Stevens case. So it's pretty likely he had poor maligned Welch in mind when he made these comments (though ethics was a focus of the conference).

Fine. Breuer thinks William Welch is the shit.

Maybe then Breuer will **also** take responsibility the next time Welch puts aside all prosecutorial judgment to pursue a minor case?

CALLING OBAMA'S BLUFF ON HIS SIGNING STATEMENT

The ACLU has a fascinating letter to Obama pertaining to his signing statement threat. It basically calls his bluff on his "pretend" problems with Congressional restrictions on his ability to close Gitmo. It does this, first of all, by pointing out that the provisions were part of the National Defense Authorization Act, and therefore limit expenditures by DOD, but not expenditures by DOJ or DHS, which collectively could take on the supposedly prohibited activities.

> Contrary to the characterization of the transfer provisions by some media reports and by several members of Congress, the Guantanamo transfer provisions, sections 1032 and 1033 of H.R. 6523, are not complete bans on transfer either to the United States for prosecution in federal criminal court or to foreign countries. Instead, section 1032 (on transfers to the United States) is a funding restriction limited to funds authorized to be appropriated by this particular NDAA, and section 1033 (on transfers to foreign countries) is limited to funds authorized to be appropriated by this particular NDAA or otherwise available to the Department of Defense ("DOD"). At most, the restrictions in the transfer provisions apply only to the expenditure of DOD funds.

> Sections 1032 and 1033 do not prohibit the Department of Justice ("DOJ") from using its own funds to transfer criminal defendants from Guantanamo to federal criminal court in the United States, and do not prohibit the Department of Homeland Security ("DHS") or State from using their own funds to transfer detainees from Guantanamo for resettlement or repatriation in foreign countries.

The letter goes on to point out the many times Congress has passed legislation that banned all expenditures tied to closing Gitmo. It even notes (addressing one of my concerns) that the House passed, but not the entire Congress, a more substantial ban in one of the versions of the continuing resolution. Congress knows how to ban all expenditures on closing Gitmo, the ACLU notes, but it chose not to do so.

But if Obama interprets the law to limit all expenditures on detainee transfers, the letter continues, then it would be an unconstitutional Bill of Attainder.

> As the Supreme Court explained in Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977), the Bill of Attainder Clause in Article I of the Constitution prohibits Congress from passing "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." The three elements of a bill of attainder are "[1] specification of the affected persons, [2] punishment, and [3] lack of a judicial trial." Selective Serv. Sys. v. Minn. Public Interest Research Group, 468 U.S. 841, 847 (1984). The transfer provisions of H.R. 6523 are unconstitutional because they would meet each requirement.

Now, IANAL, so I await bmaz' take on this (because he loves to talk about Bills of Attainder). But I'm less convinced by this argument; I'm less convinced this argument would stand up in court.

I also think this part of the argument could be stronger still. Doesn't Congress, by prohibiting the President from spending any money on Gitmo transfers, consign them to the imperfect justice system there? If so, why not note that?

Moreover, if—as ACLU argues—Congress' law equates to requiring detainees to stay at Gitmo, and if—as ACLU argues—"the 'lack of a judicial trial' element would be met because … fewer than 40 of the detainees will ever be tried for any crime," then isn't the ACLU asking Obama to complain about Congress forcing him to indefinitely detain these detainees?

Mind you that argument has one technical problem: that this defense authorization only lasts for one year. So the law only requires Obama to "indefinitely" detain these men for one year.

But then there's the larger problem. Obama is on the verge of signing an Executive Order implementing an indefinite detention protocol himself. As increasingly incredible as his "pretend" efforts to close Gitmo may be, they're still far more credible than a complaint from Obama about Congress forcing him to, effectively, do what he's about to do via EO anyway.

Which is what this letter, at its best, seems to do: force Obama to admit that he's choosing to abide by this Congressional restriction because it forces him to do what he wants to do anyway.

JAMES CLAPPER HEDGES ON PROVIDING ONGOING UPDATES ON SPECIAL OPS ACTIVITIES (AND OTHER DISCONCERTING ANSWERS)

As Josh Rogin and Marc Ambinder note, James Clapper is scheduled to get a vote tomorrow in the Senate Intelligence Committee on his nomination to be Director of National Intelligence. Ambinder reports that Kit Bond is most dissatisfied with Clapper at this point, the rest of the committee really ought to join in Bond's dissatisfaction given his answers to their post-hearing questions. Take this response to Russ Feingold:

> Success in the area of counterterrorism requires that the Intelligence Community and the Department of Defense coordinate their activities, and that congressional oversight not be fragmented. One example is Section 1208 of U.S.c. Title 10, which authorizes assistance to foreign forces, irregular forces, groups, or individuals supporting U.S. counterterrorism military operations. The Senate Armed Services Committee has expressed concern that U.S. Special Operations Command may be leveraging this authority for long-term engagement with partner nations, rather than exclusively to support operations, particularly in countries other than Iraq and Afghanistan. Information about the use of Section 1208 is therefore critical if the Intelligence Committee is to conduct oversight of how the U.S. government as a whole is fighting

> terrorism around the world.
>
> • Will you ensure that this information is provided to the Committee?
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> Section 1208 of the FY 2005 National Defense Authorization Act, PL 108-375, requires the Secretary of Defense to submit an annual report "to the congressional defense committees on support provided to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism."
>
> **If confirmed as the DNI I would not view the provision of DoD clandestine military operational information to the SSCI as being within my authority or responsibility**; however, I would fully support an arrangement agreed to by the affected oversight committees for the submission of information to Congress concerning this matter. [my emphasis]

Feingold's question pertains to this issue.

> • Section 1208 (Support to Foreign Forces)
>
> Section 1208 of the FY 2005 NDAA authorized DOD to reimburse foreign forces, groups, or individuals supporting or facilitating ongoing counter-terrorism military operations by U.S. special operations forces (SOF). The FY 2009 NDAA authorized $35 million a year for this authority through FY 2013. The Obama Administration did not request a change to Section 1208.
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> The HASC bill increases the annual budgetary authority to $50 million in order to limit funding restraints during the planning of Section 1208-funded operations. The HASC was generally

> supportive of Section 1208 programs and was pleased with more effective reporting of Section 1208-related activities. The HASC voiced concern, however, that Section 1208 should not to become a "train and equip" program managed by Special Operations Command (SOCOM). **The HASC also expressed uneasiness over the use of private contractors to carry out Section 1208 activities and thus required additional reporting requirements to track such contracting**.
>
> The SASC bill does not raise the Section 1208 funding level, and the committee expressed dissatisfaction with current reporting. **SASC voiced concern that SOCOM may be using 1208 funds to leverage long-term engagement with partner nations rather than exclusively for supporting military operations by U.S. special operations forces to combat terrorism**. The SASC asked SOCOM to review their Section 1208 execution to eliminate such leveraging. [my emphasis]

In other words, the House Armed Services Committee has expressed concern that DOD is using this Special Ops provision to train allies in military operations, and **using contractors to do so**. As Feingold notes, the Senate Armed Services Committee is concerned that in the guise of supporting distinct operations, DOD is engaging in long-term operations.

To me, this reads like DOD is using this provision to engage in war in countries against which we're not at war: like Somalia and Yemen. This sounds like the authority DOD is using to engage in operations—including drug related ones—in 75 countries, as Jeremy Scahill has reported.

So Russ Feingold, presumably thinking of the way in which the Bush Administration started using Special Ops for covert actions partly to hide

them from the intelligence committees, asks the retired general nominated to head the Intelligence Community whether he would share information with the intelligence committees about the activities. And Clapper responds, I'm not legally obligated to. But, if the Armed Services Committees agree, we can do some info sharing. Nothing, incidentally, about sharing the information in as timely fashion as the CIA would have to share information on less risky covert ops. Just a yearly report, I guess.

Now perhaps Clapper's willingness to share information is all well and good and I shouldn't worry.

But then there's Clapper's answer about how to improve information sharing in the Intelligence Community. The answer: to give ODNI the same secrecy provisions that CIA and NSA have.

> In addition, if confirmed, I will also look to Congress if legislative changes are needed to facilitate information sharing. For example, information sharing and the IC's ability to analyze intelligence information would be enhanced if Congress enacts legislation to give the ODNI the same operational files exemption granted to CIA, NGA, DIA, and NSA.

As an example why this is important, the operational files exception is what CIA has used to explain why it didn't reveal the existence of the torture tapes in response to legal inquiries on records on torture. And further note, this is the single, solitary change that Clapper said he'd like to make legislatively, even while he suggested that legislative fixes weren't needed for other broken aspects of the IC.

And that extends to putting our satellite and telecom surveillance under civilian control. When Kit Bond asked Clapper why he had flip-flopped on his earlier stated desire to move NGA and NSA under civilian control, one of his

stated newfound concerns with doing so pertained to civil liberties.

> In your meeting with me last week, you said that while you once believed that the DNI should have departmental authority over military intelligence agencies like NGA, you no longer believed that would be wise. Please take me through the evolution of your thinking on this important issue.
>
> • What led you to believe it would be a good idea and what changed your mind?
>
> I don't recall saying that the DNI should have "departmental authority" over military intelligence agencies like NGA, however when the IRTPA was being debated in the Congress, Gen Hayden (then serving as Director of NSA) and I (then serving as Director of NGA) suggested that another paradigm should be considered: moving the agencies who's first letter is "N" (as in national) out of the Department of Defense, and under the operational control of a DNI, might have merit. Putatively, although not expressed that way at the time, this would mean a "Department of Intelligence." I have since come to believe that this arrangement would not be workable, since it could pose profound civil liberties challenges, and the "donor" Department (DOD) would, over time, regenerate the capabilities lost to the "Department of Intelligence," since the support rendered by these agencies is so integral to warfighting.

Now, to be fair, Clapper may well be right about DOD's interest in recreating these entities (though Congress would have to approve their budgets!). But it seems to me moving NSA and NGA might be better for civil liberties, as it would make it harder for some clown like John Yoo to claim that the military in hot pursuit could

wiretap apartment buildings as he did in one of his opinions.

But it's the last two issues might be of greatest concern.

First, as Kit Bond noted, Clapper somehow managed to overlook the timeline stipulated by transparency questions and neglected to list his 2006-7 affiliation with a number of intelligence contractors, including GEOEYE, 3001, Inc., Sierra-Nevada Corp, CSIS, US Geospatial Intelligenc Foundation, and DFI International (the last as COO). For a discussion of why this is important, see Tim Shorrock's post on it.

Then, finally, there's Clapper's answers about the Iraq NIE:

> During your confirmation hearing you noted that you agreed with the findings of the Committee's Iraq report. that you were very familiar with the flaws in the NIE. having had your "fingerprints on it" as a member of the National Intelligence Board, and that you could "attest. since [you were] there, [the failure] was not because of politicization or any political pressure. It was because of ineptness."
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> • Did you see any evidence during this period that the Intelligence Community provided intelligence assessments of Iraq to the Administration that differed, in substance, from those provided to Congress and the public?
>
> No, from my vantage as Director of (then) NIMA, I did not see any evidence that the Intelligence Community provided intelligence assessments on Iraq to the Administration that differed, in substance, from those provided to Congress and the public.
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> • Did you ever hear a member of the Administration say something publicly about the intelligence on Iraq that you

> believed at the time was not supported by the intelligence?
>
> I wondered about the certitude with which some in the administration spoke about the presence of WMD in Iraq, but I had no basis from my position as Director of NIMA to question those statements.

Of course, Congress never saw the full NIE, so by definition, the Administration got substantially different information—like some key footnotes—than most of Congress got.

Now, I'm at a bit of a loss because my books are all packed up, so I won't find this detail directly. cBut implicit in Clapper's answer is a claim that the NGA never gave the Administration information on—for example—what it was seeing in the Tora Bora area that didn't get passed onto Congress. Clapper is claiming that all the wackadoodle satellite reports of WMD that Scooter Libby made the Iraq Survey Group chase down got shared with Congress.

I don't buy it.

Then there's the view Clapper did endorse: the claim that Saddam had snuck all his WMD out of Iraq before we got to it—something that, as head of NGA, he presumably should have had information to rebut.

Frankly, it pains me to see Kit Bond taking the lead on raising questions about Clapper's nomination here while Dems help the Obama Administration rush him through before the August break.

This is a guy who appears to disagree with everything the Senate Intelligence Committee purports to believe about the DNI position. And yet even while they're not getting cooperation on making changes to the position itself, they're giving the Administration everything it's asking for about its nominee.