

CLAPPER: Well, that's -- that's -- it is certainly a potential vulnerability, there's no question about it.

DURBIN: I would say so. Thank you very much.

Thanks, Mr. Chairman.

GRAHAM: (OFF-MIKE)

SEN. TED CRUZ, R-TEXAS: Thank you, Mr. Chairman. Thank you to the witnesses for being here today.

Mr. Clapper, you -- you testified as to the harms that come from leaks -- the harms that come to our national security -- and you also testified about the importance of protecting classified information and keeping it classified.

During your many years in intelligence, and at the DNI, have you ever knowingly forwarded classified information to a non-government employee on a non-government computer who did not have authorization to receive that information?

CLAPPER: Not to my -- not to my recollection, no, sir.

CRUZ: And, Director Clapper, what would you do, at the DNI, if you discovered that an employee of yours had forwarded hundreds or even thousands of e-mails to a non-government individual, their spouse, on a non-government computer?

CLAPPER: Well, you know, I'm not a investigatory or prosecutorial element. But if I were aware of it, I would certainly make known to the appropriate officials that that was going on.

CRUZ: Would that strike you as anything ordinary?

CLAPPER: Hopefully not.

CRUZ: What -- what concerns would that raise for you?

CLAPPER: Well, it raises all kinds of potential security concerns. Again, depending on -- on the -- the content of the e-mail, what the intent was, there's a whole bunch of variables here that would have to be considered. But, you know, potentially, and again, this is a hypothetical scenario, it could be quite concerning.

CRUZ: What would you expect to happen if you made a referral of an individual who had forwarded hundreds or even thousands of classified information...

CLAPPER: Well...

CRUZ: ... to a non-government employee...

CLAPPER: ... whether (ph)...

CRUZ: ... on a non-government computer?

CLAPPER: ... whatever the transgression -- potential transgression was, if there were sufficient evidence of a compromise, we would file a crimes report. That's standard procedure that we use when there's the potential for investigating and prosecuting someone.

CRUZ: Last week, I asked similar questions to FBI Director Comey, and -- and he said an individual who did that would be subject to, quote, "significant administrative discipline," but that he was highly confident they wouldn't be prosecuted. Do you share that assessment?

CLAPPER: Well, I don't -- I -- I don't know. I think the -- the track record is that the prior administration, I think, prosecuted more people for leaking than anyone in any -- in any other administration in the past.

So it's difficult to do that. And there are many cases we could not prosecute or even seek a crimes report because the potential audience of people that could have been the perpetrator of -- of -- of these insecurities could not be identified.

CRUZ: It is true that other individuals who were not the direct employee of the Democratic nominee for president were prosecuted for that conduct. Let me -- let me shift to a different topic.

Director Clapper, you -- you also testified that you're not aware of any intercepted communications of any presidential candidates or campaigns, other than the Trump campaign that's been discussed here. Is -- is that correct?

CLAPPER: Yes. But that's to my knowledge. But, you know, prior administrations, prior campaigns -- they wouldn't have been visible to me. So I -- I can't -- I can't say...

CRUZ: But -- but in 2016, you're not aware any other campaigns or candidates?

CLAPPER: ... no.

CRUZ: And, Ms. Yates, same question to you.

YATES: I'm not aware of any interceptions of the Trump campaign.

CRUZ: And are you aware of any intercepted communications of any other candidates or campaigns?

YATES: No.

CRUZ: Okay. Because earlier, when Chairman Graham had asked you that, I -- I thought you'd declined to answer. So perhaps I misunderstood that.

YATES: And I may have misunderstood the question. I thought the question I declined to answer was a different one than that. So I'm -- I'm glad I got a chance to clear it up.

CRUZ: OK. So you have no information of any interceptions of the Bernie Sanders campaign, Hillary Clinton campaign...

YATES: No.

CRUZ: ... or any other candidate...

YATES: No.

CRUZ: ... in 2016, or campaigns? YATES: No.

CRUZ: OK. Let' revisit the topic, Ms. Yates, that -- that you and Senator Cornyn were talking about.

YATES: OK.

CRUZ: It is correct that the constitution vests the executive authority in the president?

YATES: Yes.

CRUZ: And if an attorney general disagrees with a policy decision of the president -- a policy decision that is lawful -- does the attorney general have the authority to direct the Department of Justice to defy the president's order?

YATES: I don't know whether the attorney general has the authority to do that or not. But I don't think it would be a good idea. And that's not what I did in this case.

CRUZ: Well, are you familiar with 8 USC Section 1182?

YATES: Not off the top of my head, no.

CRUZ: Well, it -- it -- it is the binding statutory authority for the executive order that you refused to implement, and that led to your termination. So it -- it certainly is a relevant and not a terribly obscure statute.

By the express text of the statute, it says, quote, "whenever the president finds that entry of any alien or of any class of aliens into the United States would be detrimental to the interest of the United States, he may by proclamation, and for such period

as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem appropriate."

Would you agree that is broad statutory authorization?

YATES: I would, and I am familiar with that. And I'm also familiar with an additional provision of the INA that says no person shall receive preference or be discriminated against an issuance of a visa because of race, nationality or place of birth, that I believe was promulgated after the statute that you just quoted.

And that's been part of the discussion with the courts, with respect to the INA, is whether this more specific statute trumps the first one that you just described.

(CROSSTALK)

YATES: But my concern was not an INA concern here. It, rather, was a constitutional concern, whether or not this -- the executive order here violated the Constitution, specifically with the establishment clause and equal protection and due process.

CRUZ: There is no doubt the arguments you laid out are arguments that we could expect litigants to bring, partisan litigants who disagree with the policy decision of the president.

I would note, on January 27th, 2017, the Department of Justice issued an official legal decision, a determination by the Office of Legal Counsel, that the executive order -- and I'll quote from the opinion -- "the proposed order is approved with respect to form and legality."

That's a determination from OLC on January 27th that it was legal. Three days later, you determined, using your own words, that although OLC had -- had opined on legality, it had not addressed whether it was, quote, "wise or just."

YATES: And I also, in that same directive, Senator, said that I was not convinced it was lawful. I also made the point that the office of -- OLC looks purely at the face of the document and, again, makes a determination as to whether there is some set of circumstances under which some portion of that E.O. would be enforceable, would be lawful.

They, importantly, do not look outside the face of the document. And in this particular instance, particularly where we were talking about a fundamental issue of religious freedom -- not the interpretation of some arcane statute, but religious freedom -- it was appropriate for us to look at the intent behind the president's actions, and the intent is laid in and out his statements.

CRUZ: A final, very -- very brief question. In the over 200 years of the Department of Justice history, are you aware of any instance in which the Department of Justice has formally approved the legality of a policy, and three days later, the attorney general has directed the department not to follow that policy, and to defy that policy?

YATES: I'm not. But I'm also not aware of a situation where the Office of Legal Counsel was advised not to tell the attorney general about it until after it was over.

CRUZ: Thank you, Ms. Yates. I -- I -- I would note, that might be the case, if there's reason to suspect partisanship.

GRAHAM: Senator Klobuchar.

KLOBUCHAR: Thank you.

I want to thank you very much for your service Ms. Yates. From beginning to end your distinguished career as a prosecutor and I just was putting this time table together and I realize that you're second meeting, when you went over to the white house to warn them of General Flynn's line, and his connections with Russia was the same day that this Refugee order came out and it was the same day that you had to leave the justice department. So you -- when did you meet with the White House council on that day?

YATES: I met with White House Council as best as I can recall about 3:00 in the afternoon on the 30th.

KLOBUCHAR: And during that meeting did they mention -- anyone mention that this refugee order was about to come out?

YATES: No.

KLOBUCHAR: Did the acting Attorney General of the United States?

YATES: No and that was one thing that was of concern to us, is that not only was department leadership not consulted here and beyond department leadership, really the subject matter experts, the national security experts, not only was the department not consulted, we weren't even told about it. I learned about this from media reports.

KLOBUCHAR: So you learned about it after the meeting at the White house Council from the media.

YATES: Right.

KLOBUCHAR: And then it's true that during your hearing, then Senator Sessions, now the Attorney General actually asked you if the views the President wants to execute are unlawful, should the Attorney General or Deputy Attorney General say no? And what did you say?

YATES: And I said yes, the Attorney General should.

KLOBUCHAR: And then moving forward here, as was mentioned by Senator Durbin, this order was (inaudible) after a lawsuit from the State of Washington and Minnesota, the court basically challenged -- the constitutionality of the order. The order is now taken effect, but what I want to get to right now is the fact that the administration then withdrew its request for an appeal of the court ruling blocking implementation of the same order and then they changed the order that you would not implement.