Democrats back Bush's new pick for attorney general

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Leading Democratic Party congressmen moved quickly Monday to signal their support for President Bush's new choice for attorney general.

Bush announced Monday morning that he had selected the former chief judge of the US District Court for the Southern District of New York, Michael Mukasey, to replace Alberto Gonzales, who announced his resignation last month.

Mukasey served as judge on the court, which includes Manhattan, for 19 years, including six years as chief judge. Appointed by Reagan, he gained a reputation as a hard-line "law-and-order" judge and compiled a long record of anti-democratic rulings.

Most significantly, in December 2002, in an early case involving Jose Padilla, Mukasey ruled that US citizens captured on US soil could be held as "enemy combatants." This decision favored the Bush administration on a central question in the "war on terror" and constituted a major attack on the democratic rights of all Americans.

In spite of his record on such issues, Mukasey is a consensus choice in Washington and has the strong backing of leading Democrats. New York Senator Charles Schumer, a senior Democratic member of the Senate Judiciary Committee, had earlier included Mukasey among a list given to Bush of recommendations for acceptable Supreme Court nominees.

Before Bush's choice was formally announced, Schumer said that he "seems to be the kind of nominee who would put rule of law first and show independence from the White House, our most important criteria." On Monday, Schumer indicated that the choice of Mukasey would ease the way for the Democrats to drop their investigations into the practices of the Justice Department under Gonzales. "To hasten an attitude of confrontation when the White House has taken a step forward would be a mistake," he said.

Leading Democrats view Mukasey as a more favorable choice than others whose names have been floated over the past several weeks. Department of Homeland Security Director Michael Chertoff was regarded as unacceptable because his nomination would raise the issue of government indifference to the suffering caused by Hurricane Katrina.

Senate Majority Leader Harry Reid had threatened to block the nomination of former solicitor general Theodore Olson, a prominent Republican operative who played a major role in the impeachment conspiracy against Bill Clinton and went on to represent the Bush campaign in its efforts to halt vote counting in Florida in 2000, arguing before the Supreme Court in the case that ended with the court's Republican majority stopping a recount and handing the White House to Bush.

On Monday, Reid said that Mukasey, who is currently a legal adviser to Republican presidential candidate Rudy Giuliani, has "strong professional credentials and a reputation for independence."

In exchange for selecting Mukasey, the Bush administration has likely received assurances that ongoing probes into the purge of US attorneys and illegal warrantless wiretapping will be put to bed. Gonzales resigned amidst threats that Democrats would demand perjury investigations to determine whether the attorney general had lied in sworn testimony.

If Mukasey is blocked, it will be because of opposition from Republicans, though this appears unlikely. Some right-wing anti-abortion Republicans have expressed concerns over a case in which Mukasey denied asylum to a man who said his wife had been forced to have an abortion in China.

Reagan nominated Mukasey to the US District Court in New York in 1987, where he remained until 2006. During his tenure, he presided over a number of terrorism cases, including the trial of Sheik Omar Abdel-Rahman, who was sentenced to life in prison in 1996 for conspiring to commit terrorist acts in the United States.

In the case of US citizen Jose Padilla, originally accused of plotting to set off a radioactive "dirty bomb" in the US, Mukasey signed the original order authorizing the government to hold Padilla as a "material witness"—a category used frequently in recent years to hold people against whom the government has insufficient evidence to prosecute. Padilla's original hearings were also before Mukasey.

In June 2002, shortly before Mukasey was to rule on the continued ability of the government to hold Padilla as a material witness, the Bush administration declared him an "enemy combatant" and transferred him to a military brig in South Carolina. In his December 2002 ruling on this move, Mukasey accepted the category of "enemy combatant" as applied to US citizens.

According to Mukasey, the president's commander-in-chief powers include "the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on United States soil." It also did not matter that the "current conflict with Al Qaeda... can have no clear end," Mukasey wrote.

In a partial defeat for the administration, Mukasey did rule that

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Padilla had to be given access to his lawyers while under military confinement and that the government had to provide evidence for its "enemy combatant" designation. This is being cited by Democrats as evidence of his independence.

The Second US Circuit Court of Appeals later ruled against Mukasey and the Bush administration on the question of Padilla's enemy combatant status. The Supreme Court never ruled on this issue, however. The Bush administration avoided the possibility of an unfavorable decision by transferring Padilla to a civilian court, before which he was tried and convicted in August of this year on charges unrelated to those for which he was originally held for more than three years in solitary confinement in a military prison.

Mukasey's contempt for democratic rights is evident in two opinion pieces he has written for the *Wall Street Journal*, both of which were cited by the White House in its "fact sheet" supporting his nomination.

In "Jose Padilla Makes Bad Law," published on August 22, Mukasey reacted to the conviction of Padilla by arguing that Congress should pass new legislation for terrorism cases.

The Padilla case, Mukasey wrote, "shows why current institutions and statutes are not well suited to even the limited task of supplementing what became, after Sept. 11, 2001, principally a military effort to combat Islamic terrorism." In other words, new statutes need to be enacted gutting civil liberties protections guaranteed in the Bill of Rights of the US Constitution.

In the opinion piece, Mukasey defended the government's handling of Padilla and never mentioned the fact that during his confinement in military custody he was tortured.

Repeating the arguments of the Bush administration to justify extreme secrecy, he wrote, "[T]errorism prosecutions in this country have unintentionally provided terrorists with a rich source of intelligence."

Mukasey argued that it was necessary to "consider the distortions that arise from applying to national security cases generally the rules that apply to ordinary criminal cases." Requirements aimed at assuring that "only the highest level of proof will result in a conviction" are inappropriate for "national security" cases, he said. These rules "do not protect a society that must gather information about, and at least incapacitate, people who have cosmic goals that they are intent on achieving by cataclysmic means."

Mukasey concluded his essay by calling on Congress to pass legislation that restricts the rights available to people caught up in "national security" cases. He cited approvingly proposals to set up a separate "national security court" and to "incapacitate dangerous people, by using legal standards akin to those developed to handle civil commitment of the mentally ill."

An earlier opinion piece is even more revealing. In an essay entitled "The Spirit of Liberty," published by the *Journal* on May 10, 2004, Mukasey strongly defended the Patriot Act, a major assault on democratic rights passed, with bipartisan support, following the attacks of September 11, 2001.

Mukasey defended the expansion of police spying powers of US intelligence agencies, including new powers for the FBI to seize business and other records. He also defended the rounding up and deportation of immigrants following the September 11 attacks, a process in which Mukasey himself was deeply involved.

An indication of Mukasey's profoundly anti-democratic conceptions can be gleaned from the essay's conclusion. "When we speak of constitutional rights, we generally speak of rights that appear not in the original Constitution itself, but rather in amendments to the Constitution—principally the first 10." These amendments—the Bill of Rights, which establish freedom of speech, protection against unreasonable search and seizure, and other basic protections against government power—are "a noble work," he wrote, but "it is the rest of the Constitution... that guarantees that the rights referred to in those 10 amendments are worth something more than the paper they are written on."

The attempt to separate the "original Constitution" from the Bill of Rights is deeply reactionary and lacking any legitimacy either from a juridical or historical standpoint. The amendments are no less part of the Constitution than the rest of the document. Indeed, ratification of the Constitution by the states was predicated on an agreement to pass a Bill of Rights that would explicitly guarantee basic freedoms of the population.

By the "rest of the Constitution," Mukasey is referring, in particular, to those aspects dealing with presidential power. The clear implication of his argument is that the expansion of the police powers of the state, at the expense of democratic rights, is necessary to guarantee the "security" of the population. On this basis, he concludes that "the government [which the Constitution] establishes is entitled, at least in the first instance, to receive from its citizens the benefit of the doubt. If we keep that in mind, then the spirit of liberty will be the spirit which, if it is not too sure that it is right, is at least sure enough to keep itself—and us—alive."

These conceptions, which are now dominant within the American political establishment, run directly contrary to the spirit of the American Constitution, which incorporated the basic idea that government power must be circumscribed and that the people must exercise "eternal vigilance" against government usurpation of their rights.

The Democratic Party has been complicit in every attack on democratic rights carried out by the Bush administration, from the Patriot Act through changes to the Foreign Intelligence Surveillance Act passed last August. In their handling of the US attorney firing scandal and revelations regarding warrantless spying programs, Democrats have sought to obscure the fundamental issues of democratic rights involved.

The Democrats' assurances that Mukasey will face no serious opposition from their side demonstrates that should the Democratic Party capture the White House in 2008, none of the police state measures implemented under Bush will be reversed.

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