

Senate hearings on Mukasey nomination

Democrats prepare to install defender of torture, illegal spying as attorney general

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20 October 2007

This week's Senate hearings on the nomination of Michael Mukasey as US attorney general made clear that the Democratic leadership is preparing to install as the country's chief law enforcement official a right-wing former judge who backs the illegal methods of the Bush administration in its so-called war on terror, including torture and domestic spying.

Bush nominated Mukasey to replace Alberto Gonzales, his former White House counsel, who resigned as attorney general in August amid a mounting crisis over the politically motivated firing of nine US attorneys and his role in pushing through a secret warrantless domestic wiretapping program.

The two days of testimony given by Mukasey before the Senate Judiciary Committee have established that whatever differences he may have in terms of style or ability, Bush's new nominee will maintain fundamental continuity with the policies of his predecessors, Gonzales and John Ashcroft.

On the eve of the hearings, the chairman of the judiciary committee, Senator Patrick Leahy (Democrat, Vermont), told reporters in Washington, "I would expect him to be confirmed." He added: "I like Judge Mukasey. I want him to succeed."

Indeed, on the first day of the nominee's testimony, the Democratic-led panel was described by the *Washington Post* as "generally friendly," while the *New York Times* reported that Democrats kept their "questions polite and the banter cordial throughout the day." Indeed the committee's chairman, Leahy, set the tone by threatening protesters from Code Pink that they would be thrown out of the hearing after they raised signs calling for the shutdown of the Guantánamo prison camp.

In the course of this first day's "cordial" encounter, Mukasey defended the right of the US president to seize US citizens and detain them without charges. He was asked by Senator Diane Feinstein (Democrat, California) about his own ruling in the case of Jose Padilla, in which he ruled that the president as commander-in-chief had the power to decree the detention of US citizens. He cited as legal justification Congress's own vote to authorize the use of military force in the wake of the September 11, 2001, terrorist attacks.

In answering Feinstein, he pointed to the Supreme Court's decision in the Hamdi case. When Feinstein pointed out that she was referring to the seizure of citizens in the United States, while Hamdi was detained in military operations in Afghanistan,

Mukasey expressed the opinion that the Hamdi decision "left open the question of where the battlefield is and who defines the battlefield."

Asked about the Guantánamo detention facility, where hundreds of people have been held without charges or trials for years, Mukasey lamented that it had given the US a "black eye" in terms of world public opinion. But he added, "I can't simply say we have to close Guantánamo, because obviously the question then arises what we do with the people who are there. And there is now no easy solution to that."

In terms of international law, there is an incontrovertible solution, which is to either charge and try those detained for crimes, or release them. Mukasey's answer made it clear that he supports a continuation of the present illegal setup.

Also in relation to Guantánamo, Senator Dick Durbin (Democrat, Illinois) recounted an earlier discussion with the nominee in which Mukasey expressed his contempt for the rights of those imprisoned there. Guantánamo, he told the senator, was used as a "fright wig" by critics of the administration, but the detention camp was humane and legal. Detainees there, he told Durbin, get "three hots and a cot, healthcare better than many Americans and taxpayer-funded Korans."

Mukasey stood by this statement, telling the panel, "I don't think people are mistreated there." Asked whether imprisoning people for years without charges did not constitute mistreatment, Mukasey replied, "What one regards conversationally as mistreatment or not, I think, is probably in the eye of the beholder." Whatever one's opinion, he insisted, doing so is legal.

Questioned by Leahy whether the president could authorize and legalize torture, Mukasey insisted that torture is illegal and "not what this country is about." He was asked about the 2002 Bybee memo, which claimed that the president as commander-in-chief had unlimited powers in time of war, including that of overriding laws, both national and international, barring torture. It also defined torture so narrowly—as equivalent to inflicting pain associated with major organ failure or death—as to permit a broad range of torture methods.

Mukasey declared the memo "worse than a sin. It was a mistake." By which he meant that the memo was legally flawed and unnecessary—certainly not a crime. He contrasted it to a subsequent torture memo that "narrowed substantially the basis for

authorizing methods beyond, perhaps different from, those that may be contained in the Army Field Manual.” Under that memo, torture was continued.

Finally, questioned on the Bush administration’s warrantless surveillance program, conducted in violation of the Foreign Intelligence Surveillance Act, Mukasey allowed that the president could not legally sanction a violation of the law, but quickly added that there exists a “gap between where FISA left off and where the Constitution permitted the president to act.” The clear implication was that as commander-in-chief, the president has the power to override or ignore the law in the name of conducting war.

Only on the second day of the hearings, however, was Mukasey subjected to any probing questions. Much was made in the media about the nominee having “struck a different tone,” as the *Washington Post* put it.

Leahy insisted that “on a number of your answers yesterday, there was a bright line on the questions of torture and the ability of the executive or inability of the executive to ignore the law. That seems nowhere near as bright a line today.”

To use Mukasey’s phrase, the brightness must be in the eye of the beholder. In point of fact, he was saying virtually the same thing on both days. The well-publicized “clash” on Thursday between Mukasey and Democrats on the committee seemed far more likely a result of Democratic concern that the excessively affable character of the previous session had exposed their own subservience to the Bush administration and its repressive policies.

On Thursday, the nominee was asked directly whether waterboarding—a technique in which prisoners are strapped to a board and subjected to simulated drowning—constituted torture. Mukasey claimed in his response, “I don’t know what’s involved in the technique.”

He added, “If waterboarding is torture, torture is unconstitutional.” This empty semantics is more or less the flip side of Bush’s claim that “we don’t torture.”

While some Democrats fulminated over Mukasey’s failure to answer, a White House spokesman defended his response, declaring that he was “not in a position to discuss interrogation techniques, which are necessarily classified.” As the *Washington Post* pointed out, waterboarding has been a known practice—banned and prosecuted as torture in US military courts—since the Spanish-American War.

Mukasey also amplified on his answer regarding FISA and the warrantless domestic spying, holding that the president does have the power to ignore a law if it impedes the exercise of his authority as commander-in-chief during wartime.

“The president doesn’t stand above the law,” he said. “But the law emphatically includes the Constitution.” The answer amounted to an implicit defense of the core legal argument made in defense of all of the criminal actions of the Bush administration, from torture, to domestic spying, extraordinary rendition and detention without charges or trials.

The nominee also supported the White House’s claim that executive privilege can be used to cover communications that do not directly involve the president, an argument used to stonewall congressional investigations and defy subpoenas, particularly in the case of the fired US attorneys. He also indicated that as

attorney general he would not seek to enforce contempt citations against members of the executive branch who refuse to testify before Congress.

Despite the verbal sparring, there was no indication that the Democrats will oppose Mukasey’s nomination. “He’s at least answered the questions, which is better than his predecessor,” said Leahy, referring to Gonzales, who deflected questions from the same committee by repeatedly claiming he could not remember. “He’s going to be different than Gonzales on all the issues. He will certainly be better than Gonzales on morale.”

Mukasey’s views are hardly a mystery. He spent 18 years as a federal court judge, including 6 as chief judge of the federal court in Manhattan. In the 1970s, he was a federal prosecutor, working with Republican presidential candidate Rudy Giuliani, with whom he remains close both personally and politically.

He has repeatedly expressed his contempt for democratic rights and his unconcealed loathing for those who have challenged the repressive policy of the Bush administration. In a *Wall Street Journal* opinion column last August, he advocated the creation of a special “national security court” system to “incapacitate dangerous people” without having to observe the niceties of constitutional rights, appeals or the principle that a defendant is innocent until proven guilty.

As a Manhattan federal judge, Mukasey presided over a number of cases involving those who were illegally rounded up and imprisoned by the FBI in the wake of September 11 based solely on the fact that they were Muslims or from Arab countries.

In one such case, a lawyer representing a Jordanian detainee brought before Mukasey in October 2001 told the judge that his client, marched into court in shackles and an orange jump suit, had been beaten by his jailers while in custody. Mukasey brushed off the protest, declaring, “As far as the claim that he was beaten, I will tell you that he looks fine to me.” So much for his feigned aversion to torture.

In moving toward Mukasey’s confirmation, the Democratic leadership in the Senate is once again exposing its complicity in the wholesale assault on democratic rights unleashed by the Bush administration over the past six years. It sees in the ex-federal judge a more competent executor of this same basic policy.



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