US attorney general rejects investigation into use of waterboarding

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9 February 2008

Two days after the Bush administration officially acknowledged for the first time its use of waterboarding on detainees held by the CIA, Attorney General Michael Mukasey rejected any criminal investigation into the use of the torture method. The statements come amidst fresh evidence that the government obstructed justice by destroying videotapes of waterboarding despite ongoing relevant court cases.

Mukasey's testimony on Thursday was part of a series of statements by administration officials that amount to an open admission of criminality. Waterboarding—which involves pouring water over a prisoner's head to produce the sensation of drowning—is internationally recognized as a form of torture and has been prosecuted by the US as torture in the past.

The Bush administration is now developing the argument that while the technique may be illegal under current US law, it was not illegal in 2002 and 2003, when it was used. According to administration officials, it was legal at the time because of the "circumstances" prevailing then, and that this legality was based on secret internal administration memos that the administration refuses to release. At the same time, the administration is leaving open the possibility that the president could legally order waterboarding in the future.

On Tuesday, CIA Director Michael Hayden confirmed the use of waterboarding on three individuals: Khalid Sheikh Mohammad, Abu Zubaydah and Abd al-Rahim al-Nashiri, all alleged members of Al Qaeda. Videotapes of the interrogation of Zubaydah and al-Nashiri were destroyed in November 2005, a fact acknowledged by Hayden last year.

Asked by House Judiciary Committee Chairman John Conyers if Mukasey would open a criminal investigation into the legality of waterboarding now that it had been confirmed, Mukasey replied, "No, I am not."

Mukasey said he could not subject individuals who had carried out waterboarding to a criminal investigation because they had acted pursuant to an opinion of the Justice Department itself. "Essentially, it would tell people, you rely on a Justice Department opinion as part of a program, then you will be subject to criminal investigation when and if the tenure of the person who wrote the opinion changes or, indeed, the political winds change."

"That would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice," Mukasey repeated.

Mukasey again refused to release the opinions developed in 2001 and 2002 by the department's Office of Legal Counsel, saying that they remained classified. He also refused to present them before Congress, even in closed session. The opinions were part of a series of memoranda prepared by administration lawyers shortly after September 11 to justify unprecedented executive powers on the pretext of the "war on terror."

The lawyers working on these memos included then-Deputy Assistant Attorney General John Yoo, Vice President Dick Cheney's legal counsel David Addington, and White House Counsel and later Attorney General Alberto Gonzales. Among the memos prepared at the time was the infamous "torture memo," which argued that the president may have a constitutional right to torture regardless of US and international law. While this memo was subsequently leaked to the public, a separate memo on waterboarding and other specific methods is still secret.

Mukasey's basic argument is that because Justice Department lawyers determined in secret that a form of torture is in fact legal, those who carried out the torture are immune from criminal investigation by the Justice Department. None of the congressmen present suggested that the Justice Department open an investigation into the decisions of its own lawyers.

Mukasey made a similar argument in response to a question from Democratic Representative Jerrold Nadler. Nadler asked if the Justice Department would appoint a special prosecutor to investigate whether the administration violated the law in ordering warrantless domestic spying in violation of the Foreign Intelligence Surveillance Act (FISA). Mukasey said he would not do this because there existed an opinion of the Justice Department finding that surveillance was legal.

The central issue is that all the memoranda drafted at the behest of the Bush administration were designed to justify a criminal policy. For all the hand-wringing of Democratic congressmen, it is quite obvious that the Bush administration will never investigate the legality of its own policy. The criminal investigation announced in January into the destruction of the videotapes was designed from the outset to be a whitewash.

From a constitutional standpoint, the response of the opposition party in such a situation would be a call for impeachment. However, even before the Democrats took control of Congress last January, this option had already been ruled out by the leading figures in the party. Democrats have also shelved the few congressional investigations launched after the revelation of the videotapes' destruction.

The position of the Democratic Party is explained by the fact that the party has been complicit from the very beginning in the policy of torture. The Bush administration is relying on this complicity as its shifts to a position of more openly and aggressively defending waterboarding.

During Mukasey's testimony on Thursday, Republicans on the committee made a point of highlighting comments by Democrats to counteract criticisms of the CIA program.

Republican Representative Daniel Lungren (Calif.) cited Democratic Senator Charles Schumer's statement, made in 2004, that it was necessary to have "balance" in the discussion on torture. "I think there are probably very few people in this room or in America who would say that torture should never, ever be used, particularly if thousands of lives are at stake," Schumer said at the time.

Schumer went on to say, "It's easy to sit back in the armchair and say that torture can never be used. But when you're in the foxhole, it's very different." The senator was a key figure in ensuring the confirmation of Mukasey as attorney general last year, despite his refusal to condemn waterboarding as torture.

The administration's argument is essentially the same as Schumer's, though the government still officially denies that what it has done can be classified as "torture." The "war on terrorism" is being used as a pretext for violating domestic and international law. On Thursday, Cheney defended the CIA program, saying that it had "foiled attacks against the Untied States, information that has saved thousands of lives."

Leading Democratic Party officials, including the current speaker of the House, Nancy Pelosi, were given a detailed briefing of the CIA's torture program in 2002. Democratic congressmen were informed in 2003 of the existence of videotapes depicting waterboarding and were told of plans by the CIA to destroy them. Nothing was done to inform the American people of this evidence, and no objections were raised to the practice of waterboarding.

The impotence of the Democratic Party and the liberal establishment was highlighted by an editorial in the *Washington Post* published on Friday. Entitled, "A President Who Tortured," the editorial begins by noting that the official admission of the use of waterboarding "puts to rest any doubt about whether President Bush authorized torture."

The *Post* reviewed the evidence demonstrating that the president had committed one of the gravest breaches of international law, and noted that administration officials left open the possibility that waterboarding would be used in the future. The *Post* then meekly called on Congress to pass legislation requiring that the CIA follow the Army Field Manual on interrogations. If Bush vetoes this legislation, the editors concluded, "It will be but another stain on his legacy."

In a related development, a federal court released documents showing that the judge in the case of Zacarias Moussaoui had requested information on the interrogation of Abu Zubaydah as late as November 29, 2005—around the time that the CIA destroyed the videotapes. The judge in the case, Leoni Brinkema of the US District Court for the Eastern District of Virginia, was never told of the videotapes, before or after they were destroyed.

A *New York Times* article published February 7 reports that one document "states that on Nov. 29, 2005, government lawyers produced documents, including 'intelligence summaries,' about Abu Zubaydah but never told the court about the existence or destruction of the tapes."

The destruction of the videotapes was an act of obstruction of justice in relation to the Moussaoui case, and there were other court cases still pending at the time. Another judge had ordered the CIA to turn over or account for all documents related to the interrogation of prisoners. The government also withheld the videotapes from the 9/11 Commission, despite requests from commission members.

Another document released this week indicates that prosecutors in the case may have been informed of the destruction of the tapes at least as early as February 2006. A letter from Chuck Rosenberg, an attorney for the Eastern District of Virginia, reported that one of the lawyers "may have been told in late February or early March 2006" of the videotapes, but that he "does not recall being told this information."

The revelations regarding the judge's requests in the Moussaoui case directly contradict statements made by Hayden last year when he first revealed that the tapes had been destroyed. Hayden said that the CIA made the move "only after it was determined [the videotapes] were no longer of intelligence value and not relevant to any internal, legislative or judicial inquiries."