



ATTORNEY GENERAL MICHAEL B. MUKASEY AFTER SIX MONTHS: *A Pawn of the Bush Administration*

Wednesday, June 3, 2008

It has become increasingly clear during the first six months of Attorney General Michael B. Mukasey's leadership at the Department of Justice that all hopes that he would stand up against the Bush administration and rebuild the Department's reputation as a beacon of the rule of law have been dashed.

During his confirmation hearing in October, Mr. Mukasey promised first and foremost to be a lawyer for the people of the United States. He swore to uphold the Constitution and to exercise independent judgment. Both Democrats and Republicans proclaimed their belief that Mr. Mukasey would turn a new page for the Department. For example, Senator Feinstein (D-CA) expressed her view that "[o]ur nation needs a strong and independent Attorney General, and I believe that Judge Mukasey will rise to the challenge." Senator Graham (R-SC) declared, "He is the right person at the right time to lead the Department of Justice." Notwithstanding these endorsements, his actions have demonstrated that, like his predecessors, Mr. Mukasey is most interested in defending the Bush administration's lawless actions, not in exercising independent judgment.

Under Mr. Mukasey's leadership, the Department of Justice has moved further backwards with regard to some of the most important and fundamental legal issues of our day, including the scope of executive power, allegations of politicization at the Department, and the proper interpretation of landmark federal statutes designed to protect ordinary Americans. He promised a new day for the Department of Justice, but has only repackaged the *status quo* established by his predecessors.

His tenure has made one thing clear: the American people, in choosing their next president, must evaluate whether he or she will appoint someone to head the Department of Justice who is truly dedicated to the rule of law and independence from the White House, rather than an advocate for the White House.

BROAD EXECUTIVE POWER WITH NO ACCOUNTABILITY

Attorney General Mukasey continues to take an extremely broad view of presidential power and to insist that presidential power is essentially unreviewable – often employing the smokescreen of "national security." These positions are fundamentally at odds with the system of checks and balances envisioned by the Framers of our system of constitutional government:

- **Protection of “high-level officials” engaged in discrimination.** In February, the Department of Justice filed a petition for certiorari with the United States Supreme Court seeking review of a Second Circuit decision that rejects immunity for government officials, such as former Attorney General John Ashcroft and FBI Director Robert Mueller, in a case brought by post-9/11 detainees alleging widespread discrimination based on race, religion and national origin. The Second Circuit opinion specifically finds that the assertion of “national security” is insufficient: “[M]ost of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.” The Department is urging the Court to review the case because it asserts that the decisions of “high-level officials” must not be clouded by fears of liability for engaging in actions like race discrimination.
- **Endorsement of torture.** The Department, responding to an inquiry from Senator Ron Wyden (D-OR) about the protections of Common Article 3 of the Geneva Convention and the Detainee Treatment Act (DTA) of 2005, continued to seek room to engage in harsh interrogations techniques. In a letter dated March 6, 2008, the Department’s Office of Legislative Affairs takes the position that the meaning of “cruel, inhuman and degrading treatment” under the DTA, and the meaning of Article 3’s prohibition on “outrages upon personal dignity,” could both vary depending on “the circumstances surrounding the action,” including the purpose in engaging in the treatment in question. The letter specifically states that treatment might be measured as less outrageous if its purpose were to “prevent a threatened terrorist attack.” Thus, once again, the Department is writing a public document that endorses the use of otherwise prohibited acts in the name of preventing terrorism.
- **Support for sweeping executive privilege.** In late February, Mr. Mukasey refused to prosecute congressional contempt citations against former White House staffers Harriet Miers and Joshua Bolten issued because they refused to appear before, testify or provide documents to the House of Representatives Committee on the Judiciary. The letter’s extremely broad view of executive privilege, under which the privilege can only be tested through the cumbersome and uncertain process of a civil action by Congress, is justified entirely by reference to a 1984 Office of Legal Counsel opinion prepared by Ted Olsen, the lawyer who represented President Bush in *Bush v. Gore*. Mukasey’s letter seeks to transform an assertion of executive privilege into an absolute prerogative of the president that can never be reviewed by anyone. The result of this obstructionism is a lawsuit by the House against Ms. Miers and Mr. Bolten, which is scheduled for its first court hearing on June 23, 2008, in the United States District Court for the District of Columbia.

- ***Baseless claims in support of illegal wiretapping.*** Mr. Mukasey has used misleading statements to support the Bush administration’s exemption from the requirement of a court-issued warrant for wiretapping telephone calls in which one participant is in the United States. In late March, Mr. Mukasey said in a speech that a call had been made from “a safe house in Afghanistan” to the United States, and suggested that, had United States intelligence officials been able to intercept this call, they might have averted the 9/11 attacks. In fact, there is no information supporting the existence of such a phone call.
- ***Defense of outrageous legal reasoning.*** In delivering a May 23 commencement speech at Boston College Law School, Mr. Mukasey sought to give cover to officials like John Yoo, who wrote the infamous Department memoranda authorizing the use of torture. Mr. Mukasey criticized those who have claimed that such officials should be held accountable for their promotion of torture, stating: “In some corners, one even hears suggestions—suggestions that are made in a manner that is almost breathtakingly casual—that some of these lawyers should be subject to civil or criminal liability for the advice they gave. The rhetoric of these discussions is hostile and unforgiving.” Meanwhile, Mr. Mukasey continues his deafening silence on the subject of what constitutes torture, and whether torture includes waterboarding or indeed any other specific technique, no matter how barbaric.

THE RULE OF LAW CONTINUES TO SUFFER

Mr. Mukasey persists in allowing the rule of law at the Department of Justice to deteriorate during his tenure:

- Mr. Mukasey has made no assessment of numerous allegations related to politically-motivated selective prosecutions of prominent Democrats by the department, including the prosecutions of former Alabama Governor Don Siegelman and of Georgia Thompson, a Wisconsin state procurement official.
- In late March, Mr. Mukasey touted the Department’s prosecutions of two Republican congressmen, stressing how damaging public corruption was to public confidence in government. A week earlier, the Department disbanded the public corruption unit at the United States Attorney’s office in Los Angeles.
- Mr. Mukasey continues to retain Steven Bradbury as the acting head of the OLC in violation of the Vacancies Reform Act. Under this federal statute (5 U.S.C. § 3346), no person may serve in an “acting” capacity for more than a total of 630 days in an office requiring presidential appointment and Senate confirmation. Mr. Bradbury has held this position for nearly three years.

- The report of Inspector General Glenn Fine on his investigation into the firing of United States attorneys under Albert Gonzales, as well as into other allegations of politicization at the Department, has still not been published. This report is being undertaken together with the Office of Professional Responsibility, which is directly under the attorney general's control. Mr. Mukasey has failed to explain the status of this report to the public.

CONCLUSION

Though the damage this White House has done to the Department of Justice is vast, it is not irreparable. As we begin to prepare for a new administration, Americans must urge the confirmation of a new attorney general who can restore the Department's integrity and reputation. We must demand an attorney general who – unlike Mr. Mukasey - does not just pay lip-service to the rule of law, but will act to defend the Constitution.