



Analysis of Attorney General Nominee Michael Mukasey's Written Responses

ON RESTORING THE REPUTATION OF THE JUSTICE DEPARTMENT:

Despite the Bush administration's ongoing obstruction of congressional inquiries into abuses of power within the Justice Department, Judge Mukasey continues to place unfettered trust in the Department's decision whether or not to prosecute individuals for contempt of Congress. He even asserts that no independent prosecutor is required to examine Justice Department malfeasance, preferring instead to have the Department act as judge and jury on its own failures.

Question: If the Inspector General uncovers potential criminal conduct by Mr. Gonzales or any other Department personnel, will you promise to appoint a nonpartisan special prosecutor to handle any such finding of improper conduct?

Answer: "I believe that the members of the Department have the integrity and ability to discharge whatever responsibilities they may have in this matter."

Question: This summer the Justice Department announced that, even if Congress issued a contempt of Congress citation in response to an official's failure to appear pursuant to a validly issued subpoena, it would block prosecution of any contempt of Congress charge against presidential aides (current or former) covered by Executive Privilege....Will you pledge to allow any U.S. Attorney to use his or her prosecutorial discretion in such instances to determine whether there is probable cause to charge the contempt citation?

Answer: "[I]t is the long-standing Department of Justice position that the criminal contempt of Congress statute does not apply to an executive branch official who declines to comply with a congressional subpoena based on the President's assertion of executive privilege."

Question: [D]oesn't this make any claim of Executive Privilege absolute?

Answer: "As noted, the Department has long taken the view that no crime is committed when an executive branch official declines to comply with a congressional subpoena based on the President's assertion of executive privilege....Disputes between Congress and the President, however, have historically have [sic] been resolved by an accommodation process, rather than by a contempt of Congress prosecution."

ON WARRANTLESS WIRETAPPING:

Judge Mukasey continues to assert that in unspecified situations, the president has independent constitutional authority to direct individuals to violate federal law. In particular, while he concedes that the Foreign Intelligence Surveillance Act (FISA) is constitutional, he continues to insist that the president has the authority to spy on American citizens on American soil without warrants—an act which is specifically prohibited by FISA.

Question: In your view, is the Foreign Intelligence Surveillance Act (FISA) an unconstitutional infringement on the power of the President?

Answer: "As I testified, FISA has been and continues to serve as the foundation for conducting foreign intelligence surveillance of persons in the United States. That said, it is well established that the President has the constitutional authority to conduct foreign intelligence surveillance....I believe it is a well-established principle of constitutional law that each branch of government has authorities that another branch cannot take away."

Question: In your view, did the Authorization for Use of Military Force (AUMF) authorize warrantless surveillance beyond what is permitted under FISA?

Answer: "I still have not come to a conclusion. As I testified, I believe there are good arguments on both sides of that issue."

ON TORTURE:

Judge Mukasey refuses to define torture in any specific way that would constrict the president's power to order cruel and coercive interrogation techniques. Specifically, although he took nearly two weeks to respond to written questions and knew that waterboarding was of great concern to the Senate Judiciary Committee, Mukasey continues to claim that does not know enough about the technique to condemn it as impermissible torture.

Question: Does the waterboarding of detainees held by military or non-military agents of the United States violate the McCain Amendment or Common Article 3 of the Geneva Conventions?

Answer: "As described at the hearing, these techniques seem over the line or, on a personal basis, repugnant to me, and would probably seem the same to many Americans. But hypotheticals are different from real life, and in any legal opinion the actual facts and circumstances are critical."

Question: The Army Field Manual asks soldiers evaluating whether or not to use a specific interrogation technique, "If the proposed approach technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?" Do you believe that the techniques set out above [simulated drowning, dogs, forced nudity, stress position, stress positions, beatings, and induced hypothermia] would be abuse if applied to captured American soldiers?

Answer: "[A]s a general matter, different legal standards would apply to protect American soldiers than would be available to members of al Qaeda."

ON EXECUTIVE POWER:

Although Judge Mukasey pledge to stand up to the Bush administration in his hearing, his written responses show a willingness to give President Bush a blank check on all matters relating to national security.

Question: In a May 2004 op-ed in the *Wall Street Journal*, you wrote that "the hidden message in the structure of the Constitution...is that the government it establishes is entitled, at least in the first instance, to receive from its citizens the benefit of the doubt."...Do you believe that this Administration deserves the trust of the American people after taking us to war in Iraq on false pretenses, denying that it engaged in torture when we know that it did, and listening to the conversations of Americans without warrants?

Answer: "Yes, I believe that the Administration deserves the trust of the American people."

Question: Do you believe that this Department of Justice deserves the trust of the American people, when we know that political considerations have infected its hiring and its law enforcement decisions and that it has given severely flawed legal advice?

Answer: "Yes, I believe that the Department of Justice deserves the trust of the American people."