



PRELIMINARY REPORT ON THE NOMINATION OF MICHAEL B. MUKASEY TO BE ATTORNEY GENERAL OF THE UNITED STATES

On September 17, 2007, President Bush nominated Michael B. Mukasey, former Chief Judge of the United States District Court for the Southern District of New York, to be attorney general of the United States. Judge Mukasey has been named as the nation's chief law enforcement officer and a preeminent arbiter of the rule of law both here and abroad. He will head a Department that has been plagued by politicization by the White House and whose integrity desperately needs to be restored.

The Department of Justice – and the nation – need an attorney general who will adhere to and advance the rule of law; appropriately balance national security concerns with individual rights and liberties; promote the nomination of fair and independent judges; put the interests of Americans ahead of the interests of the president; and cooperate with the United States Congress.

The Department also needs to be rebuilt and insulated from improper White House political influence. Under Attorney General Gonzales, public confidence in the Department has been shaken by improper politicization and disregard for domestic and international law:

- ◆ United States attorneys have been fired *en masse* by a process, evidently tainted by politics, that neither the White House nor the Department will adequately explain. Attorney General Gonzales stonewalled Congressional oversight of the Department's actions in these firings, and serious questions exist about whether he lied to Congress. The White House continues to withhold documents and information from Congress crucial to its oversight role. Indeed, just last week further evidence was disclosed that the prior attorney general misled and deceived Congress about the administration's and the Department's position on the legality of torture.¹
- ◆ Despite repeated rebukes by Congress and the Supreme Court, the Department continues to defend the legality of abusive interrogation techniques. Though international treaties and federal statutes prohibit such methods of interrogation, the Department issued secret legal memoranda that endorsed painful physical and psychological tactics. These secret legal opinions were distributed while the Department and the White House continued to publicly denounce torture as "abhorrent."²

¹ Scott Shane, David Johnston, and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, available at <http://www.nytimes.com/2007/10/04/washington/04interrogate.html?>

² *Id.*

- ◆ The Department has inappropriately revised its long-standing election fraud guidebook to permit the Department to take action before or during elections which poses grave risks of elections being influenced by political appointees. The new guidebook encourages political interference in election outcomes.
- ◆ An ailing former attorney general was pressured by the White House to endorse a domestic surveillance program. Several of the Departments' highest-ranking officers have resigned in the wake of these and other events that have shaken confidence in the Department. This type of improper behavior by the White House must be resisted and disclosed to Congress.
- ◆ The White House has indicated that it will block the United States Attorney for the District of Columbia from enforcing contempt of Congress prosecutions in cases involving executive privilege.
- ◆ The Department's Honors Program – which is supposed to bring outstanding young lawyers into the Department – was under the unprecedented control of political appointees during the Bush administration, and has resulted in a Department disproportionately staffed by movement conservatives.

It is the responsibility of the Senate to ensure that Judge Mukasey is the right person to face these challenges. Unfortunately, President Bush, when nominating Judge Mukasey, did not acknowledge the politicization of and disarray in the Department, nor did he address Judge Mukasey's qualifications as the best person to work to repair the damage. This is not surprising, for the source of that politicization and disarray is the White House itself. It therefore is imperative that the Senate be vigilant in making its own assessment of whether Judge Mukasey is qualified for the special and difficult role he faces in restoring the Department's reputation in the face of continuing political pressure from the White House. In order to make this assessment, the Senate must know:

- What went wrong at the Justice Department?
- What steps must be taken to undo the damage that has been done?
- Will Judge Mukasey commit to undertaking those steps?
- Will Judge Mukasey cooperate with, rather than resist, Congressional oversight over his management of the Department?

Judge Mukasey can provide some of this information, but much of it must come from the White House. All evidence regarding the firing of United States attorneys must be provided to Congress. The veracity of Gonzales's testimony to Congress must be tested against that evidence. Without the details of how the Department has become so politicized and has fallen into such disarray, the ability of the Congress to engage in meaningful oversight will be drastically diminished.

The Senate should be mindful that other attorneys general have faced monumental challenges. In these circumstances, the Senate should evaluate Judge Mukasey against the model provided by Attorney General Edward Levi and his deputy attorney general, the

Honorable Harold R. Tyler, Jr., with whom Judge Mukasey later worked at the law firm Patterson Belknap Webb & Tyler. Edward Levi had the support of President Ford in his effort to restore the integrity of the Justice Department in the wake of the Nixon administration. Indeed, he was appointed by President Ford to rectify what President Ford described as politicization of “crisis proportions” in the Justice Department following the Nixon administration, which had forgotten that “the rule of law requires respect for the law, especially by those who enforce it.” President Ford decided that this task required “someone of towering intellect and spotless integrity.” Additionally, Ford specifically nominated Judge Tyler as Levi’s deputy to emphasize that the new Department would be committed to neutrality and professionalism – characteristics commonly associated with the judicial branch.

Judge Mukasey faces a different and possibly more challenging task than did Levi and his deputy: he must undo the politicization of, and the damage done to, the Justice Department, but with no certainty that the efforts of the White House to politicize the Department are at an end and without any guarantee that the White House will support him in undoing the damage it itself has done. Only full disclosure by the Bush administration of evidence regarding its political manipulation of the Justice Department will enable senators to decide whether Judge Mukasey is the right person to take on these tasks.

Judge Mukasey’s record as a federal district judge and his writings provide the expectation that he may be able to restore some measure of integrity to the Department. However, without full disclosure of information about what has gone wrong in the past, the Senate cannot evaluate his qualifications and commitment to make needed changes and to resist improper political influence. Judge Mukasey’s record shows that he has not followed in lockstep with the Bush administration, even on matters touching on national security and terrorism. His judicial record reveals him to be very conservative, but generally fair-minded, although in some of his judicial opinions he has shown a dismissive approach in civil rights matters that he should be asked to explain, and his published writings on the balance between national security and individual rights suggest that he may support curtailment of individual rights.

Judge Mukasey’s confirmation hearing provides a unique opportunity for the Senate and the public to inquire into his views on important topics such as the legality of interrogation techniques and warrantless wiretapping, the applicability of international law to the war on terror, and the proper relationship between the White House and the Department of Justice. Judge Mukasey should be asked to expound on these issues and others and describe what his priorities for the Department would be going forward, should he be confirmed. Ultimately, the Senate must exercise its constitutional duty of advice and consent by thoroughly examining Judge Mukasey’s record and ascertaining whether he is committed to advancing the rule of law, rather than the political agenda of the Bush administration.

BRIEF BIOGRAPHY OF JUDGE MUKASEY

A. Career

Michael B. Mukasey was born in New York City in 1941. He earned his B.A. from Columbia University in 1963 and graduated from Yale Law School in 1967. Judge Mukasey served as Assistant U.S. Attorney for the Southern District of New York for 1972 to 1976, where he became the head of the Official Corruption Unit. In 1976, he joined the firm of Patterson, Belknap, Webb & Tyler, L.L.P., where he practiced until he was nominated to be a district judge in the Southern District of New York by Ronald Reagan in 1987. While an attorney in private practice, Judge Mukasey represented many high profile clients, including Roy Cohn, Joseph McCarthy's counsel during his hunt for Communists. Judge Mukasey defended Cohn at his disbarment proceeding. Judge Mukasey sat on the federal bench for eighteen years—from 2000 to 2006 as Chief Judge. He resigned in September of 2006 and rejoined Patterson Belknap, where according to the firm's website he now practices in the areas of white collar criminal defense and investigations, media and entertainment, and subprime mortgages.

B. Political Activities

Judge Mukasey, in the words of one New York state assemblyman, is “extremely close—extremely, extremely close” to Rudy Giuliani.³ Judge Mukasey endorsed Rudy Giuliani for president in 2008, and he and his family have already donated thousands of dollars to the Giuliani campaign.⁴ The two men first became friends in the 1970s when both worked at the Manhattan U.S. Attorney's office, and this relationship has strengthened over time.⁵ In 1994, for example, Giuliani chose Judge Mukasey, then a federal judge, to swear him in as New York City's Mayor.⁶ Currently, Judge Mukasey's son, Marc, works at Bracewell & Giuliani, a law firm, and both father and son advised Giuliani's presidential campaign by serving as members of the campaign's Justice Advisory Committee, which is chaired by former Solicitor General Ted Olson.⁷ Judge Mukasey, however, resigned from the committee upon being nominated for attorney general.⁸

Considering the closeness between the two men, which on several occasions prompted Judge Mukasey to recuse himself from cases involving Giuliani's Mayoral administration, it is worth noting that, if confirmed, Judge Mukasey will lead the Justice Department while New York prosecutors continue their investigation of Bernard Kerik, Giuliani's former police commissioner and business partner. From a political standpoint,

³ Alec MacGillis, *Giuliani- Mukasey Ties Go Back Decades*, WASH. POST, Sept. 18, 2007, at A8.

⁴ Michael Cooper, *An Old Friend Joins Giuliani in Spotlight*, N.Y. TIMES, Sept. 19, 2007.

⁵ MacGillis, *supra* note 1.

⁶ *Id.*

⁷ Cooper, *supra* note 2; Phillip Klein, *Ted Olson Supporting Giuliani*, AM. SPECTATOR, Feb. 13, 2007, available at www.spectator.org/blogger.asp?BlogID=5549.

⁸ Associated Press, *Bush Picks Ex-Judge For Attorney General*, BOSTON GLOBE, Sept. 17, 2007.

any indictment brought against Kerik would reflect negatively on Giuliani.⁹ In addition, as a Republican contender for the party's presidential nomination, and as a potential candidate for President, the Justice Department may be called upon to become involved in legal disputes arising in the course of the primary or general election. Judge Mukasey has pledged to recuse himself from matters involving Giuliani, and the Senate should confirm those assurances.¹⁰

RECORD ON THE ISSUES

Judge Mukasey has written over 1600 judicial opinions on a wide range of cases, in addition to his public writings. Of these, we believe the following types of cases are of greatest relevance to the Senate because they are in areas in which the Bush administration has sought to politicize the Justice Department. Accordingly, Judge Mukasey's judicial opinions and writings in these areas -- and his willingness to remain an independent guardian of the rule of law as attorney general in these areas -- are most important for the Senate to consider in reviewing his nomination.

A. National Security and Individual Rights

Judge Mukasey has presided over multiple terrorism cases, including highly publicized prosecutions connected to the 1993 World Trade Center bombing and the case against Jose Padilla in 2002. He has been praised for his handling of many of these cases by observers across the political spectrum for striking an appropriate balance between the protection of civil liberties and national security. However, he has indicated support, both in his rulings and in his writings, for broad deference to the government, especially with regard to surveillance and administrative detention. In particular, he believes that the protections accorded defendants in the ordinary criminal process may not be appropriate in terrorism cases.¹¹

In a 2002 decision, Judge Mukasey ruled that the government may forcibly detain witnesses to gather evidence before grand juries in its nationwide terrorism investigation.¹² According to the *Associated Press*, "Civil liberties advocates contended the material witness cases amounted to an unconstitutional roundup, and an inspector general's report later found that many of the witnesses were subjected to physical and verbal abuse while held in a Brooklyn jail." It is still not known how many people were detained through the use of material witness warrants or how many of those detentions were overseen by Judge Mukasey. However, of the at least 70 men whose detentions have been confirmed, almost half were never brought before a court or grand jury to testify. Defending his rulings in these cases in response to criticism, Judge Mukasey attempted to minimize the secrecy of the process. "Although the court proceedings were

⁹ Cooper, *supra* note 2.

¹⁰ In addition to his contributions to the Giuliani campaign, Judge Mukasey gave a \$1000 donation to Joe Lieberman's 2006 Senate reelection campaign. The Center of Responsive Politics, *available at* [http://www.opensecrets.org/indivs/search.asp?key=35XA4&txtName=mukasey.%20michael&txtState=\(all%20states\)&txtAll=Y&Order=N](http://www.opensecrets.org/indivs/search.asp?key=35XA4&txtName=mukasey.%20michael&txtState=(all%20states)&txtAll=Y&Order=N).

¹¹ Michael Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15.

¹² *In re Application of the U.S. for a Material Witness Warrant*, 213 F. Supp. 2d 287 (S.D.N.Y. 2002).

sealed because they related to grand jury matters, the lawyers for the witnesses were free to talk about the cases or not, as they chose,” Judge Mukasey told Brooklyn Law School graduates in 2002. “Some chose to speak publicly, and others didn’t. That is the unremarkable truth behind the breathless half-truths and outright falsehoods you may have heard.”¹³ Lawyers for the witnesses, however, insist that they are prohibited from discussing the sealed proceedings.¹⁴

*United States v. Rahman.*¹⁵ Judge Mukasey presided over the trials of “blind sheik” Omar Abdel Rahman and others who plotted to attack New York City landmarks and who helped to plan the 1993 World Trade Center bombing. Judge Mukasey sentenced Rahman and another man, El Sayyid Nosair, to life in prison. His role in the case exposed Judge Mukasey to death threats, which for 12 years (until 2005) required him to travel with armed guards.¹⁶ In affirming Judge Mukasey’s decision, the Second Circuit praised Judge Mukasey’s work, writing, “The trial judge, the Honorable Michael B. Mukasey, presided with extraordinary skill and patience, assuring fairness to the prosecution and to each defendant and helpfulness to the jury. His was an outstanding achievement in the face of challenges far beyond those normally endured by a trial judge.”¹⁷

*Padilla v. Bush.*¹⁸ In a mixed decision in 2002, Judge Mukasey ruled that the President had authority to hold Padilla as an “unlawful combatant,” regardless of the fact that Padilla was a United States citizen and had been captured on United States soil, a conclusion reversed by the Second Circuit on appeal. He also ruled that the military could “monitor” Padilla’s contacts with his lawyers. However, Judge Mukasey ruled that Padilla had a right to contest the evidence against him and consult with a lawyer in pressing his case, contrary to the arguments of the Bush administration. On at least one occasion, Judge Mukasey chastised the White House and Deputy Solicitor General Paul Clement for stalling compliance with court orders in the case.

*United States v. Lindauer.*¹⁹ The United States government sought a motion to compel Lindauer, an accused spy, to take psychotropic drugs that government physicians wanted to administer in hopes of rendering her fit to stand trial. Lindauer, who suffered from grandiose and paranoid delusions, was charged in four counts with conspiring to act and acting as an unregistered agent of the government of Iraq. Judge Mukasey denied the government’s motion, reasoning that the government failed to meet its burden under the four-part test for determining whether a defendant may be forced to take antipsychotic

¹³ Josh Gerstein, *Mukasey May Draw Scrutiny for Role in Secret Detentions*, N.Y. SUN, Sept. 17, 2007.

¹⁴ *Id.*

¹⁵ *United States v. Rahman*, 1996 U.S. Dist. LEXIS 4968 (S.D.N.Y. 1996).

¹⁶ White House Office of the Press Secretary, *Fact Sheet: Michael Mukasey: A Strong Attorney General*, Sept. 17, 2007, available at <http://www.whitehouse.gov/news/releases/2007/09/20070917.html>; Mukasey, *Some Questions about (His) Security*, WASHINGTON POST, October 16, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/15/AR2007101501326.html>.

¹⁷ *United States v. Rahman*, 189 F.3d 88, 188-89 (2d Cir. 1999).

¹⁸ *Padilla v. Bush*, 2002 U.S. Dist. LEXIS 23086 (2002).

¹⁹ *United States v. Lindauer*, 448 F. Supp. 2d 558 (2006).

medication. Judge Mukasey rejected the government's arguments that forced medication and prosecution of Ms. Lindauer was necessary to preserve national security.

Much of Judge Mukasey's public writing has related to the perceived tension between protecting individual rights and liberties and guarding against the threat of terrorism. In May 2004, Judge Mukasey authored an op-ed in the *Wall Street Journal* stating, "Like any other act of Congress, the Patriot Act should be scrutinized, criticized, and, if necessary, amended."²⁰ However, he argued that Americans should trust and defer to the government, writing, "in order to scrutinize and criticize it, it helps to read what is actually in it. It helps not to conduct the debate in terms that suggest it gives the government the power to investigate us based on what we read, or that people who work for the government actually have the inclination to do such a thing, not to mention the spare time." Judge Mukasey argued that the Patriot Act consists of common-sense expansions of investigatory and intelligence powers, and that what is alarming is that these measures were not enacted sooner. Mukasey also dismissed fears of the government's ability to subpoena tangible things like business records, implying that citizens are protected by the FISA court's discretion in issuing such subpoenas, and no such subpoenas had yet been issued anyway. Judge Mukasey ultimately concludes that, "the hidden message in the structure of the Constitution is that the government it establishes is entitled ... to receive from its citizens the benefit of the doubt."

In line with this emphasis on deference to government power, Judge Mukasey has also made the troubling observation that perhaps the Bill of Rights was not included in the original Constitution because "if you give equal prominence to the provisions creating the government and the provisions guaranteeing rights against the government . . . then citizens will feel that much less inclined to sacrifice in behalf of their government, and that much more inclined simply to go where their rights and their interests take them." It is not clear what he has in mind by "sacrifice in behalf of government," nor what he believes are the harms that will result if people "go where their rights take them."

On the related topic of the prosecution of terrorism suspects, Judge Mukasey has also suggested that civil liberties should give way to the needs of the government. August 2007, Judge Mukasey authored an op-ed in the *Wall Street Journal* entitled "Jose Padilla Makes Bad Law."²¹ In it, he argued that the federal courts are not equipped to handle terrorism prosecutions. He instead advocated the creation of a separate national security court with fewer procedural protections than the criminal justice system, a move that has been forcefully criticized by academics on both sides of the political aisle. Judge Mukasey argued that the standards of proof required for criminal prosecutions are inappropriate for terrorism prosecutions. According to Mukasey, keeping these two types of cases in the same system could create two problems: requiring a standard of proof too high to adequately deal with terrorism cases and potentially lowering the standards for conviction, searches, and admissibility of evidence in ordinary criminal cases. He also gave examples of how these criminal prosecutions risk disclosing U.S. intelligence

²⁰ Michael Mukasey, Op-Ed., *The Spirit of Liberty: Before Attacking the Patriot Act, Try Reading It*, WALL ST. J., May 10, 2004.

²¹ Michael Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15.

information that can then be used by terrorists. Judge Mukasey expressed doubt as to whether non-citizens in U.S. custody should enjoy the protection of the U.S. Constitution, “regardless of the place or circumstances of their apprehension,” and calls upon Congress to consider how to fix “a strained and mismatched legal system,” possibly by creating a separate national security court to deal with national security issues or using different legal standards to incapacitate dangerous people.

While participating in a panel discussion at a symposium in 2000, Judge Mukasey expressed mild support of FISA (the Foreign Intelligence Surveillance Act) when discussing the court’s role in maintaining secrecy and confidentiality of sensitive information during trials. Though he acknowledged the difficult position judges are put in under FISA (“The judge is forced not only to act as an arm of the prosecution in weighing the prosecution’s arguments about whether disclosure [of the government’s application to obtain information] would or would not compromise national security, but also to act as a defense lawyer in determining whether the information is useful to the defendant [in challenging the evidence]”), he concluded that since the alternative “is either to have no surveillance at all or to have totally uncontrolled surveillance ... the existing system is a compromise that Congress was forced to make.” Despite the “difficult” balancing the court must do, Judge Mukasey noted that, “I did not ... find [letting defendants see the application in *United States v. Rahman*] necessary and I am unaware of any other court that has.”²²

B. Civil Rights

While sitting as a judge in the Southern District of New York, Judge Mukasey was overturned by the Second Circuit in several significant cases after having ruled against plaintiffs who claimed that they were discriminated against based on their sex, race, or religion. Taken together, these cases disclose a strong reluctance to rule against law enforcement officials on civil rights claims, as well as a broader reluctance to attribute discriminatory motives to government officials. Indeed, these rulings are in keeping with Judge Mukasey’s view that the government “is entitled, at least in the first instance, to receive from its citizens the benefit of the doubt.”²³

Sorlucco v. New York City Police Dep’t.²⁴ In 1983, police officer Karen Sorlucco was raped in her own apartment by a male police officer. The police department placed her on modified assignment and then fired her. The officer accused of rape was not questioned until months after the attack. He was never charged and eventually retired from the force with his full pension. Sorlucco filed a complaint accusing the department of sex discrimination under §1983 and under Title VII. A jury ruled for the plaintiff and awarded her damages. Judge Mukasey, however, set aside the jury’s verdict, entered judgment for the police department, and granted the department’s motion for a new trial.

²² Michael Mukasey, *Symposium: Panel I: Secrecy and the Criminal Justice System*, 9 J.L. & POL’Y 9 (2000).

²³ Michael Mukasey, Op-Ed., *The Spirit of Liberty: Before Attacking the Patriot Act, Try Reading It*, WALL ST. J., May 10, 2004.

²⁴ *Sorlucco v. New York City Police Dep’t*, 971 F.2d 864 (2d Cir. 1992).

He reasoned that the jury verdict needed to be set aside because “no rational jury” could have found for the Plaintiff in this case. On appeal, the Second Circuit reversed and remanded the case with instructions to reinstate the jury’s verdict. Additionally, the court found that Judge Mukasey abused his discretion in granting the NYPD a new trial. In an earlier related case (*Sorlucco v. New York City Police Dep’t*)²⁵, which involved the same parties and underlying facts, Judge Mukasey also ruled for defendants. He granted the NYPD’s motion for summary judgment and dismissed Sorlucco’s suit. The Second Circuit reversed Judge Mukasey’s dismissal of the other claims brought by Plaintiff and remanded the case for trial.

Jordan v. Lefevre.²⁶ Flanders Jordan, a black defendant, appealed the decision entered against him by Judge Mukasey. His principal claim was that he was denied equal protection of the law during his trial by the prosecutor’s use of preemptory challenges of potential black jurors, a violation of the rule established in *Batson v. Kentucky*.²⁷ The Second Circuit reversed, saying that Judge Mukasey “made no effort to comply with the letter, much less the spirit, of *Batson*,” and the higher court directed Judge Mukasey to either hold a hearing to reconstruct the prosecutor’s state of mind at the time of jury selection, or, if that proved impossible due to the passage of nine years, grant Flanders a new trial. The court emphasized that Judge Mukasey acted inappropriately when he rushed the *Batson* inquiry in an effort to save, in Judge Mukasey’s own words, “an awful lot of time.”

Rosen v. Thornburgh.²⁸ Rosen, a Jewish Drug Enforcement Administration (DEA) recruit, alleged that he was unlawfully dismissed from his position as a Special Agent trainee of the DEA in violation of Title VII. The DEA sought summary judgment. Judge Mukasey granted the motion on the grounds that Rosen had failed to establish a *prima facie* case of discrimination and, alternatively, that Rosen failed to rebut the DEA’s stated reason for dismissing him (they claimed he was fired for failing the driving portion of his training). In resisting summary judgment, Rosen submitted an affidavit describing numerous anti-semitic comments by DEA staff: for example, one DEA counselor told him she did not like the name “Rosen” and would call him “Franklin” instead; a class instructor giving a lecture on cultural diversity stated that Jews only care about their money, and another instructor referred to New York as “Rosenland.” Judge Mukasey found that Rosen’s failure to pass his driving course provided a reasonable basis for his dismissal, and that Rosen had failed to establish that the person who dismissed Rosen knew that he was Jewish. Rosen appealed, and the Second Circuit reversed Judge Mukasey’s ruling, reinstated the Title VII claim, and remanded the case for further proceedings. The appeals court concluded that a genuine issue of fact existed as to whether or not Jewish animus, rather than poor road skills, was the reason Rosen failed a DEA driving course.

²⁵ *Sorlucco v. New York City Police Dep’t*, 888 F.2d 4 (2d Cir. 1989).

²⁶ *Jordan v. Lefevre*, 206 F.3d 196 (2d Cir. 2000).

²⁷ *Batson v. Kentucky*, 476 U.S. 79 (1986).

²⁸ *Rosen v. Thornburgh*, 928 F. 2d 528 (2d Cir. 1991).

*Nonnenmann v. City of New York.*²⁹ Judge Mukasey held that a witness's testimony in support of a coworker's claim of race and sex discrimination by her supervisors in the New York City Police Department to the EEOC was not protected against retaliation because his testimony related merely to "a private employment dispute and did not involve a matter of public concern that warrants First Amendment protection." Several years later, the Second Circuit reached the opposite conclusion, holding that "any use of state authority to retaliate against those who speak out against discrimination suffered by others . . . can give rise to a cause of action under 42 U.S.C. § 1983 and the First Amendment," and expressly overruled Judge Mukasey's contrary decision.

C. Federal Sentencing Guidelines

Where sentencing is concerned, Judge Mukasey has shown a willingness to stand up to the powerful, demand high levels of accountability from the privileged, and often show mercy when evaluating the claims of more vulnerable defendants. Statistics compiled by the Transactional Records Access Clearinghouse at Syracuse University indicate that while Judge Mukasey's median sentence was 24 months, compared with the 18-month median sentences imposed by the 70-plus judges who also sat on the federal District Court in Manhattan between 1988 and 2006, his median sentence in immigration cases was just 75% of the overall rate. Even more striking is the fact that his sentences for those convicted of white-collar crimes was 8 months, more than double the length doled out by his colleagues who more often than not sentenced such defendants to no jail time.³⁰ Sample cases are summarized below.

*United States v. Mendez.*³¹ Defendant challenged the constitutionality of the Sentencing Reform Act and the mandatory sentencing guidelines issued by the Federal Sentencing Commission, which was established by this act. Judge Mukasey, in one of his earliest judicial opinions, agreed with the Defendant and ruled the Act and the guidelines unconstitutional. He reasoned that the Act was unconstitutional because it violated the doctrine of separation of powers because the Act *required* Article III judges to serve on an executive branch committee. Judge Mukasey also emphasized that this question had already been brought before at least 140 district court judges and that, for various reasons, 87 of these judges had found the guidelines unconstitutional. In 2005, the Supreme Court in *U.S. v. Booker* struck down the mandatory sentencing guidelines as unconstitutional on Sixth Amendment grounds.³²

*United States v. Gonzalez.*³³ Sitting by designation on a Second Circuit panel, Judge Mukasey again took the position that judges should perform an independent analysis of each individual case during sentencing instead of blindly following the

²⁹ *Nonnenmann v. City of New York*, 174 F. Supp. 2d 121 (S.D.N.Y. 2001), *overruled by Konits v. Valley Stream Cent. High Sch. Dist.*, 394 F.3d 121, 125 (2d Cir. 2005).

³⁰ Adam Liptak, *Nuance and Resolve in Rulings by Attorney General Nominee*, N.Y. TIMES, Sept. 23, 2007.

³¹ *United States v. Mendez*, 691 F. Supp. 656 (S.D.N.Y. 1988).

³² *United States v. Booker*, 543 U.S. 220 (2005).

³³ *United States v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991).

Federal Sentencing Guidelines. Judge Mukasey joined the majority in upholding a downward departure from the sentencing guidelines on the grounds that the defendant was especially susceptible to assault in prison because of his feminine physical features. The court also found that because the defendant was unusually susceptible to abuse, lack of previous abuse was irrelevant (“Does it not make more sense to allow judges to prevent violence before it occurs, rather than requiring them to wait until the damage has already been done?”), and made the observation that the defendant did not actually have to be gay for this protection. Judge Mukasey observed, “Even if Gonzalez is not gay or bisexual, his physical appearance, insofar as it departs from traditional notions of an acceptable masculine demeanor, may make him as susceptible to homophobic attacks as was the bisexual defendant before us in [*United States v. Lara*].”

D. Big Tobacco & Other Powerful Defendants

Judge Mukasey has often shown a willingness to stand up to large corporate interests and other powerful parties.

Kurzweil v. Philip Morris.³⁴ Judge Mukasey reversed his earlier dismissal of a suit brought against Philip Morris Companies, Inc. by disgruntled stockholders. Plaintiffs sought relief from the dismissal under Federal Rules of Civil Procedure 60(b), which allows for relief from a final order under limited circumstances, including “newly discovered evidence which by due diligence could not have been discovered.” Though Mukasey had previously dismissed the suit for failure to state a claim, he was willing to reconsider the issue when Plaintiffs produced significant new evidence concerning the cigarette manufacturer’s knowledge of nicotine’s addictive properties, which provided a previously-lacking basis for Plaintiffs’ claim. Mukasey’s new opinion and order reopening the case paved the way for a landmark \$368.5 billion settlement between states and the tobacco industry.

*West Tsusho Co. v. Prescott Bush & Co.*³⁵ Plaintiffs (a Japanese Company) sued Defendants (a business consulting firm and its principal, Prescott Bush, brother of former President Bush) to recover on Defendant’s guarantee that the business Plaintiffs invested in on Defendants’ advice would not fail within five years. The company failed within the five-year period, but Defendants refused to pay, claiming they were fraudulently induced into the contract by the Plaintiff, who they claimed was not a legitimate business, but rather a front for the Japanese mob. Judge Mukasey dismissed Defendants’ counterclaim and all affirmative defenses except one. In his opinion, Judge Mukasey reasoned that the mob accusations were irrelevant to the question of whether or not the agreement was valid, stating that “even if [Plaintiff] is a Japanese mob organization, PBI and Bush could and did contract with it ... the validity of the contract does not hinge on the parties legitimacy ... its officers were not applying for membership in a country club.” Additionally, Judge Mukasey rejected Defendants affirmative defense of fraud, reasoning that Defendants’ desire to rescind was nothing more than a “desire to find a convenient excuse for avoiding the consequences of the contract.”

³⁴ *Kurzweil v. Philip Morris*, 1997 U.S. Dist. LEXIS 4451, *8 (S.D.N.Y. 1997).

³⁵ *West Tsusho Co. v. Prescott Bush & Co.*, 1993 U.S. Dist. LEXIS 8467 (S.D.N.Y. 1993).

E. Access to Justice

1. Attorney's Fees

Judge Mukasey has only written a handful of opinions in which he awarded attorney's fees under federal fee-shifting statutes designed to encourage and enable litigants to bring claims to federal courts. For example, in *Malarkey v. Texaco, Inc.*, 794 F. Supp. 1237 (S.D.N.Y. 1992), he awarded substantial attorney's fees and costs in a successful suit against Texaco in which the plaintiff prevailed on her claim that Texaco retaliated against her for charging the company with age discrimination. He also awarded significant fees in *Weaver v. New York City Employees' Retirement System*, 1991 U.S. Dist. LEXIS 1976 (S.D.N.Y. Feb. 20, 1991). In *Proulx v. Citibank*, 709 F. Supp. 396 (S.D.N.Y. 1989), he sharply reduced (by approximately 90%) an attorney's fees request in a case in which a plaintiff had successfully proved an employment retaliation claim against Citibank, finding that much of the work for which compensation was sought to be unjustified.

Judge Mukasey was only reversed by the Second Circuit in one attorney's fees decision: *Ortiz v. Regan*.³⁶ Ortiz had successfully challenged New York State's suspension of her pension benefits without notice or due process, in violation of her right to a hearing before she was deprived of her benefits. During the course of the litigation, the state offered to conduct a hearing on her entitlement to pension benefits, but Ortiz chose to continue her federal suit—with Judge Mukasey's approval. After Judge Mukasey ruled in her favor, however, he refused to award any attorney's fees for work performed by her lawyers after the date on which the state offered her a hearing. The Second Circuit reversed, holding that the offer of a hearing did not address Ortiz's claim that her benefits had suspended without notice. In addition, the appeals court found that it was improper for Judge Mukasey to rely on the state's offer of a hearing, which occurred during negotiations between the parties rather than through a formal offer of settlement. The Second Circuit criticized the result reached by Judge Mukasey, writing, "If attorney's fees are not provided [here], there would be no incentive for private citizens to challenge pre-deprivation due process violations where a post-deprivation remedy exists."

2. Standing

Judge Mukasey has only ruled on plaintiffs' standing in a few cases of public importance. Standing doctrine is sometimes used by federal judges to prevent plaintiffs from having their day in court by finding that the injury they have suffered is insufficient or too remote. Two of these cases are summarized below. While Judge Mukasey's opinions in this area provide a comprehensive discussion of standing doctrine, they are

³⁶ *Ortiz v. Regan*, 980 F. 2d 138 (2d Cir. 1992).

inconclusive as to whether Judge Mukasey believes that the rules of standing should be applied broadly or narrowly. Though the first case shows Judge Mukasey adopting a narrow construction of standing, keeping the plaintiffs' claims out of court, the second shows a willingness to adopt a broad construction of standing at times.

*Free Speech v. Reno.*³⁷ Plaintiffs represented a low-frequency radio station broadcasting without a license in protest of a Federal Communications Commission (FCC) scheme that granted licenses to only high-wattage stations. Since these stations were often run by the same small pool of broadcasting companies, Plaintiffs argued that the licensing scheme placed unconstitutional prior restraints on diverse viewpoints not represented in mainstream radio. Plaintiffs were operating their station, Steal This Radio, from an apartment building when an FCC official threatened to seize the station's equipment if it didn't immediately stop broadcasting. Even though the station complied and went off the air, the FCC official returned to their broadcast site and shut off the building's electricity. Steal This Radio soon resumed broadcasting from a new location, and filed a suit challenging the FCC's authority to seize equipment and issue and enforce "cease and desist" orders. Judge Mukasey held that Plaintiffs lacked standing to bring this challenge because they had not suffered an "injury in fact" under the challenged provisions. He ruled that the FCC official's threat to seize Steal This Radio's equipment was insufficient to establish an injury that was "certainly impending." Judge Mukasey also found that there was "no legal ground on which to equate an official FCC cease and desist order with a single warning to stop broadcasting," despite the fact that the after making the threat, the FCC official shut off the electricity in the building from which Steal This Radio had been broadcasting. The relevant portions of Plaintiff's claims were dismissed.

*Disabled in Action v. Trump Int'l Hotel and Tower.*³⁸ Plaintiffs, individuals confined to wheelchairs and motor scooters as a result of disabilities, sued Trump International under the Americans with Disabilities Act (ADA) when they experienced difficulty accessing the restaurant and plaza of the Trump building. The restaurant and plaza were accessible only by stairs, or by lifts that were inoperable to the general public and required the assistance of security guards. Over Defendant's objections, Judge Mukasey held that Plaintiffs did have standing and that their injury did satisfy the "case or controversy" requirement of Article III of the Constitution. Judge Mukasey found that Plaintiffs' inability to return to the restaurant as they desired constituted an "ongoing injury," and that Plaintiffs had met the "concrete and particularized" requirement for standing because their inability to use the lifts independently affected their particular disabilities. Finally, Judge Mukasey found that Plaintiffs should be granted standing because they were asserting their own rights and not "generalized grievances," and because Congress had intended to create a private right of action through the ADA.

F. Social Security Review

³⁷ *Free Speech v. Reno*, 1999 U.S. Dist. LEXIS 3058 (S.D.N.Y. 1999).

³⁸ *Disabled in Action v. Trump Int'l Hotel and Tower*, 2003 U.S. Dist. LEXIS 5145 (S.D.N.Y. 2003).

During his time on the bench, Judge Mukasey heard dozens of cases in which petitioners sought judicial review of the government decisions to deny their claims for Social Security disability benefits. Judge Mukasey meticulously reviewed these claims, which usually involved *pro se* or indigent petitioners, and in at least fourteen cases he vacated the decision of the administrative law judge (ALJ) to deny benefits and remanded the case for further review. In these cases, Judge Mukasey reasoned that the ALJ failed to create a complete record before issuing a decision and thus did not provide the court with enough information to evaluate the decision. In at least six cases where he deemed the record complete, Judge Mukasey used his discretion to overturn the decision of the ALJ and find the petitioner disabled under the law and thus entitled to benefits. In approximately ten other cases Judge Mukasey affirmed the ALJ and upheld the judgment denying benefits to petitioner. At least one of these decisions was appealed to the Second Circuit, which affirmed the decision of both the ALJ and Judge Mukasey. In nearly twenty years on the bench, Judge Mukasey was never overturned in a case involving the allocation of disability benefits. On the whole, his decisions show a sensitivity to the needs of ordinary people. A sample of his rulings is provided below.

Alwashie v. Apfel.³⁹ Adel Alwashie, who complained of neck and back pain and anxiety since injuring himself while working as an engineer on a ship, appealed the decision of the ALJ that he was not disabled within the meaning of the Social Security Act, and thus not entitled to benefits. Judge Mukasey vacated the ALJ's decision and remanded the case for further review. Judge Mukasey reasoned that Alwashie was entitled to further process because the ALJ did not fulfill his duty to ensure that the record upon which he based his decision was as complete as possible.

Rivera v. Apfel.⁴⁰ Luciana Rivera, who suffered from severe asthma attacks every few hours, appealed the decision of the ALJ finding him not disabled within the meaning of the Social Security Act, and thus not entitled to disability benefits. Judge Mukasey overturned the decision of the ALJ and entered judgment for the plaintiff. He remanded the case for the sole purpose of calculating benefits. Judge Mukasey reasoned that the record provided persuasive proof of disability and a remand for further evidentiary proceedings would serve no purpose. He added that this remedy was particularly apt in this case because plaintiff had already been denied his rightful benefits for far too long; any further delay would not only be unnecessary, but also unjust. Similarly, in *Geisler v. Apfel*, Judge Mukasey overturned the ALJ's determination that the Plaintiff, who could not carry more than five pounds or stand/walk for more than two hours per day, was not disabled under the law.⁴¹ Once again, Judge Mukasey reasoned that because the record clearly supported that the Plaintiff was disabled, further delay of benefits would only compound plaintiff's suffering. He remanded the case solely for the calculation of benefits.

G. Immigration

³⁹ *Alwashie v. Apfel*, 2001 U.S. Dist. LEXIS 1501 (S.D.N.Y. 2001).

⁴⁰ *Rivera v. Apfel*, 1999 U.S. Dist. LEXIS 2855 (S.D.N.Y. 1999).

⁴¹ *Geisler v. Kenneth S. Apfel*, 1998 U.S. Dist. LEXIS 14326 (S.D.N.Y. 1998)

As a District Court Judge with New York City in his jurisdiction, Judge Mukasey dealt with a variety of immigration and asylum issues. In his most notable immigration case, *Dong v. Slattery*,⁴² Judge Mukasey held that China’s population control policies did not constitute “persecution” justifying a grant of political asylum. Judge Mukasey again confronted requests for asylum based on China’s population control policies in 2005, while sitting by designation on the Second Circuit. In these unanimous opinions, the court often relied on the discretion of the Immigration Judge (IJ) and Board of Immigration Appeals (BIA), but it did depart from the BIA’s decisions if it felt it was appropriate, such as in *Bao Zhu Zhu v. Gonzales*.⁴³

Dong v. Slattery.⁴⁴ Jia-Ging Dong, a citizen of China, sought review by Judge Mukasey of a decision by the Board of Immigration Appeals (BIA) that denied his request for political asylum in the United States. Dong, along with several hundred other Chinese people, had been passengers aboard the vessel *Golden Venture*, which ran aground in New York in June of 1993. Dong’s basis for seeking political asylum was his support for his wife’s defiance of Chinese government orders to have an abortion. Dong’s wife had been forced by the Chinese government to use an intra-uterine device as a contraceptive after they had two children, but still became pregnant in 1992 and was ordered to have an abortion. If they fled their home to avoid the forced abortion, their house would be destroyed. Although they did flee, and their house was ransacked, she was later forced to have an abortion by Chinese authorities. He feared that if he was returned to China he would be “severely punished” for assisting his wife in avoiding compliance with the government’s directive. Judge Mukasey, relying on the authority of the BIA to construe the federal statute authorizing political asylum, held that he had to follow the BIA’s 1989 determination that China’s population control policies did not constitute “persecution” justifying the grant of political asylum. Moreover, he ruled that a person resisting China’s coercive population control policies was not being persecuted for his political opinions—as required for political asylum—but for his past or future conduct. In doing so, Judge Mukasey took the unusual step of disagreeing with one of his fellow judges in the Southern District, Judge Robert Patterson. Patterson had ruled in 1994 that the asylum request of another male passenger of the *Golden Venture*, whose wife underwent forced sterilization in China, should be considered in light of a rule issued by the attorney general in 1993 that persecution based on resisting forced abortion is a basis for political refugee status. Judge Patterson’s decision was later reversed by the Second Circuit in part for the same reasons that Judge Mukasey refused to honor the January 1993 rule.⁴⁵ Congress later amended the asylum statute to make clear that resistance to coercive population control policies constitutes a basis for refugee status.⁴⁶

Bao Zhu Zhu v. Gonzales.⁴⁷ The Second Circuit, with Judge Mukasey sitting by designation, unanimously vacated the BIA’s denial of review of a refugee’s application

⁴² *Dong v. Slattery*, 870 F. Supp. 53 (S.D.N.Y. 1994).

⁴³ *Bao Zhu Zhu v. Gonzales*, 460 F.3d 426 (2d Cir. 2005).

⁴⁴ *Dong v. Slattery*, 870 F. Supp. 53 (S.D.N.Y. 1994).

⁴⁵ *Xin-Chang v. Slattery*, 859 F. Supp. 708 (S.D.N.Y. 1994), *rev’d*, 55 F.3d 732 (2d Cir. 1995).

⁴⁶ See 8 U.S.C. § 1101(a)(42).

⁴⁷ *Bao Zhu Zhu v. Gonzales*, 460 F.3d 426 (2d Cir. 2005).

for asylum, which was based on the IJ's finding that the refugee was not credible. The court held that the refugee's credibility should not have been dismissed because of inconsistent testimony from her absent husband about when she had undergone forced sterilization. The court remanded for review and stated that more information was needed before the refugee's testimony could be considered unreliable.

*Chen v. Bd. of Immigration Appeals.*⁴⁸ The Second Circuit, with Judge Mukasey sitting by designation, unanimously denied an asylum-seeker's petition of review after the BIA issued an order of removal for him. The court held that the appellant failed to show he had suffered any persecution in China and had not shown concrete evidence that he and his wife would be subjected to coercive birth control measures if they returned to China.

*Yan Ping Xiao v. United States.*⁴⁹ The Second Circuit, with Judge Mukasey sitting by designation, unanimously denied an asylum-seeker's petition of review after the BIA issued an order of removal. The IJ had found that the appellant was not credible based upon the improbability and internal inconsistencies of his testimony. The court found that record supported the reasons proffered by the IJ for his credibility determination, and those reasons bore a legitimate nexus to that conclusion.

ADMINISTRATIVE EXPERIENCE

The attorney general is tasked with running an incredibly large bureaucratic institution. In addition to the typical difficulties associated with running such a large department, the Department of Justice is currently disorganized and suffering from widespread low morale. Whoever the next attorney general is will have to employ exceptional administrative skills in order restore the Department's ability to conduct the nation's business. It is important that the Senate take the time to determine if the current nominee is willing and able to take on what is likely to be a monumental task.

As Chief Judge of the Southern District Court of New York between 2000 and 2006, Judge Mukasey proved an able, though somewhat reluctant, administrator, often under tough circumstances. His guiding principle was to "try and make things as easy as possible for my fellow judges and then just stay out of the way and let them do their job—foster an atmosphere where everybody can get along."⁵⁰ Though Judge Mukasey admits that "throughout my career, I avoided administration like the plague," when offered the position as Chief Judge he accepted the job and, in the words of a fellow judge, resolved the issues that came before him with "aplomb and dignity and good sense."⁵¹ During his tenure as Chief, he oversaw the almost immediate reopening of the Southern District Court, which is within blocks of Ground Zero, after the September 11th attacks. He also oversaw the smooth transition of judges from the Thurgood Marshall

⁴⁸ *Chen v. Bd. of Immigration Appeals*, 138 Fed. Appx. 356, (2d Cir. 2005)

⁴⁹ *Yan Ping Xiao v. United States DOJ*, 127 Fed. Appx. 10 (2d Cir. 2005).

⁵⁰ Mark Hamblett, *Unassuming Chief Oversaw Court's Adjustment to Terrorism*, N.Y.L.J., Vol. 236, Aug. 1, 2006.

⁵¹ *Id.*

Courthouse at 40 Foley Square, which was desperately in need of renovations, into the Daniel Patrick Moynihan Courthouse at 500 Pearl Street.⁵²

OTHER

Before he became a federal judge, Judge Mukasey resigned from a private club in New York City because it did not admit women, despite efforts by him and others to change the club's policy. In resigning, he wrote that he had "two regrets – one that things did not turn out differently, the other that I did not resign sooner."⁵³

CONCLUSION

Judge Mukasey's confirmation hearing will be a critically important moment for the Department of Justice. The hearing presents a chance to shed light on a branch of government that has managed to escape oversight and operate in the shadow of the White House for many years. It offers an opportunity for Congress and the public to learn about the workings of a Department which has evaded the law, misrepresented the truth, and imposed a veil of secrecy on a wide range of its activities. In order to restore public faith in the Justice Department, Judge Mukasey must be forthcoming about his own views on controversial legal subjects—and likewise insist that the Department he has been nominated to head is equally forthcoming. Candid responses and complete answers by Judge Mukasey, both about his legal views and his plans for the future of the Department, could be the first step in the long road towards rebuilding the tattered reputation of an institution historically revered for its independence.

⁵² *Id.*

⁵³ Michael Mukasey, *United States Senate Judiciary Committee Questionnaire for Judicial Nominees*, on his nomination to the U.S. District Court for the Southern District of New York, 1987.