

Testimony of

Mary Jo White

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(Partner, Debevoise & Plimpton LLP
Former United States Attorney
for the Southern District of New York)

On the Nomination of Judge Michael B. Mukasey
To Be the Attorney General of the United States
before the
United States Senate
Committee on the Judiciary
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Senator Leahy, Senator Specter, Members of the Committee, my name is Mary Jo White. I am currently the Chair of the Litigation Group at the law firm of Debevoise & Plimpton LLP. I am honored to have been invited to appear before you today.

It is my privilege to speak on behalf of the nomination of Judge Michael B. Mukasey to become the next Attorney General of the United States. Judge Mukasey is a man of great intellect and integrity with an unswerving commitment to the rule of law. He is independent, fair-minded and has a wealth of relevant experience from his years of service on the federal bench, in the private sector and as an Assistant United States Attorney. There could not be, in my view, a stronger or better nominee to head the Department of Justice, particularly at this time when the Department is in need of a strong and respected leader as our country faces one of the greatest challenges in its history--to secure the nation against the threat from al-Qaeda and related terrorist networks, and to do so consistently with the law and our principles as a free and democratic society. I have no doubt that Judge Mukasey, if confirmed as Attorney General, will meet that challenge, on behalf of the Department of Justice, effectively, intelligently and with sensitivity to all of the complex issues that are inherent in this challenge to which there are no easy or obvious solutions. I am equally confident that Judge Mukasey will be a superb leader of the Department in carrying out its many other important responsibilities and priorities that are vital to the safety and well-being of our country and the American people.

By way of background, let me tell the Committee how I know Judge Mukasey. From June 1, 1993 until January 7, 2002, I served as the United States Attorney for the Southern District of New York, the judicial district in which Judge Mukasey served as a United States District Court Judge for over 18 years, and as its Chief Judge beginning in 2000 until he retired from the bench in 2006.* As U.S. Attorney, I observed directly, and through the approximately 200 Assistant United States Attorneys whom I supervised, the outstanding work of Judge Mukasey, who day in and day out administered justice evenhandedly, with a deep knowledge of the law and with rigorous adherence to the rule of law. As a judge, he embodied all of those qualities of intelligence, temperament, preparedness and fairness that bring high credit and honor to our American system of justice. In each encounter I have had with Judge Mukasey, I have come away with deep admiration for him as a person, a lawyer and as a public servant. I thus join with the many others who strongly support his nomination, including representatives of both the defense bar and prosecutors.

I have personally observed Judge Mukasey in his courtroom in the Southern District of New York preside over many challenging cases with unparalleled ability, fairness and dignity. Prominent among these cases was the complex and potentially volatile terrorism trial of the leader of the al-Gama'a terrorist organization, Sheik Omar Abdel Rahman, and nine of his co-defendants, who were charged with an horrific plot to blow up, in a single day, the tunnels connecting New York and New Jersey, the George Washington Bridge, the United Nations, and the FBI's headquarters in Manhattan. *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999). In this "Day of Terror" case, Judge Mukasey was

called upon to deal with and decide novel and some of the most difficult issues ever faced by any court. And he did so, while constantly keeping his eye on the primary ball in any trial--to ensure a fair proceeding for all parties.

In affirming the convictions of the defendants, the Court of Appeals for the Second Circuit said this, in a rare statement of appellate praise:

"The ten defendants were accorded a full and fair jury trial....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." *Id.* at 160.

What Judge Mukasey learned substantively and procedurally from this trial will, I believe, serve him very well as Attorney General as he shapes and guides the Department of Justice's role and policies in addressing the grave threat posed by radical Islamic terrorism.

In this regard, I would like to just briefly comment on two issues that have been debated since the attacks of September 11th and which have been discussed by some in connection with Judge Mukasey's nomination: how best to deal with individuals accused of committing terrorist acts against the United States and the propriety of using the federal material witness warrant statute, 18 U.S.C. § 3144, for witnesses believed to have material information relevant to an investigation by a federal grand jury of terrorist crimes, such as occurred with intensity in the Southern District of New York after the attacks of September 11th.

As I testified five years ago before the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence Joint Inquiry into the September 11th Terrorist Attacks, while I was United States Attorney for the Southern District of New York, our Office was responsible for the investigations and successful prosecutions of most of the major international terrorist cases before September 11th, including the "Day of Terror" case, the bombing of the World Trade Center in 1993, the Manila Air Plot hatched by Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing and Khalid Sheik Mohammed, the mastermind of the September 11th attacks, and the bombing of our embassies in East Africa in 1998 for which Osama bin Laden and the entire al-Qaeda leadership were indicted. The prosecutors involved in those cases learned a great deal about the terrorist threat we face from Islamic fundamentalists and all of us, I believe, came to share the view that the civilian criminal justice system cannot be the or the primary means of effectively combating international terrorism.

This terrorist phenomenon and threat are different than and go beyond conventional crimes. And the civilian criminal justice system, as effective as it has been in a few individual cases, has significant limitations as to what it can accomplish and weaknesses, which I detailed in my prior testimony, when it is used to try terrorist crimes, which will necessarily involve disclosure of extremely sensitive intelligence and national security information that can be difficult, if not impossible, to manage successfully in our civilian criminal courts and under our rules of criminal procedure. Other, more optimal, but uncompromisingly lawful and fair alternatives or supplements to our civilian criminal justice system need to be explored and considered.

Since leaving the bench, Judge Mukasey has publicly expressed similar concerns and questions, and has urged that Congress and others give serious study to these issues which present excruciatingly difficult questions with no easy answers. We need our best and most open minds to apply themselves to them. We are indeed fortunate as a country to have someone of Judge Mukasey's knowledge, experience, and thoughtfulness to be in a position to provide his input and leadership on these issues.

As to the material witness warrants issued after September 11th, I will comment very briefly. It was initially my decision, as United States Attorney, to use that statute in connection with the very intense investigation our United States Attorney's Office and a federal grand jury sitting in Manhattan was conducting of al-Qaeda and the September 11th attacks. To my mind, doing so was a straightforward application of 18 U.S.C. § 3144, the federal material witness warrant statute, for situations where we had information that an individual likely had information material to that critical investigation and was a risk to flee before the grand jury could secure that information. Such warrants were sought based on the facts we had and our good faith belief that a material witness warrant was justified under the law.

Federal judges, including Judge Mukasey, were presented with applications for material witness warrants and were required to decide, based on the statute and the facts presented whether such warrants should issue. If the warrant was approved, the material witness was brought before a federal judge, had counsel appointed, a bail hearing and the opportunity to argue that the warrant should be vacated. Although I am certainly aware of and understand the criticism that this procedure was used too frequently after September 11th, in my view, it would have been a dereliction of our duty as prosecutors not to use this established and lawful procedure to investigate al-Qaeda and the September 11th attacks.

Another daunting challenge any Attorney General has is to oversee and manage the over 100,000 employees of the Department of Justice, and its many programs and component parts. While Judge Mukasey, of course, has not been previously called upon to manage an organization of the kind and size of the Department of Justice, I believe he brings to that task both the right qualities and relevant experience. He is first and foremost a leader with credibility who, by example, motivates professionals to do the best work of which they are capable. He is organized, efficient, works extremely hard and has the ability and judgment to prioritize and delegate wisely.

As Chief Judge of the United States District Court in New York for six years, Judge Mukasey was called upon to manage our largest and oldest federal court, with over 40 active and senior United States District Judges, 15 United States Magistrate Judges, and 11 bankruptcy judges. The Southern District of New York federal court has one of the busiest and most complex dockets in the country. Typically, over 12,000 new cases (criminal and civil) are filed each year.

The Chief Judge of the Southern District of New York is ultimately responsible for, among other things, the budget, security issues, personnel, infrastructure, subcommittees on various issues affecting the court, litigants and juries, inter-agency communications and docket administration. In addition to having responsibility for these issues, Judge Mukasey, as Chief Judge, guided the federal court in the Southern District of New York from a paper filing system to the Electronic Case Filing System and put in place the first emergency preparedness program for a federal court. As it happened, Judge Mukasey was fortunately the Chief Judge of the Southern District of New York District Court on September 11th. His leadership during this time of extreme crisis has been accurately described by many as heroic.

The Southern District of New York's courthouses in Manhattan are located just a few blocks from where the World Trade Center stood. All of us working in the vicinity of the courthouse complex on September 11th personally witnessed the horror of that day and were required to respond to the physical and emotional issues of our staffs and then work to try to restore normal functioning in the aftermath of the most abnormal and jolting experience any of us had ever encountered. Judge Mukasey directed that the two Manhattan courthouses be closed for a week while he maintained an operational base for the court at the federal courthouse in White Plains, New York, some 30 miles north of Manhattan. He also ensured that the court processes remained available at all times for essential business and applications.

On Tuesday, September 18, 2001, because of Judge Mukasey's planning and leadership, the federal courts in Manhattan were able to reopen fully for business, despite badly disrupted or non-existent phone and computer services and significant transportation issues, not to mention the emotional stress of the court's employees. But as the District Executive, Clifford Kirsch, who works for the Chief Judge observed: "Almost everyone who worked at the courthouse...was back at their desk....[I]t was very important to come back downtown and to come back to work. Everyone wanted to be together to do our best to show that life would go on in New York...." For the Southern District of New York, Judge Mukasey and the District Executive staff he managed made that possible.

In sum, I believe that, however he is measured, Judge Mukasey will be a superb Attorney General. He will hit the ground running at the Department of Justice, and deal effectively with its full range of priorities and problems. He will lead and inspire the career lawyers at the Department and in the field, as well as the United States Attorneys. He will remain the person he has always been--a dedicated, hardworking public servant with the ability and humility to do an outstanding job of which we will all be proud. I urge that the Senate confirm him.

Thank you for inviting me to testify.
Mary Jo White

