

Nomination of Michael B. Mukasey for Attorney General

Questions for the Record

Senator Joseph R. Biden, Jr.

Politicization of Hiring/Termination Decisions

On September 14, 2007, I sent a letter to then serving Attorney General Alberto Gonzales requesting a briefing to the Senate Judiciary Committee by October 15, 2007 on the hiring process and conversion of political appointees to career positions at the Department of Justice. To date, I have received no response from the Department (a copy of this request will be forwarded to you upon request).

- Do you intend to respond to my request within a reasonably short time should you be confirmed as Attorney General? And, will you, or an appropriate designee, provide this briefing to the Senate Judiciary Committee staff?
- Given the politicization of the hiring and termination process of political appointees and career positions at the Department, will you commit to taking steps to ensure that any conversion of political appointees to career positions is transparent, non-political, adheres to all applicable rules and regulations, and avoids even the appearance of impropriety?

COPS and Assistance to Law Enforcement

- In your hearing testimony you expressed the view that grants programs such as COPS were meant as a short-term supplement to states. In your view, what are the appropriate circumstances for the implementation of grant assistance such as the COPS program to local law enforcement?
- The increase in crime around the country to levels not seen since the 1990s, the post-9/11 reallocation of FBI resources away from traditional crime to counterterrorism, and the reduction in the number of state and local law enforcement officers has created a perfect storm for police and sheriffs departments. Put simply, state and local law enforcement are being asked to do more with less. Under these circumstances isn't limited competitive grant assistance from the federal government to state and local law enforcement appropriate? If not, please elaborate on the circumstances under which you would feel that federal financial assistance to state and local law enforcement would be warranted.

Military Commissions Act of 2006

- During debate on the Military Commissions Act of 2006, Senator John Warner stated that all the techniques banned by the United States Army Field Manual on Intelligence Interrogation including “water boarding,” forcing detainees to be naked, applying beatings, electric shocks, burns, or other forms of physical pain, using dogs, and inducing hypothermia or heat injury, constitute “grave breaches” of Common Article 3 of the Geneva Conventions and are “clearly prohibited” by the Act.¹
- Senator Warner – one of the Military Commissions Act’s primary authors – was expressing the intent of Congress to criminalize the use of these techniques when it passed the Military Commissions Act. Will you stand by Senator Warner’s interpretation of the law he authored? If not, why not?

Torture

- Article 2 of the Convention against Torture states, in relevant part: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”
- Do you believe any “exceptional circumstances” exist that would justify torture? If so, please describe those circumstances in as much detail as possible.
- As attorney general, would you authorize the use of torture in any circumstances? If so, please describe those circumstances in as much detail as possible.

Waterboarding

- The US has long taken the position that techniques such as waterboarding, forced standing, and sleep deprivation constitute war crimes. As early as 1901, a US Army Major, Edwin Glenn, was sentenced to 10 years hard labor for waterboarding a captured insurgent in the Philippines. US military commissions after World War II prosecuted Japanese troops for engaging in waterboarding and other techniques allegedly currently being employed by the CIA. A Japanese soldier named Tetsuo Ando was sentenced to five years hard labor for, among other offenses, forcing American prisoners to “stand at attention for seven hours” (*United States of America v. Tetsuo Ando*, Yokahama, May 8, 1947). Another was sentenced to 10 years for, among other things,

¹ Congressional Record, September 28, 2006, p. S10390.

forcing a prisoner to “bend his knees to a half bend, raise his arms straight above his head, and stay in this position anywhere from five to fifteen minutes at a time” (*United States of America v. Chikayoshi Sugota*, Yokahama, April 4 1949).

- Do you believe the US was right to prosecute these men?
- If the Department of Justice now takes the position that waterboarding, forced standing and use of stress positions are legal – and within the bounds of Common Article 3 – what grounds will we have to condemn or prosecute enemies of the US if they engage in such practices against captured US forces in the future?

Hamdan

In the wake of the *Hamdan* decision, everybody – including the administration – has acknowledged that Common Article 3 of the Geneva Conventions applies to the treatment of anyone the US takes into custody in the fight against terrorism. The same minimal standard that protects US troops and citizens applies to the people we have taken into custody – which means that anything we say can be lawfully used against those in our custody can also be lawfully used against captured Americans.

- Would you agree, then, with the commonsense principle that we should not employ any interrogation techniques against enemy prisoners that we would consider unlawful if used against Americans?
- If the government of Iran or North Korea captured an American, held him incommunicado with no access even to the Red Cross, tied his hands to the ceiling and forced him to stand without sleep in the cold for days on end, would you consider that acceptable? Would it be acceptable for Iran or North Korea to strap that captured American to a table, stuff his mouth with a cloth, and pour water over his face to create a sensation of drowning?

Rendition

Many have noted that President Clinton initiated the so-called rendition program. But renditions under Clinton were designed to bring terrorist suspects *to* justice – by bringing them here to the United States to face charges, as was done with respect to a suspect in the 1993 World Trade Center bombing, or by returning them to their countries of origin to be tried for their crimes or imprisoned pursuant to past convictions.

The program changed under President Bush – into rendition *away* from justice, by taking detainees from places like Italy and Germany where they could have

been prosecuted to places where they were hidden away from any court. Some of those rendered away from justice were innocent victims – individuals like Khaled el Masri, the German abducted in Macedonia, and Maher Arar, the Canadian arrested at JFK airport, who were then sent to Syria, where they were not charged with any crime, but held incommunicado and abused. And others – such as Khalid Sheikh Mohammad (KSM) and other high value detainees – rendered to secret prisons and other undisclosed locations where they are widely alleged to have been tortured and abused, making it difficult, if not impossible, to charge them before a tribunal and bring them to justice as the victims of 9/11 deserve.

- How can you justify the rendition of individuals away from justice?
- If the purpose is to gather intelligence, why would the United States trust interrogations carried out by Egyptian or Syrian intelligence agencies – agencies that the United States has long acknowledged and criticized for engaging in torture and abuse?
- If the purpose is to keep them off the streets, why the need for secrecy and incommunicado detention in a place where they can never be brought to justice? Do you think that the leaders of al-Qaeda didn't know when KSM was arrested? And that by detaining him in secret the US somehow tricked al-Qaeda into thinking he was still at-large, and if the US had acknowledged his arrest and detention they would be giving away a great secret?

President's constitutional powers

When asked whether the president's constitutional powers allow him to authorize an illegal act, you responded: "If by illegal you mean contrary to statute, but within the authority of the president to defend the country, the president is not putting somebody above the law; the president is putting somebody within the law."

- In his well-known concurring opinion in the Steel Seizure Case (*Youngstown Sheet & Tube Co. v. Sawyer*), Justice Jackson articulated an often-cited test for evaluating the limits of presidential power during wartime. Justice O'Connor cited this case in support of her statement in *Hamdi v. Rumsfeld* that, "We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." Do you subscribe to Justice Jackson's test, which limits the president's wartime power in a particular area when Congress has passed legislation in that area, or do you believe the president's power under Article II of the Constitution is plenary?

U.S. Attorney Dismissals & Executive Privilege

- Do you believe the reputation of the Department of Justice has been damaged by the way former Attorney General Gonzales handled the firings of the US Attorneys and the manner in which the Department and the White House explained the firings to Congress and the American people?
- If so, and if confirmed, what steps will you take to correct those mistakes to ensure that such inexcusable conduct does not happen under your watch?
- As you know, the Inspector General at the Justice Department has commenced investigations into the conduct of the former Attorney General Gonzales and others former Department personnel regarding testimony provided to this Committee about the firings of U.S. Attorneys.
- If confirmed, do you promise that you would not interfere with, hinder or otherwise obstruct these investigations, even if upholding this pledge were contrary to the President's (or his advisers') direction?
- 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?
- The Department of Justice has taken the legal position that former top White House aides, such as Harriet Miers and Karl Rove, are immune even from appearing before a Congressional Committee. Do you believe that the President's invocation of Executive Privilege protects *former* top White House officials from even appearing before Congress in response to a validly issued subpoena?
- The White House under President Bush has taken unprecedented steps to "politicize" federal agencies that should be independent from political influence. From the hiring and firing to bankruptcy judges to the formulation of national drug control policy, the White House Office of Political Affairs has had enormous and improper influence. In fact, when the former head of that office testified before this Committee, she remarked, "I took an oath to the President." Of course, her oath was in fact to the Constitution and she quickly corrected this mistake when pointed out by Chairman Leahy.
 - Will you allow the Office of Political Affairs to, in any way, influence decisions about the hiring or firing of DOJ personnel?

- Will you pledge not to provide the Office of Political Affairs any information about any ongoing investigation, civil or criminal?
- How else can you assure me and the American people that you will not be subject to such improper influence, that you will speak truth to power, and that you will above all else uphold your oath to the Constitution and the rule of law?
- 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.
 - Do you believe that the Constitution and the principle of separation of powers allow the Department to prevent a U.S. Attorney from pursuing such a contempt citation?
 - If so, please explain in detail your legal rationale.
 - If not, 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?
 - On the first day of your testimony before this Committee you indicated that if Congress referred a contempt citation to the U.S. Attorney and the President invoked Executive Privilege, the U.S. Attorney must make an independent determination of the merits of the Executive Privilege claim before deciding whether to proceed. Yet, later you seemed to indicate that it would be improper for the U.S. Attorney to pursue such a citation if DOJ had instructed it not to.
 - Which view do you hold?
 - If it is the former, doesn't this put the U.S. Attorney in a position of deciding the merits of the claim of Executive Privilege, a job that is more appropriately suited for the courts?
 - If it is the latter, doesn't this make any claim of Executive Privilege absolute?
 - Then how do you square that action with the Supreme Court authority of *U.S. v. Nixon*, which recognized a qualified – not absolute – privilege.
 - Under this view, would the U.S. Attorney ever review the merits of the contempt claim, or must he or she simply refuse to pursue every contempt referral based on the Department's (and the Administration's) direction?
 - Is it your view that 2 U.S.C. § 194 does not apply in any case where the President has invoked Executive Privilege?

- If so, is this based on your views on Executive power rooted in Article II? If not, what is the basis for this view?

Renewing the Federal Assault Weapons Ban

- The Federal Assault Weapons Ban expired in 2004. The ban had prohibited the manufacture and sale to civilians of AK-47s and other semi-automatic assault weapons, as well as high-capacity magazines holding more than 10 rounds. As you know, the bloodiest shooting in U.S. history on the campus of Virginia Tech involved a shooter with large capacity magazine clips, which would have been illegal for purchase had the ban been extended.
 - What steps will the Department of Justice take to urge Congress to renew the Assault Weapons Ban?
 - Will you actively push for renewing the Assault Weapons Ban?
 - Do you believe renewing the ban is important to fighting gun crimes, saving lives, and improving public safety?
 - Do you believe that high-capacity ammunition magazines, like the ones used by the Virginia Tech shooter, should be illegal?

Drug Sentencing

As a federal judge in Manhattan, you've addressed and dealt with the scourge of drug use on our city's streets and the effects it has on lives, families, and our society. Under federal law it takes 100 times more powder cocaine to trigger the same sentences as it does for crack cocaine.

- Do you believe that the penalties for these two forms of the same drug should be equalized?
 - If so, would you do so by raising penalties for powder cocaine, and if so, why do these penalties warrant increased sentences?
 - If not, please explain your view with specific, evidence-based reasons.
- Do you believe that the current mandatory minimum sentence of five years for simple possession of five grams of crack cocaine should be repealed? If not, why do you believe that crack cocaine should be the only drug for which there is a mandatory minimum sentence for simple possession for a first time offender?

Civil Law

- There has been much discussion in recent years about whether the U.S. judicial system should even consider or look at foreign law or customs in determining our own precedent. Without relying on it as precedent, do you believe that foreign laws or customs might ever be useful comparisons or perspectives when deciding issues that have little precedent in U.S. case law?

