

Senate Judiciary Committee Confirmation Hearings for Attorney General Nominee Michael Mukasey

Excerpt from the October 18, 2007 hearing: questions about torture

SENATOR RICHARD DURBIN (D-IL): We had questions yesterday about the issue of torture under the Geneva Conventions. The techniques which have been attributed to this administration involve painful stress positions, threatening detainees with dogs, forced nudity, waterboarding – that is, simulated drowning – and mock execution.

When we had the judge advocates general testify, I asked, point blank, whether they believed that these techniques violated the Geneva Conventions. They said yes.

And I asked if they felt if those techniques were used against an American detainee, they would be violative of the Geneva Convention. And they answered in the affirmative.

What is your opinion?

JUDGE MICHAEL MUKASEY: They – I mean, I'm certainly not in a position here to argue to argue with a judge advocate general's view that they violated the Geneva Conventions and that, whether used against us or against anybody else, that they would.

That said, I think we have to also recognize that when we're talking about coercive methods of interrogation, this is not a matter of choosing pleasant alternatives over unpleasant alternatives or good alternatives over bad alternatives.

It's a choice among bad alternatives.

What the experience is of people in the Judge Advocate General's Corps who are enormously well-disciplined and very skilled, what that experience has been with captured soldiers, captured military people from enemies we fought in the past may very well be far different from the experience that we're having with unlawful combatants who we face now. It's a very different kind of person.

DURBIN: Well, I want to make sure I understand that response, because I think you may have created a division here in treatment, arguing that if these techniques were used in the

past, before the current threat of terrorism, it would be a different circumstance under the Geneva Convention than it might be today.

I want to make sure I don't draw the wrong conclusion from that previous answer. So if you'd clarify it for me, please.

MUKASEY: I'm not sure how I can – I mean, I'm sorry. I'm not sure how I can clarify it.

DURBIN: Well, let me go back. I understood you to say that the judge advocates general, speaking about the Geneva Conventions and these specific methods of torture, may have been referring to previous times, previous conflicts, and that this conflict and this challenge of terrorism may present a different set of challenges that might be viewed or interpreted differently under Geneva Conventions.

If that is not what you said, please clarify it.

MUKASEY: I'm not sufficiently familiar with interpretations of the Geneva Conventions to be offering views on what would or would not come within it or outside it.

What I thought I was talking about is procedures that are acceptable to the military, that are authorized in the field manual and that represent the limit of what it is that the armed forces can do.

There are other techniques that are, as I understand it, that may be used by – with proper authorization – people outside the military. And those are not covered in the field manual.

DURBIN: But I'm speaking to the Geneva Conventions and the judge advocates general said the techniques that I described to you violated Common Article 3, and this is the baseline test that applies to everyone, not just soldiers. And I believe that the Supreme Court agreed with that conclusion in Hamdan.

Do you see that differently?

MUKASEY: What part of Common Article 3 the Supreme Court found in Hamdan was applicable through, I believe through the Universal Code of Military Justice, unless I'm confusing my cases.

I can't, as I sit here, recall precisely what part of Article 3 the Supreme Court found applicable. I thought they were talking about the need for a trial and for an opportunity for a detainee to get a hearing. I did not think that that concerned interrogation techniques.

DURBIN: Let me try to bring it to the bottom line, because I want to make sure if there is common ground we find it, if not, that it's clear on the record.

I want to understand as to these interrogation techniques whether you believe that they would constitute torture and therefore could not be used against any detainee, military or otherwise, by the United States government.

MUKASEY: I don't think that I can responsibly talk about any technique here, because of the very – I'm not going to discuss, and I should not – I'm sorry, I can't discuss, and I think it would be irresponsible of me to discuss particular techniques with which I am not familiar, when there are people who are using coercive techniques and who are being authorized to use coercive techniques, and for me to say something that is going to put their careers or freedom at risk simply because I want to be congenial, I don't think it would be responsible of me to do that.

DURBIN: This is not a congeniality contest, and I'm sorry that I've gone over, Mr. Chairman.

But, for instance, I just want to – if I can make one last point, on the issue of waterboarding, simulated drowning.

The United States has long taken the position that this is a war crime. In 1901, the U.S. Army Major Edwin Glenn sentenced to 10 years hard labor for waterboarding a captured insurgent in the Philippines.

DURBIN: U.S. military commissions after World War II prosecuted Japanese troops for engaging in waterboarding. The torture statute makes it a crime to threaten someone with imminent death. Waterboarding is a threat of imminent death.

I'm hoping that you can at least look at this one technique and say that clearly constitutes torture, it should not be the policy of the United States to engage in waterboarding, whether the detainee is military or otherwise.

MUKASEY: It is not constitutional for the United States to engage in torture in any form, be it waterboarding or anything else.

DURBIN: Take that as your answer.

(CROSSTALK)

SENATOR PATRICK LEAHY (D-VT): I want to make sure I fully understand. But I wrote down about three different times you said: Unless it is authorized. Are you saying that techniques can be authorized that are not constitutional?

MUKASEY: No. That is emphatically not what I'm saying. What I'm saying is that techniques can be authorized that are beyond the Army field manual, and I should not get into a discussion of what they might be or in what combination they might be authorized.

LEAHY: But if they – simply because something is authorized, if you have a law that says that it is torture and it is not allowed, is there any way it could be still authorized?

MUKASEY: If it is torture as defined in the Constitution, or as defined by constitutional standards, it can't be authorized. We don't have the Nuremberg defense here.

LEAHY: Is the current statute outlawing torture constitutional?

MUKASEY: I believe it is.

LEAHY: So that if something was authorized outside that statute, or that violates that statute, that authorization is illegal.

MUKASEY: Correct.

DURBIN: Thank you. Thank you, Judge, Mr. Chairman.

LEAHY: Senator – which one's next? I've lost track. Senator Whitehouse? Sorry.

SENATOR SHELDON WHITEHOUSE (D-RI): Just to finish that thought: So is waterboarding constitutional?

MUKASEY: I don't know what's involved in the technique. If waterboarding is torture, torture is not constitutional.

WHITEHOUSE: "If waterboarding is constitutional" is a massive hedge.

MUKASEY: No, I said, "if it's torture." I'm sorry. I said, "if it's torture."

WHITEHOUSE: If it's torture? That's a massive hedge. I mean, it either is or it isn't.

Do you have an opinion on whether waterboarding, which is the practice of putting somebody in a reclining position, strapping them down, putting cloth over their faces and pouring water over the cloth to simulate the feeling of drowning – is that constitutional?

MUKASEY: If it amounts to torture, it is not constitutional.

WHITEHOUSE: I'm very disappointed in that answer. I think it is purely semantic.

As you consider this, I'd like to offer you at least a thought that I'd ask you to consider. This comes from testimony that was brought before the Senate Intelligence Committee, that is declassified.

It comes from a military officer who's conducted interrogations, who was team chief during the Gulf War, who had all the services under his command, interrogating literally thousands of prisoners.

He was an adviser to special operations task forces during Iraqi Freedom. He says, "I have had a chance to really look at the academic, theoretical side of interrogation, but I am steeped in the operational side."

I asked him, "From a point of view of intelligence-gathering effectiveness, would you, could you, or should you go beyond the Army Field Manual and the techniques that are authorized in the Army Field Manual, in order to obtain intelligence?"

His answer: "Senator, I thank you so much for that question, because I've been waiting 20 years to answer it. That is, absolutely not. I am not at all limited by the Army Field Manual, in terms of what I need to do to generate useful information."

That's the key – accurate useful information. Not leading to questions to force somebody to say what they think I want to hear. And the full spectrum of their knowledgeability, not answering only the questions I ask, but developing what I call operational accord, a relationship that they see it's in their best interests under non-pressure, non-coercive circumstances, that it would be in their best interest to answer these questions fully.

It gives an example of critical intelligence gathered in a search for Scud sites in the Iraq war and explains that he received it because the individual said, "I'm so amazed at my

treatment. I wanted, if I was going to be captured, to be captured by one of your allies. Not by the Americans, because I was told you were animals. You've treated me like a gentleman. You've treated me with respect. You are clearly knowledgeable of my customs and my culture. I'm more than happy to answer any questions that you have."

So, I asked him to confirm this. What you mean to say was you don't see the constraints of the army field manual – the moral constraints, the legal constraints – as in any way inhibiting the effectiveness of your examination techniques? That you could do everything you wanted to, that you missed for nothing because of those restrictions – is that what you intended to say?

The answer: "That's precisely what I meant to say. I don't see those as limiting my ability to work, the spirit or the letter of that guidance. My approach was what we call a relationship-based approach. I've never felt any necessity or operational requirement to bring physical, psychological or emotional pressure on a source to win their cooperation.

So, following the guidance in the field manual, I feel unconstrained in my ability to work in the paradigm I've taught for so many years – 22 years of 100 percent interrogation experience."

So then I asked him, "Why do other countries do this?" And he said, "That gets to the very heart of the matter, and it is this. There are two objectives that one can pursue in interrogation: either winning cooperation, or compliance. They seem very similar, but there are profound differences.

Compliance means to take action that is against your interest, that you don't support – it has nothing to do with intelligence. Cooperation is winning a source's willingness to provide useful information. What the Chinese were interested in, the Koreans, the North Vietnamese was maybe five percent intelligence, 95 percent compliance, meaning creating propaganda.

That's a while different paradigm. And the approaches that they use, like sleep deprivation and torture, ultimately will get any one of us in this room to do things that we couldn't imagine today, but it doesn't necessarily mean our ability to provide useful information."

And he concluded later by saying, "So, I think the key points there is – are we trying to produce compliance, which is propaganda, or cooperation, which leads to intelligence? I hope, as you're evaluating these techniques, you will also consider the, I believe, widely held view of career professionals in the FBI, in the military, in the interrogation field who think that these techniques are not only wrong, but ineffective."

Two quick questions. We talked yesterday about the rules and regulations, the norms and the practices, the protocols and traditions of the department. I urged you to consider those.

You said that you would do so, and you referred to a variety of people.

I want to pin you down and ask you, sir, if you would pledge to undertake some formal process of review and evaluation of those internal protocols, norms and practices so that you get a report from experienced people on what needs to be repaired.

MUKASEY: I'm going to pledge to undertake to review the practices. I am going to pledge to consult people both inside and outside the department in the course of that.

Convening a formal process is something I can't commit to now. If it is necessary, and if I find that the results of inquiry and consultation don't yield a satisfactory result, I will consider that.

WHITEHOUSE: Will you agree to keep me informed of your activities in this area?

MUKASEY: I will.

WHITEHOUSE: Thank you.