



**GEORGE W. BUSH ORAL HISTORY PROJECT**

**FINAL EDITED TRANSCRIPT**

**INTERVIEW WITH MICHAEL MUKASEY**

October 8–9, 2012  
Washington, D.C.

**Participants**

*University of Virginia*  
Barbara Perry, chair

*State University of New York – New Paltz*  
Nancy Kassop

**Also Present**

Sarah Wilson, Covington & Burling

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**Perry:** We have one administrative thing to do for our transcriber, to be able to separate out our voices. We go around the room and say who we are and our title. I'm Barbara Perry. I'm a senior fellow at the Miller Center, in the Presidential Oral History Program.

**Wilson:** Sarah Wilson. I'm currently a litigation partner at Covington & Burling, and a former Justice Department and White House counsel's office official.

**Kassop:** Nancy Kassop, professor in the Department of Political Science and International Relations at the State University of New York at New Paltz.

**Mukasey:** Michael Mukasey. I'm a former Attorney General, 2007 to 2009, now a lawyer in private practice in New York.

**Perry:** Great, thank you very much. We will start with your life and with the question that we offered at the top of our suggested topics, about your life and just a little bit of autobiography if you will, to set us up for your career.

**Mukasey:** I was born in the Bronx, New York, in 1941. It's not Bronx but "the Bronx." It's like The Hague or the Vatican. My father was a storekeeper. He had a series of what seemed to be diminishingly successful businesses, mostly laundry, either automatic or hand, some partnerships. He was a partner in a candy store for a while, I liked that. We also owned a little apartment building that we lived in, a 16-family house, which was enough to be an annoyance and not enough to really make any money. Do you want to know where I went to school?

**Perry:** And your roots. Was it one or both of your parents came from Russia?

**Mukasey:** My father came from Belarus when he was about 16. I found the ship's manifest and some papers indicating that when he came over, he was traveling with his younger sister. They were waiting for a cousin to pick them up and he was a day or so late. So these two people who know nothing about this country and don't speak a word of English had to pay \$3.00 or \$1.75 for their meals until they could be picked up by their cousin. He came here with nothing in his pocket.

My mother was born here and had been a bookkeeper before she had children. I have one sister who lives in suburban Maryland.

**Perry:** You went to an Orthodox school?

**Mukasey:** Yes.

**Perry:** And that was also in the Bronx?

**Mukasey:** Initially I went to a school in the Bronx, and then a school in Manhattan, so I would travel by subway every day, starting in the second grade.

**Perry:** And do you think that had an impact on your career choice of law?

**Mukasey:** I guess, although I had cousins who were lawyers and I worked summers, beginning in junior high school, for the law firm where one of them was a partner. I was a messenger and I changed the towels in the bathrooms and stuff, and I didn't much like it. I was going to be a journalist, or so I thought, and when I was in college, I took the law boards just as a backstop. Because I wasn't at all nervous about it, I did very well.

**Perry:** And you were at Columbia [University] for undergraduate.

**Mukasey:** I was at Columbia.

**Perry:** And your major?

**Mukasey:** American history. I actually started working on a paper when I was a junior. I remember going to visit with a professor at Columbia, I was analyzing some Supreme Court decision. My belief was that there was some problem with the text, that based on the papers I had seen and the opinion itself, it looked as if they had put something down there that they didn't intend to put down. Actually, it was a case handled by the law firm I worked for.

**Wilson:** Which firm was that?

**Mukasey:** The Rosenman firm in New York. So I had this theory about the case and the professor was Gerald Gunther.

**Perry:** Oh, we all know that name.

**Mukasey:** Right.

**Wilson:** He taught undergrad?

**Mukasey:** No. He taught in law school and I went over to the law school to talk to him about this paper that I was writing, this theory I had. He listened patiently and fairly tolerantly to this goofy junior. He said, "Have you considered going to law school?" I said, "Yes, but I don't think I want to do that." He said, "Think about it again." So I did.

**Perry:** He must have been impressed.

**Mukasey:** I was very flattered.

**Wilson:** Do you remember what decision you were referring to or working on?

**Mukasey:** It had to do with the Niagara Power Project and some Indian tribe claims, I think.

**Perry:** So that conversation with Professor Gunther is the first time you really start to think seriously about law school and perhaps law as a career?

**Mukasey:** Yes. I had been told when I was a little kid that I had to go into a profession. I couldn't stand the sight of blood, so it would have to be law school, right? *[laughter]* Process of elimination. I used to talk a lot and people said, "You're a natural lawyer." But that was the first time I started to think about it seriously, as something other than—

**Perry:** Had your parents been political in any way?

**Mukasey:** No.

**Perry:** Did they talk politics at home?

**Mukasey:** Yes, in the sense that there were political conversations among my extended family. I had an Uncle Charlie, who I later found out was a socialist. I don't actually recall the conversations but I do remember that in the 1952 election, which is probably the first one where I was politically conscious, I woke up to find that [Dwight] Eisenhower had won, and I had heard conversations that led me then to be afraid to go to school.

**Wilson:** Why?

**Mukasey:** Because [Adlai] Stevenson was a much better man and they all supported Stevenson and Eisenhower was whatever. I don't remember the conversations. I remember waking up and hearing that Eisenhower had won and saying that I was afraid to go to school. My mother looked at me and said, "Don't be ridiculous. He's a very fine man." She was a very no-nonsense person and that was that. I don't recall whose conversations they were, but obviously I had been led to believe that—

**Perry:** The country would meet a bad end.

**Mukasey:** A very bad end, he had horns and a forked tail. But there was not a lot—there was some discussion of current events and politics.

**Perry:** As you got older, did that have an interest for you and perhaps lead to your major of American history?

**Mukasey:** American history fascinated me. I don't know that I was necessarily interested in politics, because I could never see myself, and still can't, in elective office. I'm not suited for that. When I was in law school, I toyed with the idea of—New York was having a constitutional convention and I thought that would be a hoot, I would stand as a delegate for the constitutional convention. Apparently, it terrified the local political people in the Bronx, to the point where I was told, in no uncertain terms, that that was something people in the party got and that I wasn't

to entertain any idea of going out and getting signatures and so on. That even if I got to do it, it would do me no good eventually.

**Perry:** So that turned out to be very partisan.

**Mukasey:** Yes. “Those jobs aren’t for you.”

**Perry:** So how did you decide on Yale [University] then, for law school?

**Mukasey:** I had heard good things about it and that if you absolutely had to go to law school, that was the place. It was a school full of people who were ambivalent about being lawyers, but the reputation—And the cousin who was the partner at the Rosenman firm where I worked during the summer was down on Yale. He had gone to Harvard. He said, “I’ve always thought of that as the Yale school of law and sociology and not necessarily in that order.”

**Perry:** And did you find that to be the case?

**Mukasey:** A little bit. There’s a basis to every caricature, otherwise it wouldn’t be recognizable. You could learn some law there but you had to work at it. It was a great place to go to school. It was difficult to get in, but once you got in it was nearly impossible to get thrown out.

**Kassop:** That’s been its reputation ever since too, from my understanding.

**Mukasey:** Yes, and it’s true. In fact, there was a member of our class who failed. He was from Panama and he spent all his time playing cards and failed to make the minimum average. And the minimum average had been set so low that nobody knew what to do. It was anticipated that nobody would ever fail to meet it. They finally had to ask him to leave and it took, I gather, quite a few meetings to figure that out.

**Kassop:** Going back to the Rosenman law firm where you said your cousin worked. Was that Sam Rosenman’s firm?

**Mukasey:** Yes. I actually got to meet him.

**Kassop:** He was a living legend.

**Perry:** He was at the time.

**Mukasey:** Yes. In fact, my cousin’s office was right across from his.

**Perry:** Tell us about any professors you worked with at Yale who stand out to you.

**Mukasey:** Fleming James, who was a former railroad lawyer and had a lot of common sense. Ralph Winter, with whom I remain friendly to this day.

**Perry:** And he taught what?

**Mukasey:** He taught evidence, which I liked quite a lot. It’s a somewhat mechanical course, it’s not a real law course but I enjoyed it. Guido [Calabresi] of course, the irrepressible, inimitable. I

took torts from Professor Calabresi. Antitrust with [Robert] Bork was frightening but—  
[laughter]

**Kassop:** Glad that you did it.

**Mukasey:** Right. In retrospect I'm glad I did it.

**Perry:** And how were your ideas about the law profession beginning to gel at that point?

**Mukasey:** I had a very modest view. After my first year in law school, I worked on the chairman's staff of the National Labor Relations Board, because the father of one of my college roommates was friendly with the chairman's chief counsel, a man named Arthur Leff, so he helped me get this job for the summer and it was wonderful. I was deciding NLRB [National Labor Relations Board] cases, writing draft opinions at the NLRB, and I loved that. I liked the process of deciding things, of figuring it out and crafting decisions. That was a lot of fun.

**Perry:** So it did seem like this might be your life's calling, after some ambivalence going into it.

**Mukasey:** Right. I enjoyed that part and I thought that eventually I would either work for a firm or I would work in some government job and earn some reasonably comfortable salary and that would be it. I didn't have any particular targetable goal at that point. Then the law firm process started.

**Wilson:** What was your law school class like? Who were your peers? Can you remind us what year you graduated?

**Mukasey:** Sixty-seven. Bruce Ackerman, who is now a legend, right?

**Perry:** Yes.

**Mukasey:** Just ask him. [laughter] It was wonderful. He was incomprehensible then, he's incomprehensible now. In fact, I remember there was one exchange between him and Fleming James, who of course is exactly the opposite sort of mind. Bruce has kind of a centrifugal mind, it spins out from the center, and Professor James had a centripetal mind, which tended to go in toward the center. Bruce was always like that and he'd raise his hand and he'd say, "But I could argue thus-and-such and so-and-so," and of course he'd spin out some fantastical theory. James said, "Right, and I can call spirits from the vasty deep, but will they answer?" This is from one of Shakespeare's plays: "I can call spirits from the vasty deep, but will they answer?"

Who else? Jeff Greenfield was in that class.

**Perry:** He just spoke at the Miller Center last year about his interesting book, a what-if history.

**Mukasey:** Paul Tsongas.

**Wilson:** He was the Senator of Massachusetts when I was in college.

**Mukasey:** And Joe Lieberman was in that class.

**Kassop:** You had quite a class.

**Perry:** Indeed.

**Wilson:** Were there women in that class?

**Mukasey:** Yes, there were, a conspicuous minority. Mary Ann Rosenfield. Who else? Jenny Eisenstein. Marilyn Holifield. No, she was not in that class.

**Perry:** Was the class about a hundred?

**Mukasey:** Roughly 160.

**Perry:** Right. So a small group of women at that time. We have you in 1972 becoming assistant U.S. attorney.

**Mukasey:** I went to a firm out of law school.

**Perry:** So you were at a private firm from '67 to '72?

**Mukasey:** Right.

**Wilson:** Which one was that?

**Mukasey:** A firm called Webster Sheffield.

**Wilson:** Oh, sure, John Lindsay's old firm.

**Mukasey:** Yes, it was John Lindsay's old firm, it was a wonderful place. I was told when I was in law school that there were two firms you could work for and still be a human being.

**Wilson:** Patterson Belknap.

**Mukasey:** Patterson Belknap and Webster Sheffield, exactly. The people who ran that place, it was wonderful. The summer people were referred to as "summer boarders."

**Kassop:** Summer boarders.

**Mukasey:** Right, "our summer boarders." It was just very quiet, low key. When I got out, that was the time when Cravath [Cravath, Swaine & Moore] raised salaries to \$15,000 a year, because they wanted to buy the first team, and they weren't getting the first team. People were going into government work and by golly, they were going to buy the first team, so they raised—I think the salaries at that point were about \$10,000 or \$11,000, so this was a huge jump. In fact, I remember Eric Sevareid would always close his news program with some significant or telling item. The day that happened, he said—and he had that face that was like Mount Rushmore—"And today in New York, a law firm raised starting salaries to—" and then the camera zooms in on his face, "*—\$15,000 a year. Good night.*" He didn't have to say any more, right?

**Wilson:** That was probably twice what he was making, right?

**Mukasey:** I doubt that was twice what he was making, but still, it was huge. And there was a debate within the firm as to whether to actually pay that to the associates or to donate it to charity because they weren't worth it. But you didn't want to be caught not paying it, because somebody might think the firm wasn't successful.

**Kassop:** Right.

**Mukasey:** And that got hooted down, but they made it—and it was a wonderful place to practice.

**Perry:** And what did you do there?

**Mukasey:** I did a succession of things, because they would try you out in each of—trust and estates and corporate work and litigation and so on. I did trust and estates for a while and I wrote a will where I think I left it all to the children with the remainder to the wife, and it was decided that T&E [trusts and estates] wasn't going to be my forte. I did corporate work, I enjoyed that.

You asked about women in the class. There was a public offering for a company whose chief financial officer was a woman, except you couldn't tell from her name that she was a woman. And at the time, it was thought that for a woman to be the chief financial officer of a company was something that might shake investor confidence, so they never used the pronoun. Her name was Brooks Sloane and they'd say, "Brooks Sloane did this, Brooks Sloane did that," in the prospectus. They never said "she."

**Perry:** No photos obviously.

**Mukasey:** No photos. Actually, that gave me an idea for something that happened later on, I'll tell you about it. Anyway, I did a succession of things at Webster Sheffield. They represented a tobacco company and there were a lot of cigarette cases going to trial at that point, so we had a number of those trials.

**Wilson:** Who was the head of the firm at that point?

**Mukasey:** Beth [Bethuel] Webster and Fred Sheffield. Fred Sheffield died while I was there.

**Perry:** Did you think that you might want to stay there?

**Mukasey:** Yes. I was there for five years and there was a fellow there named [Edward M.] Mike Shaw, who came from the U.S. attorney's office to the firm, and he didn't seem to enjoy private practice. He was very tall, he looked like Abraham Lincoln, and he used to slouch around the office. But when we went to court, we'd go visit the U.S. attorney's office and he would suddenly straighten up and his step changed, everything about him changed. And I thought, *I don't know what's doing that but whatever it is, I think I'd like to do that.* Seriously. There was one other partner at the firm who had been at the U.S. attorney's office, Don Cohn, and I expressed an interest and applied.



**Perry:** No politics involved in that at all? Aside from things that happened in the early part of the [George W.] Bush administration, sometimes we hear that one must be politically active or be making political links.

**Mukasey:** No, to the contrary.

**Perry:** But you didn't find that.

**Mukasey:** That office in particular, beginning with [Henry L.] Stimson or Emory Buckner, going way back, eliminated any political—the U.S. attorney is appointed by the President. Even there, the people continue their tenure. If they were appointed in the middle of a term, they will continue until their term ends in four years or so, and then a new U.S. attorney is appointed. But assistants, never. And I was told that way back at the beginning of the 20th century, it used to be there was a little “R” or a little “D” next to your name and they made decisions on that basis, but not while I was there.

**Perry:** So that was perfect for you again.

**Mukasey:** Yes.

**Wilson:** And who was the U.S. attorney in 1972?

**Mukasey:** Whitney North Seymour Jr. I liked Seymour. Succeeded by Paul Curran, succeeded by Bob Fiske. I worked very briefly under Fiske, but Seymour was the one who hired me.

**Perry:** So you were there for about four years, was it?

**Mukasey:** Yes.

**Perry:** Seventy-two to '76.

**Mukasey:** Right.

**Perry:** And as I understand, you did mostly criminal.

**Mukasey:** All criminal.

**Wilson:** Was the office at that time divided into criminal and civil?

**Mukasey:** Yes. I was told that you didn't really get a choice, but you could express a preference. I expressed a preference for criminal because the criminal division was larger than the civil division. The odds are you get your preference and I did.

**Wilson:** Do you recall explaining to Whitney North Seymour about why you wanted to leave private practice and go to work in the U.S. attorney's office?

**Mukasey:** I don't remember being asked that. I think everybody just assumed, *Of course he wants to be here, this is the place to be.* The only thing he asked me was, “How do you see yourself in 20 years?”

**Kassop:** And what did you answer?

**Mukasey:** I said as a U.S. district judge. I said, “If I could do anything, I would want to be a district judge,” because by that time I had seen enough trials. When I sat in court, I would watch what the judge did and I thought, *Yes, I would do that; no, I wouldn’t do that*, and watched the dynamic.

**Kassop:** Were there any particular high-profile cases that came up during that period of time?

**Mukasey:** There were cigarette cases. We were in Grand Rapids in front of the most—he was then the most reversed or the most mandamus’d, I forget which, judge in the United States, Noel Fox. He wanted desperately for the plaintiff to win in that case, and he wound up doing the plaintiff no favors by admitting the Surgeon General’s report. There was one holdout for the plaintiff on the jury, and the Surgeon General’s report said that cigarette smoking caused not only cancer but heart disease as well. And we later found out what convinced this juror was that on autopsy the decedent’s heart was normal, so he figured that cigarettes couldn’t have been doing him any harm or it wasn’t the cigarettes. It was crazy, right? But if the judge hadn’t admitted the report, which he shouldn’t have admitted in any event, that wouldn’t have happened. We could always tell when we were ahead in those cases. The jury room door would open and the smoke would come wafting out. [*laughter*]

**Wilson:** So these were product liability cases?

**Mukasey:** Product liability cases, and we tried them in different places.

**Wilson:** Why should the Surgeon General’s report not have been admitted?

**Mukasey:** It’s hearsay, it’s not evidence. It’s not really evidence of anything, and it certainly didn’t bear on the issues in the particular case.

**Wilson:** I take it that the Surgeon General’s report wasn’t public.

**Mukasey:** Yes, it was. It was a public document.

**Perry:** That had come out in the ’60s, I think.

**Mukasey:** But it bore only a tangential relevance to the particular issues of the case. Those were very interesting cases because a fair number of them went to trial.

We had some funny experiences. We had one in New Orleans. You’d always have local counsel in these cases because you’d go in there with a bunch of lawyers from New York, but local counsel generally didn’t do terribly much. We were taking the deposition of the plaintiff’s expert, who I think was a statistician. Of course the burden of his testimony was that as a statistical matter lung cancer associated with cigarette smoke. They would go around the table and ask whether anybody had any questions, and they asked the local counsel and he said yes. And everybody tightened up a little bit. He said, “Now, you say that your statistics say that cigarette smoking causes lung cancer, is that right?” The expert said, “Yes, there’s a definite statistical association.” The counsel said, “Would you also say, sir, that drinking causes cancer of

the larynx?" The expert said, "Yes, there's a definite statistical correlation there as well." The counsel said, "Would you also say, sir, that sexual intercourse causes cancer of the cervix?" The expert said, "Yes, there's a statistical association there as well."

The counsel said, "Thank you very much. I just want to tell you, your testimony ain't going to be worth a damn in the South." [laughter]

**Wilson:** Do you recall what happened then?

**Mukasey:** Brackets, laughter.

**Perry:** So that was from '72 to '76, and then you go back into private practice in '76.

**Mukasey:** Right. And subsequently, I went to Patterson Belknap.

**Perry:** And the decision to go back into private practice you made—?

**Mukasey:** They didn't encourage careers. You stayed, the commitment was three years, and by that time I was married and had a family.

**Perry:** But you were still thinking and hoping for a judgeship at some point.

**Mukasey:** That was my dream.

**Perry:** Right. Twenty years down, so you were four more years into that. Maybe in about 16 years.

**Mukasey:** So I thought. A person I developed a close friendship with at the office was a great help in eventually getting the judgeship. Rudy Giuliani.

**Perry:** Tell us about your friendship with him and your professional work with him.

**Mukasey:** I had to pass his office in order to get to mine and we would talk. About two or three weeks into my tenure my father died. At the funeral I looked up and there was Rudy, with 10 or a dozen assistants he had brought up. I was overwhelmed, my mother was overwhelmed. That's the sort of person he was, so we became very good friends.

**Perry:** That's very meaningful.

**Wilson:** Did you work on cases together?

**Mukasey:** There was one notable case. I was the number three seat on the prosecution of a case called *United States v. Bertram Podell et al.* Podell was a Congressman from Brooklyn who had taken money in the form of legal fees in return for helping somebody get a route to fly gambling junkets from Florida to the Bahamas. He had taken money and he wasn't as experienced as some of them were, so he didn't really do it right, and then he came up with this cockamamie theory that it had been a Podell in a Podell law firm that he was not a member of. I remember we found a stationery engraver who had been hired after the investigation began to get up a letterhead that didn't have him on it. There was a lot of fun evidence. Rudy destroyed him on cross-

examination, and he wound up pleading guilty in the middle of cross-examination. It was a classic.

**Wilson:** Wow.

**Perry:** A Perry Mason moment.

**Mukasey:** It was a real Perry Mason moment. He had these sort of half glasses and he would put them on and take them off, and at one point he got so nervous he stuck his thumb in and popped the lens so he had to hold the lens up. It was awful. During a break, he had his lawyer negotiate a plea so that he would not be automatically disbarred. He pleaded to a gratuity count and some other counts, I think.

**Perry:** Were you talking to your friend Rudy Giuliani about your hopes and aspirations to go on the bench one day, and did he talk to you about his political aspirations?

**Mukasey:** He never talked about political aspirations. I'm sure I talked to him about wanting to be a judge. We talked a little bit about practicing together and then—

**Perry:** Going out on your own?

**Mukasey:** Not on our own but being at the same firm. I don't know whether it got as specific as on our own. People at Patterson wanted him to come there. They were talking to him. Somebody told me they had a nameplate for the door, but then he became Associate Deputy when Harold Tyler, who had been a district judge, became Deputy Attorney General, when [Ed] Levi became the Attorney General of the [Gerald] Ford administration. He went down to be Associate Deputy, so they settled for second best or third best and took me.

Then, when Ford wasn't reelected, Rudy was looking for places to go, Tyler was looking for places to go, and Rudy said that if Tyler went to Patterson Belknap, he would go with him because I was there. I used to do negative research on all the other—Rudy would call me up, tell me the other places he was thinking of going and I would give him the skinny on those places and he would whisper in Tyler's ear as to why he shouldn't go. Eventually Tyler came to Patterson Belknap and it changed to Patterson Belknap Webb & Tyler. And Rudy came with him.

**Perry:** So '87 then, your dream comes true and you go on the bench.

**Mukasey:** Right. Surprise.

**Perry:** Tell us how that happened.

**Mukasey:** That was during one of those periods when Rudy and [Alfonse] D'Amato were getting along. District judgeships are within the gift of a U.S. Senator, so that was the way it got done.

**Wilson:** The [Jacob] Javits-[Daniel Patrick] Moynihan commission had already started, in about 1980, right? Where there was this bipartisan arrangement?

**Mukasey:** Yes, in the sense that they divided up the judgeships, depending on which party controlled the White House.

**Wilson:** Right.

**Mukasey:** Because there was one Democratic Senator from New York, one Republican.

**Wilson:** Right.

**Mukasey:** I think it was the party that controlled the White House got four out of the five slots statewide. I think that's the way that worked.

**Wilson:** My understanding—I think this is from reading Sheldon Goldman but also having worked on judicial appointments during the [William J.] Clinton administration—and this is the way it was at the time. The Southern District was three for one. So there were three from the President's party and one from the other party. And my understanding had been historically that that started in about 1980, with regard to U.S. attorneys specifically, and then Moynihan and Javits had worked out this three-for-one deal.

**Mukasey:** Maybe. That was before I got involved in the process. There was also a man who had gone to the same elementary and high school I went to, was a year ahead of me, Sandy Eisenstat, who organized a PAC [political action committee] and was a donor to D'Amato's campaign. Sandy knew that I wanted to be a judge too, and D'Amato hadn't appointed any Jews, so—

**Kassop:** Ergo.

**Mukasey:** Right.

**Wilson:** That's a rather extraordinary fact.

**Perry:** Let the tape show that there were some hand gestures and facial expressions to indicate that—

**Kassop:** Therefore.

**Perry:** Therefore, you might be the one.

**Mukasey:** Right. I got a call one afternoon from Rudy and he said, "You're going to get a call from D'Amato. He called up to find out whether—" because I had spoken to D'Amato about it months or years before. And he said, "You're going to get a call from D'Amato this afternoon and he wants to know whether you're around," but he didn't tell me what was happening. And then I got a call and the Senator said he was going to put my name in, but I wasn't to tell anybody, which made me a little nervous. What's this about? Then he called and I told Tyler and I told my wife, and then nothing happened. Then these forms arrived.

**Kassop:** The ubiquitous forms.

**Mukasey:** Right, the ubiquitous forms, stuff that you have to submit to the Judiciary Committee.

**Perry:** You say that you had spoken to D'Amato some time before that.

**Mukasey:** Yes. I don't remember exactly how long. I know that Rudy and D'Amato were friendly, and I remember a conversation in the back seat of a car. I forget exactly where we were going but we talked about various things, including Rudy telling him that I wanted to be a judge. He said something noncommittal but it registered.

**Perry:** Right.

**Wilson:** Which elementary school and high school were you referring to?

**Mukasey:** Ramaz.

**Wilson:** Where is that located?

**Mukasey:** It's in Manhattan.

**Wilson:** And that's where you met Sandy Eisenstat?

**Mukasey:** Yes.

**Wilson:** And what was he doing at the time?

**Mukasey:** He was a lawyer. We didn't overlap, but he had been at the U.S. Attorney's Office with the civil division, well before I was. He was two or three years ahead of me.

**Wilson:** So do you think it was Giuliani suggesting your name to Eisenstat and then Eisenstat speaking to D'Amato?

**Mukasey:** No. I think it was Eisenstat and Giuliani both speaking to D'Amato. Eisenstat I think made the point at the time that the iron was hot, and it registered with D'Amato that Rudy had a Jewish friend who—

**Kassop:** That's usually how those things go.

**Mukasey:** There you go, right. A friend who wanted to be a judge.

**Perry:** So you knew the right people at the right time. Again, you weren't politically inclined but you considered yourself a Republican at that time, right?

**Mukasey:** Yes. I had been a registered Democrat up until Liz Holtzman ran for the Senate, or Congressperson Holtzperson, as we later started to refer to her. At that point, I couldn't.

**Perry:** So you changed your registration.

**Mukasey:** I changed my registration.

**Perry:** But again, you knew people who had political ties and that certainly turned out to be very helpful.

**Mukasey:** Lloyd MacMahon, a district judge in the Southern District of New York, said there were only two reasons anybody ever becomes a judge. One is they're a Democrat, the other is they're a Republican.

**Perry:** Makes perfect sense. So tell us anything else about the process beyond the paperwork that stands out to you from that time. This is '87 and coming toward the end of the second [Ronald] Reagan term.

**Mukasey:** Right. I was asked, "Everybody's got a problem, where is yours going to come from?" I remember that part of the interview.

**Perry:** What did you say?

**Mukasey:** I had written an op-ed for the [*New York Times*], defending Rudy Giuliani's practice of holding press conferences at the time that he announced indictments, because somebody from the ACLU [American Civil Liberties Union] had written that it endangered the presumption of innocence. I wrote a column saying presumption of innocence is a rule of evidence, it doesn't apply before a trial.

**Perry:** Was that the first piece you had ever written?

**Mukasey:** Yes, for the *Times*. I'll tell you a story later on about an attempt to write something else for the *Times*.

**Perry:** But was that the first op-ed piece, period, that you had ever written, and it was for the *Times*.

**Mukasey:** Yes, for the *Times*, because they had run this other piece attacking it, so they ran this, on the other side. And sure enough at the confirmation hearing, there were two Senators in attendance. This was right after Bork, so everybody was sort of punched out. But there were two Senators, [Howard M.] Metzenbaum and Strom Thurmond. If somebody could have told me growing up that my principal antagonist would be Howard Metzenbaum and my principal defender would be Strom Thurmond, I don't think my mother would have believed it.

**Perry:** What would your Uncle Charlie say?

**Mukasey:** My Uncle Charlie would probably turn cartwheels in his grave. But that's the way it happened. Metzenbaum pulled out this column. "You mean to say as I'm walking up the street, I don't have the presumption of innocence?" I said, "That depends on what you're doing, Senator." And we went around and around, and he made me stay afterward to answer a series of questions, which felt like staying after school to write essays. I had to stay after to write answers to this series of questions, because he professed to have great unease.

**Wilson:** So he was on the Judiciary Committee at that time?

**Mukasey:** Metzenbaum, yes. But I got even because apparently Sandy Eisenstat knew him, and I described this hard time that he had given me. Apparently the next time Eisenstat saw Metzenbaum, he put it to him and he said, "Why did you give my friend such a hard time?"

Metzenbaum's highly principled response was, "Why didn't you tell me he was your friend? I had no idea that he was your friend."

**Wilson:** So what was Thurmond's role as your defender?

**Mukasey:** Because Metzenbaum would also ask me how come it had taken so long to fill my spot, because there was a lot of politics about filling spots and so forth. It was that or some other question in which I started to volunteer things I had no way of knowing about.

**Wilson:** Right.

**Mukasey:** I think Thurmond stepped in and said basically, "You shouldn't be asking these questions of him."

**Kassop:** You're not going to do your Thurmond impression for us, the way you do all the other southern impressions?

**Mukasey:** No. I can't do Thurmond.

**Perry:** He's sui generis.

**Wilson:** Was your name picked by Senator D'Amato off a commission short list or were you singularly picked by him?

**Mukasey:** The truth?

**Wilson:** Yes, always.

**Mukasey:** I was singularly picked by him and then I was sent to his committee to have a conversation with them, which I did. They were very pleasant, but candidly I think it was window dressing. Obviously, if I'd had three heads, they would have told him not to do it.

**Wilson:** Was that the only vacancy at that point or were there multiples?

**Mukasey:** I think there were multiples because Kimba Wood was up at about the same time or close to it. She was soon after me, I think.

**Kassop:** Did they ask you questions about national politics? This was the time of the Iran Contra investigation.

**Mukasey:** They didn't ask me about that. I'm trying to think of what I was asked. I remember being asked, "Who's your model judge?" which was easy, Judge [Edward] Weinfeld, who was a deity. I don't remember much else about the committee.

**Perry:** But there weren't stumbling blocks as often can be the case at the end of a term, especially a two-term President, and you think part of it was because, as you say, people were just punched out over the Bork.



**Mukasey:** That's part of it, but also the politics hadn't yet gotten down to district judgeships. Circuit judgeships, yes. They weren't yet messing with the district judges. That took some time to happen.

**Perry:** And the Senate was majoritarian Democrat? Am I remembering that year?

**Wilson:** The last two years of Reagan, I believe the Democrats were in control.

**Perry:** Which was part of the problem for Bork, of course. So even that you were not—except for Metzenbaum, you weren't running into a problem.

**Mukasey:** No, and he was the only one. As I said, there were only two Senators at the hearing, him and Thurmond.

**Perry:** Right. Anything else to ask about the process?

**Wilson:** As a born and bred New Yorker, I'm actually quite amazed that there were no Jewish candidates at that point. I'm aware that Senator D'Amato is not of Jewish heritage, nevertheless that's a very important constituency for Democrats as well as Republicans in New York.

**Mukasey:** Right, particularly for New York.

**Wilson:** Other than Sandy Eisenstat's commentary, was there any kind of campaign or talk about that gap point?

**Mukasey:** Not that I'm aware of. There were Jewish judges, plenty.

**Wilson:** Oh, yes.

**Mukasey:** Who had been appointed earlier, at the recommendation of other people, so it's not as if Jews were underrepresented on—

**Wilson:** The Southern District.

**Mukasey:** The Southern District or in New York generally.

**Kassop:** But Republican Jews were not very plentiful.

**Mukasey:** Right, exactly. Count them on the fingers of one hand and have enough left over to play "Chopsticks."

**Wilson:** While we're on the topic, I'm curious what Yale Law School was like as a Jewish law student. Did you feel that there were any opportunities that were closed off to you?

**Mukasey:** None.

**Wilson:** Big law firms or anything?

**Mukasey:** No, not at all. The only resistance I got—I wrote my way onto the law journal rather than getting on based on grades. I interviewed with a firm that I don't think is in existence anymore, Arthur, Dry & Kalish, and I was told two things. The partner took a look at my transcript and said, "You're going to have to shore up those grades." He made it sound like a collapsing excavation. And then I started to ask about pro bono work at the firm. Then he started to talk to me about the definite article coming into light, "*the* economic realities of *the* practice of *the* law." At the end of the interview he stuck his hand out and said, "I guess it's just as important in an interview to find out that you're not suited for each other as it is that you are, isn't it?"

Fast-forward a semester, I write my way onto the law journal and one of his partners came up for a moot court in which I was sitting, as one of the judges, first year moot court. He said, "Have you considered law firms in New York?" I said, "Yes, as a matter of fact I interviewed with yours." [laughter]

**Perry:** Again for the record, score one for Judge Mukasey.

**Kassop:** Hand gesture.

**Mukasey:** Not yet judge.

**Perry:** Not yet judge but currently judge. So you take your seat on the bench, and in the beginning is it what you thought it would be like? What are your first impressions?

**Mukasey:** Somebody on D'Amato's committee said, "You know, Mike, it's a frisky horse. If you like a frisky horse, you'll enjoy it." And he was right.

**Perry:** And do you like frisky horses?

**Mukasey:** Actually, I took riding lessons at the Claremont Riding Academy in Manhattan.

**Perry:** So you were perfectly suited.

**Mukasey:** Right. But you had the lawyers there to teach you, and I'm serious. They have to make it comprehensible or else they suffer the consequences. Then you have law clerks and so forth. I got a bunch of everybody's worst cases that they would offload onto the new judge, got a docket composed of a certain number of—

**Wilson:** Dogs.

**Mukasey:** Dogs, right, the kennels were opened. In fact, the only restriction was they weren't supposed to send cases with pending motions, and I got one case that not only had pending motions, it had motions that had been pending at the time the case was assigned to the judge who gave it to me. I went to see Charlie Briant and asked, "How do I give a case back because obviously there's been a mistake, people aren't supposed to assign cases with pending motions." And he looked at me and said, "Mike, you're going to be here for a long time." I thanked him and I got up and left. Obviously, he was telling me to suck it up and deal with it.

I was very fortunate. There was a woman who had clerked for Judge [Charles E.] Stewart, who helped me out, along with the two people I picked as my law clerks, one of whom was a lawyer who had been at Patterson, Mickey Rathbun, and another—my two law clerks, and she helped me go through the files, called people in for conferences. That was before the books arrived, so I would hold the conferences in the chambers. People would walk in and there were these empty bookshelves and “Oh, my God, we’ve got a blank slate,” so a number of cases settled right off the bat.

**Perry:** But the Federal Judicial Center didn’t say, “Come to Washington for a seminar”?

**Mukasey:** No. There was new judges school before I was confirmed. I went to new judges school at the Federal Judicial Center and learned some very valuable tricks of the trade, how to put together a charge. And in fact unfortunately, one of the people in my class at the Federal Judicial Center, who had already been sworn in, was Richard Daronco, who months later was murdered by the father of an unsuccessful litigant. Shot him in his garden.

**Wilson:** Who swore you in?

**Mukasey:** Judge Briant. I didn’t have a private swearing-in; I delayed it for a while, which drove him nuts, because he wanted to staff up. You get confirmed, you get sworn in. I was confirmed in November and I wasn’t sworn in until the first week of January. I wanted to close out the year.

**Wilson:** So did you stay with Patterson Belknap until the end of the year?

**Mukasey:** Yes. In fact, the commission came through while I was in new judges school, and we were down at a dinner that they gave at the Supreme Court. Justice [William] Brennan was there. A bunch of us had been given commissions, and he offered to swear in anybody who was there who wanted to be sworn in by—I think once you get sworn in, then you are in fact a judge, so I thought I’d better not do it. I tucked my commission under my arm and went home and waited for the swearing-in.

**Perry:** But that would have made Uncle Charlie stop spinning, if you had been sworn in by Justice Brennan.

**Mukasey:** Yes, it would have, but I didn’t do it.

**Perry:** So it’s January of ’88 then?

**Mukasey:** Early January of ’88.

**Perry:** You take your seat on the bench. Tell us about those first few years, up until you become chief judge 13 years later, right?

**Mukasey:** Right. Although Charlie Briant knew—we had a conversation a year or two in. Somebody had named me as executor of a will and the question was whether I could take a fee or not. He said, “You’d better write to the committee on codes of conduct. You know you don’t want a question raised. You’re going to be chief judge someday.” And I thought, *God, he had*

*already sat down and done the math.* He was interested in things like that. It floored me in an odd sort of way. Why do you know that? But he understood it.

**Perry:** What do you think it was about you, that he knew that you would do that at some point?

**Mukasey:** He just did the math.

**Perry:** He just plotted out the longevity.

**Mukasey:** Yes. It's all based on seniority; it has nothing to do with merit. It's based on seniority, and there's a limit on the number of years you can serve. So he did the math. And you can't begin your term after you turn 65. So he looked up the ages of all the other judges between me and him and figured it out.

**Perry:** How did that make you feel, knowing that that was in your future? Was that something you would look forward to?

**Mukasey:** No, not at all. In fact, I had thought about the people who had been chief judge and I frankly didn't have any desire to join those ranks. The first blunt comment of the day.

**Wilson:** Why is that?

**Mukasey:** Because it had nothing to do with merit, it was an administrative job. Throughout my practice I had shunned administration like the plague. I didn't feel any particular competence at it. I wanted to be a good judge, I didn't want to be some ridiculous figurehead and you were chief—What I surmised was that there must have been a meeting at which somebody decided, "We have to have an administrative judge for each district because otherwise the staff is going to wind up running the place and you can't have that. So there's got to be an Article III person in charge, but if we call it administrative judge, nobody will ever do it. So let's call it chief judge, and by the time they find out that there's nothing attached to the reins, it will be too late." Actually, Ralph Winter, who was chief judge of the Second Circuit, told me that the principal thing the chief judgeship is good for is it looks great in your obituary. But other than that—So I had no aspirations along those lines.

**Kassop:** Semantics is everything, right?

**Mukasey:** It is everything or it's enough. In fact, I was thinking of passing on it.

**Kassop:** Would that have been possible?

**Mukasey:** Yes. Amalya Kearse passed on it, on the Second Circuit, and there were a lot of people very unhappy with her and told her so. "You're a traitor to yourself, you're a traitor to all of us. You mustn't do that, can't do that, shouldn't do that," but she did it anyway.

**Perry:** Tell us about those first years sitting on the bench. Was it what you had hoped it would be? What kinds of cases?

**Mukasey:** Everything I hoped it would be and more, with a mine run of civil and criminal cases. I enjoyed it. I didn't find it difficult.

**Perry:** This was your niche.

**Mukasey:** I just found the courtroom stuff very enjoyable. I like to write. The clerks helped me a lot. I would divide up opinions. Some judges assign cases to their clerks from the get-go. I didn't. We would sit down and do assignments of cases every week or two, because I tried to play to people's strengths and weaknesses. But once you got a case, regardless of the issue, that was your case henceforth. They would do some draft opinions, I would do some draft opinions. They would do draft jury charges based on—this is what I learned in new judges school. You have a sort of library of numbered charges, so you have a conspiracy charge and a bank robbery charge, an aiding and abetting charge, and then the introductory comments, closing comments, credibility of witnesses, all that stuff, and you assemble it, like putting together a prefabricated garage or whatever, with this and that, tighten the screws and there you go. You just have to put in the names. Eventually, it got to the point where we could do that.

**Wilson:** What percentage of your docket was criminal versus civil, approximately?

**Mukasey:** By number? Well, I'd say there were 10 or 20 to one, civil versus criminal. On the other hand, the criminal cases went to trial more often, took a lot more time per case than the civil cases, which generally settled.

**Perry:** So before we get to the early '90s and the Trade Center bombing and those cases, anything for the historical record that you—

**Mukasey:** Yes. Actually, the first criminal case I tried, the defendant waived a jury and I acquitted him, and the assistant, Cathy Seibel, who is now a judge, it was *her* first criminal trial and from that day forward she referred to me as "that new judge."

**Wilson:** And why did you acquit him?

**Mukasey:** A technicality. He had done it, no doubt about that. He had stabbed a postal worker. He lived in a rundown section of the Bronx in which they had torn out all the mailboxes. And what the letter carriers used to do is if you were home, then you would get your mail. If you weren't home, they would keep it at the post office for two or three days and then send it back. But if you gave the letter carrier a couple of dollars, then they would keep it for longer. Our hero defendant was expecting a very important piece of mail, notwithstanding that he had paid the letter carrier and it had gone back. So he went to the post office to settle accounts with him. They had words in the post office and then went out onto Jerome Avenue, where he pulled a knife and stabbed him. The statute said—

**Wilson:** Did he die?

**Mukasey:** No, he did not, I don't think. The statute that criminalized attack on a federal officer said "while engaged in or on account of the performance of his duties." That's the wording of the statute. He wasn't then engaged in his duties, because they were outside the post office. And I

found that it wasn't on account of the performance of his duties because it was on account of this private arrangement that they had.

**Wilson:** Right.

**Mukasey:** So, yes, it was a state crime, but it wasn't a federal crime. They said, "You're wrong, you're not reading the statute right, that 'on account of the performance of' related to 'engaged also,'" and I said, "No, it doesn't, it means because of." So, for example, if you were getting even with somebody, let's say with a judge for a ruling, that would be on account of the performance, even if the assault occurred while the judge was someplace else.

**Wilson:** Right.

**Mukasey:** "While engaged."

**Wilson:** It's not really a technicality, it's statutory construction.

**Mukasey:** Yes, but they wanted me to read it as "while engaged, on account of the performance of," so some sort of fuzzy-wuzzy—No, that's not what the statute means and I acquitted him.

**Wilson:** Did the defense counsel move for acquittal, or was this your—

**Mukasey:** The defense counsel to this day doesn't understand why his client was acquitted.

**Wilson:** He had a defense counsel.

**Mukasey:** Oh, yes. In fact, he was a guy with a waxed mustache.

**Wilson:** So this was *sua sponte*?

**Mukasey:** Yes.

**Wilson:** Do you know whether he was then tried in state court?

**Mukasey:** I don't. In fact, the assistant wanted me to hold him so that the state authorities could get there, and we had a lively discussion about whether I could. You can't really do that.

**Wilson:** Hold someone who's free?

**Mukasey:** Right.

**Kassop:** Exactly what nobody did.

**Mukasey:** I just acquitted him.

**Wilson:** Right.

**Mukasey:** I think he had been ridden in from Rikers [Island], so I think there was some grace period during which they could do whatever they needed to do. But I couldn't. Could I hold him? I said no, I could not.

**Wilson:** Was there an appeal?

**Mukasey:** The government can't appeal a verdict, even a bench verdict.

**Wilson:** Of course.

**Mukasey:** Although when a case is bench tried, whether it's a conviction or an acquittal, you have to provide a reasoned opinion. You don't just go out there and pronounce a verdict.

**Kassop:** Was this a pretty cut-and-dried, pretty easy case for you? In other words, you read the statutes, that's how you interpreted it, and there wasn't a large question in your mind?

**Mukasey:** Was I in doubt? No.

**Kassop:** Yes, that's my question to you.

**Mukasey:** Right. No, I was not. The case that actually caused me the most doubt and hesitation was a sentencing in a criminal case, where a woman was found with cocaine. It was one of those bus terminal cases, where she was acting funny and the agents came over to her, asked to look in her knapsack and sure enough, she was off to Cleveland with a kilo or so of cocaine, and naturally she was doing it for her boyfriend.

**Perry:** We should ask, powder or crack?

**Mukasey:** Powder. No crack, she'd be under the jail. There was a five-year mandatory minimum but she cooperated. But they told her, "Don't go home." She didn't have anyplace else to go, so she went home, and of course her boyfriend immediately knew that she hadn't gone to Cleveland and he called the person in Cleveland who was supposed to be getting the drugs, so they couldn't arrange the delivery. Hence, her cooperation was frustrated.

Now had I been a little more venturesome or thoughtful, it would have occurred to me to depart even from the mandatory minimum, because you could sentence below the mandatory minimum if the government gave a recommendation that there had been cooperation. Then you were out from under the mandatory minimum. But the government refused to do it in this case because her cooperation hadn't in fact gone full cycle. I felt that that was the government's fault, it was the fault of the agents. They should have provided her with a place to stay. But I didn't come up with that in time, so I sentenced her to five years. She did get out early. She was eligible for an early release program, and I was asked did I think she should, and I said absolutely. But still, it's five years for that.

**Perry:** Your thoughts generally on sentencing guidelines are what?

**Mukasey:** Generally, I didn't have much trouble with them. I thought it was a little like a board game. You'd go to a sentencing and it was like going to the meeting of some esoteric society,

because you'd hear people slinging terms around. "Do you think this is a 2.0 or a 1.3?" And the defendant and his family would be sitting there utterly befuddled. And people would be talking in subsections. And it promised great precision but delivered as many random results as—I don't know about as many, but for different reasons, as the prior system had. I think what we should have had was a system involving—you cut off the goofy sentences at the top and the bottom and leave the middle for reasonable discretion, but it came down to this—I used to have a foldout table of the guidelines. You know what I'm talking about.

**Wilson:** I think I remember those.

**Perry:** A periodic table.

**Mukasey:** Right. It looked like a railroad timetable. They're still there, but they're advisory now.

**Wilson:** Right. Did you preside over any cases involving elected public officials?

**Mukasey:** I don't think so. I had some crooked cops and one or two federal agents, but I don't think I had any elected.

**Wilson:** Any organized crime cases?

**Mukasey:** Yes, but not big time. I had one where the lead defendant in the case was a member of one of the five families, and he had gotten some vulnerable person in a brokerage firm, who controlled the—there was a transit, I don't know what you would call it. An account where they held money until they could figure out where it went. In a brokerage firm, that could be a sizable amount of change. He got access to this guy and controlled this money, so he could transfer money out every so often. The assistant who tried it was a guy named Henry DePippo, who now is practicing in New York, and the agent was a guy named Dowden, and the claim was that this made man had been at the top of this conspiracy. Needless to say, he shows up least frequently and the agent had—I think he had a videotape of him appearing at one meeting and lost it. He was supposed to show up for another meeting, the agent was taking surveillance photographs, and he ran out of film at the point where this guy showed up. That was his testimony, that he had had the videotape, lost it, and ran out of film before he showed up.

The defense lawyer, John Jacobs, gave a brilliant summation. He said, "Ladies and gentlemen, let's say two guys showed up at your door from the brokerage firm of Dowden and DePippo, and they wanted to sell you stock, and you asked for a registration statement and they said, 'We had a registration statement and we lost it.' You ask, 'Do you have any financials?' They say, 'We had them but we ran out.' Would you buy the stock? If you wouldn't buy that, don't buy this," and the jury, they nearly hung. They were going to convict him, but I gave an Allen charge over Jacobs's objection and they came in with a verdict of not guilty.

**Wilson:** Interesting.

**Mukasey:** But that was the only. There were one or two other mob related but nothing substantial.

**Perry:** How about on that point we just take a quick break.



[BREAK]

**Perry:** All right, so we're backing it up to 1993. Your courthouse is right by the World Trade Center, is that correct?

**Mukasey:** No, it's not right by.

**Perry:** But in the same neighborhood, lower Manhattan.

**Mukasey:** Oh, yes. It's about a half a mile as the crow flies.

**Perry:** Describe to us the '93 World Trade Center bombing.

**Mukasey:** The first I heard about it, I was on the subway and somebody said there had been an explosion in a transformer under the World Trade Center. Then it became clear that it was something other than that. I remember they recovered the serial number of the truck and went to the rental agency from which the truck had been rented, and because it had been such a low-budget operation, one of the people involved had shown up to try to get the deposit back. They had an FBI [Federal Bureau of Investigation] agent behind the counter, and there was a video. At one point he said he wanted justice, and the agent who was posing as the attendant said, "Oh, you'll get justice."

**Perry:** In spades.

**Mukasey:** Right. And as it later developed, because of that and other aspects of what had gone wrong with this plot, it seemed almost like—there were six people killed. There were many people injured and millions of dollars' worth of damage, and what they had really intended to do was topple one tower into the other. They drove the truck underneath and the idea was to topple one tower into the other. And in fact, the truck had, I think, cyanide, which had vaporized instead of burning. They thought that if it burned it would go up into the vents and kill people in the towers, but that didn't work. The whole thing seemed to have an almost comic opera aspect to it, because they were such bumblers. It was sinister and awful, and yet there was a certain ridiculous aspect to it, how these people hoped to do this.

**Perry:** Right. And as the story went on, this was part of a larger plot that was brewing.

**Mukasey:** That came later.

**Perry:** And how does the case come to you?

**Mukasey:** The way all cases come, it gets wheeled out. One defendant was arrested for assaulting an FBI agent during a search of his home. He was the cousin of El Sayyid Nosair, who had shot Kahane. Meir Kahane was a right-wing Israeli politician who was killed in a ballroom in New York in 1990. Nobody made this connection at the time, but one of the demands of the

people who blew up the Trade Center was that Nosair be released from prison. So they followed his cousin and they were going to search his apartment. He got into a fight with them and was arrested for assault.

Then they arrested the people who were immediately involved in the bombing, except for one who had fled to Egypt and was subsequently returned, Abou Halima. But when they wheeled out the cases, the larger case was the bombing itself and the smaller case was this assault. I got that one. Judge [Kevin T.] Duffy got the bombing case. In fact, Duffy and I had lunch the day the case was wheeled out or the day before, and I was saying, “Gee, this would be an interesting case to get” and he said, “No, you don’t—” because he had had a couple of mob cases.

I said, “Fine, if you get it, you can give it to me,” and he said sure. P.S., he didn’t, he got the big one, I got the small one. The bombing was in February of ’93. I remember we started the pretrial proceedings and in that summer came the arrests in the larger case. They filed an indictment that named the defendant who had been charged with assault as part of this larger conspiracy, so Judge Duffy’s case on the ’93 bombing went ahead. Mine was subject to the superseding indictment, which charged a larger conspiracy. [Omar] Abdel Rahman was the lead defendant.

**Perry:** And the larger plot was to blow up landmarks, tunnels.

**Mukasey:** There was a larger plot that was apparently ongoing in ’93 and maybe into ’94 to blow up the Lincoln and Holland Tunnels, the George Washington Bridge, the United Nations, assassinate [Hosni] Mubarak, but it also included the Kahane murder. As the evidence showed, these people had started training in the United States in the ’80s. In fact, there was an encounter—do you want to hear about this?

**Perry:** Yes, absolutely.

**Mukasey:** There were some FBI agents who saw people taking particularly aggressive target practice at a shooting range out in Calverton, Long Island, in the 1980s. Do you know Calverton?

**Kassop:** I grew up on Long Island, so yes.

**Mukasey:** They were going to go over and challenge them. The people who were taking target practice accused the agents of what we now call racial profiling, because they were all Muslim men, so they backed off. One of the people taking target practice was El Sayyid Nosair. When he was picked up, [Robert] Morgenthau said it was the lone act of a lone gunman. There were lots of articles about how he was a misfit at work and all sorts of psychological explanation for why he did this. The case in fact was so overtried in the state court that he was acquitted of the murder but was convicted of using the gun and got a seven-year sentence, I think. His release was then one of the demands of the people who bombed the Trade Center in ’93, and it turned out that his cousin was the person who had assaulted the—was involved in that, and the spiritual inspiration behind all of this was the sheikh, Abdel Rahman. The government had an informant, a former officer in the Egyptian military, who was into the conspiracy and made tape recordings of conversations.

My case followed Judge Duffy's. Duffy tried his case first, and they were convicted. They were not defendants in my case, although the bombing that they had carried out was part of the proof.

**Perry:** What do you learn from trying that case, both about the judicial process and about how well suited our court structure and our judicial process are to what turns out to be terrorism?

**Mukasey:** At the time, not a lot frankly. I'd love to say, "Oh, I saw it all at the time." No, I didn't. The statute that was used was a Civil War-era seditious conspiracy statute. We didn't have terrorism statutes at the time, so they were charged with seditious conspiracy. Sedition to these people, these defendants aren't going to overthrow the government, they were going to open on that. It's the only case, I think, at which I'd given a preliminary jury charge on what the law is, so that they understood they didn't have to plan to overthrow the government and take it over as long as it was an act or a series of acts that could legitimately be called—I forget the words of the statute but among other things that it was seeking to, by force, change government policy or try to undermine people's confidence that the government could continue to maintain order.

**Kassop:** As one of the first, I presume, cases dealing with terrorism as a crime, and obviously the fact that later in your career that became so influential in terms of what you've done, did you get a sense of the workings of terrorism? Was it clear to you from this case that there were tentacles that went out and there were all these—

**Mukasey:** Yes, it was clear to me that there was a large group of people who had an agenda and, as crazy as it sounded, this was on their list of things to do that was figuratively up on their refrigerator every morning, essentially to bring down Western civilization.

They had seized material from Nosair's apartment. It was just sent to the warehouse. After the '93 bombing, they took a look at it and it included material on attacking Western civilization by toppling tall buildings. It was *weird* that it was already revealed. There were tape-recorded conversations. The language that they used about the decadence. Their point of view was a combination of awe and contempt for this country and everything it represented. There was one tape in particular, the informant was working on Canal Street in Manhattan where there are a lot of small electronics stores, and they were looking for something they could use as a detonator. And he starts to talk about, "Look at this country, you can buy anything here. You can buy a detonator, you can buy this and that and the other," and then they segued from that to pornography and what a decadent society this is and how ripe for the plucking it is, that it is morally corrupt and therefore bound to fail and as long as people remain true to the faith the jihadis will bring it down.

It was obvious that these people were not the only people involved in this. Abdel Rahman, the lead defendant, had a long history. He was the spiritual inspiration behind the assassination of [Anwar] Sadat. In fact, he had defended himself at trial, on the basis that all he had done was to give pronouncements on Islamic law and that's not something you could be punished for in a Muslim country, and he was acquitted.

**Perry:** There had not been a lot of cases at that point—What did we know about terrorism in the early 1990s? I remember the [Leon] Klinghoffer case, the guy on the ship.

**Mukasey:** Right, who was thrown over the—right.

**Perry:** Right. But in terms of federal judges getting these kinds of cases, this is still quite rare.

**Mukasey:** Yes. In fact, the Oklahoma City bombing occurred during the trial, and there was a whole go-around about it because nobody knew at the time what it was. In fact, there were some people, “Oh, yes, this is definitely, because it’s a soft target and this must be Middle Eastern terrorists.”

**Perry:** What did you think at the time you heard about the Oklahoma City bombing?

**Mukasey:** I didn’t know at first. It was clear to me regardless that it had nothing to do with my case in the sense that there was no logical or necessarily one-to-one relationship. I didn’t know of any overlap, even if it was “related” in some fashion. And what I had to do was make sure that my case got tried in as error-free a way as possible. I was getting all sorts of people saying, “You’ve got to sequester the jury.” I said, “No, because all that’s going to do is alarm them.” I heard, “How can you protect them against this, you know they’re hearing about it” and so forth. I said, “I’ve got a novel suggestion. Why don’t we treat them as adults and tell them the truth?” By that time, it was clear that it was domestic.

**Kassop:** Yes.

**Mukasey:** I said, “Look, folks, when you get home tonight, you’re going to hear that there’s been a bombing in Oklahoma City in which people have been killed, and there are people who are talking about connections between that case and this. Now, you took an oath at the beginning of this trial to try the case based on the evidence presented here. Those reports are not part of that evidence. They’re never going to be part of that evidence. I’m not saying you can’t hear about it, you’re bound to hear about it. Number one, don’t wallow in it, and number two, remember there’s no connection between that and this. If you’re influenced in any way you’re going to wind up giving an unfair trial to somebody here, whether it’s the government or one of the defendants.” And a week or two later, I doubled back with interviews of each of them, to make sure that they could try the case based on the evidence.

**Wilson:** One-on-one interviews.

**Mukasey:** One-on-one interviews in the robing room, without anybody else present other than a court reporter.

**Wilson:** Were the counsel present?

**Mukasey:** We had a transcript for sure, but no, I don’t think there were counsel present.

**Wilson:** Did you sense any ambivalence in any of them serving at that point?

**Mukasey:** No. They were selected anonymously. They were picked up every morning at a different place, one on the East Side, one on the West Side, brought to the courthouse, kept and then taken out by the marshal so nobody could follow them.

**Perry:** As I understand it, your life changed dramatically because of security concerns at that time.

**Mukasey:** Right.

**Perry:** Can you tell us what that was like for you and your family?

**Mukasey:** Wild in retrospect. Initially, there was a detail on Judge Duffy.

**Wilson:** Extra marshals?

**Mukasey:** Yes, who were protecting him. I had the case involving this one defendant. Then there was a superseding indictment and the sheikh, that was before me. What happened was I ran into Louis Freeh, who was then Director of the FBI, on the subway, and he took a look at me and said, “What the hell are you doing?” I said, “What do you mean? It’s public transportation.” He said, “No, you should have protection.” And about two weeks later, somebody from the marshal service came up and we sat down and they said, “This is something we think you should do. You should have protection.”

**Perry:** Were you getting threats?

**Mukasey:** No.

**Perry:** Not to your chambers, not anywhere else? This was just Louis Freeh passing the word to the marshals that you needed protection.

**Mukasey:** Right. Then at first, we have to do it on a trial basis. And there are only two ways to provide protection. You either provide it or you don’t. You can’t provide a little bit of protection, 12 hours a day or whatever, and then—There was a time when I was being driven to and from work, but then I would go home and walk the dog. Of course the dog had no idea, the dog had to be walked at the same time and the same route every day.

**Perry:** Please tell us it’s a Doberman or—

**Mukasey:** No, it was a Shih Tzu. So they said, “We’re going to do it on a trial basis” and I started asking when is this trial, when is this over, and then I stopped asking. But they rented a room in the apartment building where we lived then, in the back where the superintendent was.

**Perry:** And this was in Manhattan?

**Mukasey:** In Manhattan. They would be in the lobby and I had to ring down when I was going to go out, and of course the people in the building—Did any of you read *Bonfire of the Vanities*?

**Wilson:** A long time ago.

**Mukasey:** There’s a point in that book where his neighbors knock on his door and he thinks they’re all coming to express support. This is a guy who runs over a black kid in the ghetto, who was mythologized into an honors student and so forth, and there are demonstrations outside, and

he thinks his neighbors have come to express solidarity and in fact they're there to ask him to move. It was something like that, because the neighbors didn't like the idea. The marshals were there. Of course there's always one loudmouth, "This is like an armed camp, we can't have this." And in point of fact, it was the safest building in the city.

**Wilson:** Right. [*laughter*]

**Mukasey:** So we had a meeting in our living room of the neighbors, those who chose to come, and the U.S. marshals of the Southern District of New York brought the late Romolo Imundi, who gave an impassioned description of what it was all about and people sucked it up and dealt with it. But I had that starting in the end of '94, I think.

**Perry:** And it was 24-7?

**Mukasey:** Yes. As I said, you can't do it—

**Perry:** Right. For you and your wife?

**Mukasey:** Me and my wife, right. She was the headmistress at the school, in fact the same school that I went to.

**Perry:** So anything else to follow up with on the trial?

**Kassop:** When did the trial end?

**Mukasey:** The trial ended in September of '95. It started in January and it overlapped in fact, almost to the day, which was sort of good, with the O. J. Simpson case. I'm one of the few people who can say that he had O. J. Simpson running interference for him. All the nervous energy was focused on that trial, and none of it was—in fact, I did sequester the jury for the deliberations, because I didn't want anything to happen during that period. It was a great New York jury. They were told they'd have to bring in their clothing because although I said I wasn't going to sequester them during the trial I was going to do it for the deliberations, and they understood that. They were told, "Your belongings are going to be searched when you go in, so don't bring anything that you shouldn't have." One woman said, "You mean they're going to go through my dirty laundry?" Meaning she knew that because they were going to put her in a hotel, she was damned if she would come with clean clothes. She'd come with used clothes and let the government pay for the cleaning—isn't it great?

**Wilson:** When you met with the jurors, what did you discuss with them?

**Mukasey:** You mean afterward?

**Wilson:** I would like to hear about that too, if you met with them afterward, but during the course of the trial, you said you met with them.

**Mukasey:** Oh, when I met with them after Oklahoma City.

**Perry:** After Oklahoma City.

**Mukasey:** About a week or two later. I said, “We’re a week or two past what we now know as the Oklahoma City bombing. Now that you’ve absorbed that, I want to know is there anything about that that you think is going to affect your view of the evidence in this case or has affected it, and be honest with me.” I didn’t have to say be honest with me, they were an incredible group. None of them said they were affected.

**Wilson:** Tell us about your discussions with the jury afterward.

**Mukasey:** There weren’t really discussions. The reporters passed a note that they wanted to interview the jurors, because the O. J. jurors had been interviewed.

**Wilson:** Sure, right.

**Mukasey:** People would learn from it and so on. They wanted no part of it. They wanted to get out, get back, and they didn’t want to be known or make themselves obvious. Notwithstanding that they’d been picked anonymously, notwithstanding they refused to meet with reporters. We got the verdict on a Sunday, because I sequestered them and they deliberated for about a week. We got the verdict on a Sunday. When they got back home, two of them found reporters on their doorsteps and they were absolutely terrified. And we got them out of town and in fact, the then U.S. attorney, now my partner, Mary Jo White, called the two—the *New York One* (television station) reporter was one of them and I forget which was the other—to tell them to back off. And it’s obvious why. These people don’t come from Mars. Even if you pick them anonymously, everybody’s got one good friend, and if you have a friend who’s going to be interviewed for a jury, and then they don’t show up for nine months or don’t show up at work for nine months, or you go down to the courtroom and you see them.

**Kassop:** Yes, right.

**Mukasey:** All the people in their lives have good friends and it’s bound to get back to one of the good friends, who is bound to be a reporter, and it’s obvious that that’s what happened.

**Perry:** Any more questions on the ’93 bombing?

**Kassop:** Going forward, how does this begin to affect you in terms of the way you see terrorism and as Barbara said, the way you see the federal judicial system handling it?

**Perry:** When it’s all over.

**Mukasey:** When it’s all over, we get the verdict. The detail continued and it was something I started taking an interest in. The more I read about it, the more disturbed I got. In fact one of the unindicted co-conspirators in the case was Osama Bin Laden. Nobody knew at that time who he was. The government is required in every conspiracy case to serve, on demand of the defendants, a list of unindicted co-conspirators. The indictment says X, Y, Z and “others to the grand jury, known and unknown,” so the defendants are entitled, “Who else do you know about, who’s involved in this conspiracy?” The government is required to serve a list of unindicted co-conspirators. They served a letter with names in it, including Bin Laden.

Years later we later learned that within two weeks after that list went to the defense in that case, it found its way to him in Khartoum, so he knew not only that they knew about him but also who else they knew about.

**Perry:** And I think in one of the documents in the briefing book, you mentioned that he stopped doing whatever it was.

**Mukasey:** That was a different issue. That was something that happened at Duffy's trial, where there was testimony about delivering a cell phone battery, I think it was, and that had been discussed on a telephone and whatever it was about that conversation, it was totally innocuous in the sense that you wouldn't have known listening to it that it involved something sensitive. But because it was the subject of testimony in that case, the defendants knew that whatever conversation that was, it was known to the government, and the only way it could have been known to the government was that the government was tapping that line, as a result of which that line of communication was shut down and we stopped getting information.

**Perry:** So as the '90s go on and we get into 2000, we're seeing more of these terrorist attacks around the world, including—

**Mukasey:** In '96, '98.

**Perry:** And 2000, the *Cole*. What are your thoughts about the ensuing years leading up to 2001, as you see again, around the world, the United States is still being targeted by al-Qaeda?

**Mukasey:** I kept thinking back to the '93 bombing. People kept saying, "This is a wake-up call," and we hit the snooze alarm. Somebody hit the snooze button because we're not reacting to these things, and in each case, after Kenya and Tanzania, after the *Cole*, it's "We're going to bring them to justice, right?" And it's the criminal law paradigm. I gradually started to think that this wasn't the correct paradigm. In fact, the person who really inspired that thought was John Sprizzo, who was a judge on the Southern District. We were walking back from lunch one day and there were concrete barriers up and so on. He looks around and says, "What the hell are we doing here? This isn't a legal problem, this is a military problem." And it was like one of those aha moments, which then receded.

**Perry:** I presume they put up obstacles around your courthouse.

**Mukasey:** Concrete barriers, guys with long guns.

**Perry:** And this is a response both to al-Qaeda and presumably to Oklahoma City.

**Mukasey:** Not Oklahoma City.

**Perry:** No.

**Mukasey:** No. Not Oklahoma City. This was a response to—by that time we had the embassy bombings.



**Wilson:** Going back to your earlier case on the World Trade Center bombing, was that basically tried by the prosecutors in the Southern District?

**Mukasey:** Yes.

**Wilson:** Did the main DOJ [Department of Justice] have any involvement or oversight?

**Mukasey:** No.

**Wilson:** Did the government make any attempt during the course of that trial to limit evidence in any way, in a manner that may have reflected national security concerns?

**Mukasey:** Yes, there was the CIPA, the Classified Information Procedures Act. I had a safe in my office, on the use of which I had to be instructed by some guy from headquarters, and I reviewed transcripts of interceptions that included various of the defendants in the case. What I had to do was to certify that none of them were exculpatory, which I did, but I had to look at the transcripts and those were classified intercepts.

**Wilson:** And had they been exculpatory, then what would have been the consequence? The jury would have to have been—those would have been useful.

**Mukasey:** Yes, then we would have had to put it to the government as to how that evidence was going to be offered to the jury, whether it was going to be offered in a summary or it would have to be disclosed or what. Then it would become something for the lawyers to fight about. Until that happened there wasn't.

**Wilson:** Had you had any other cases involving potential or actual classified information?

**Mukasey:** No, that was the only one.

**Kassop:** How did you find the process worked in that case?

**Mukasey:** Obviously, I thought it worked fine because I did it and it held up on appeal. The whole notion of doing it that way and having a trial, they had to bring in marshals from all over the country. The district didn't have enough marshals to staff that case or to staff my or Kevin's detail. They brought in people from all over the country and they couldn't bring them in permanently, so there were rotating shifts and there were plane fares. There was a hotel in my neighborhood, it was a very narrow building and small rooms, and it became one of the top-rated hotels in New York because apparently the way they judge that is based on occupancy rate. And they were putting up all the marshals in this hotel.

**Perry:** Four stars by the time the trial was over.

**Mukasey:** This became kind of a little gem, right?

**Perry:** A boutique.

**Mukasey:** A boutique hotel, precisely. It was a boutique because the rooms were small and the beds were small. But it was very expensive for the government to do that. They didn't have enough deputies.

**Wilson:** You mentioned your conversation with John Sprizzo. Did other judges, either the trial judges or the appellate judges, talk at the time about whether the federal judicial system—the pros and the cons of handling these either logistically or substantively?

**Mukasey:** Did they talk among themselves? I have no idea. Did they talk to me? No.

**Kassop:** And looking much further down the road and maybe this is something we can just plant the seed now and talk about more later on: When I asked whether or not you were satisfied with the way CIPA worked in this particular case, you said that your own opinion has changed and that the law enforcement model and using criminal trials is not the most effective way of dealing with these cases.

**Mukasey:** Right.

**Kassop:** And one of your concerns about bringing this information into federal court is the classified information and the ability for that to get out. But if CIPA worked well in this case, then why wouldn't CIPA continue to work well in today's world?

**Mukasey:** CIPA would, but there's so much more than simply whether a particular piece of evidence is disclosed or not. Example. An FBI agent is testifying and generally it's in the interest of defense lawyers to push on cross-examination as far as they can. If they get to something that the agent doesn't want to talk about because it involves disclosing means and methods of intelligence gathering, then the government is going to get up and object and—"they're trying to hide something from us"—the agent is maybe going to look evasive. It's way beyond simply the question of whether a piece of information gets disclosed or not, and sometimes you don't know what it tells them, like the example from Duffy's case.

**Perry:** We should probably get to George W. Bush and ask when you first became aware of George W. Bush, first met him, your first thoughts about him.

**Mukasey:** I first became aware of him during the primary. I was somewhat enamored of [John] McCain at the time and I didn't think Bush was all that well spoken. I talked to one of my friends and I said he's this or that, and my friend's response was, "Yes, but he's *our* this or that," so just basically suck it up and deal with it.

**Perry:** Had you met his father?

**Mukasey:** No, I hadn't met either of them.

**Perry:** So he wasn't your frisky horse in that race, in the Republican primary in 2000?

**Mukasey:** No.

**Wilson:** Did you have any ties to Dick Cheney?

**Mukasey:** No.

**Perry:** So your first meeting then?

**Mukasey:** My first meeting with him was when I was interviewed by him to be AG [Attorney General].

**Kassop:** And do you know how your name got to him for that?

**Mukasey:** Do I actually know all the details? No, and I've made sure that I don't necessarily find them all out. But I can tell you the way it developed; it was sort of funny. It actually started, there was a vacancy on the Supreme Court that Justice [John] Roberts got.

**Perry:** That was the [Sandra Day] O'Connor retirement?

**Mukasey:** Yes. Chuck Schumer was on one of the Sunday shows and he said he was going to vote against Roberts, but not just because he was a Republican, no, not at all. Why, there were many Republicans he could support for the Supreme Court, and he rattled off a bunch of names, all of whom had two things in common. One is they were Republicans and the other is they didn't stand *any* chance, a snowball's chance in hell of ever getting to the Supreme Court. I was one of them. In fact, I met one of my law clerks on the street the Monday or Tuesday after that program and he said, "Oh, I see Schumer gave you the kiss of death." [laughter]

Fast-forward to the summer of '07, when they were giving [Alberto] Gonzales a very hard time and Schumer again went on, demanding that Gonzales resign and that he should be replaced by somebody like Larry Thompson or Jim Comey or Michael Mukasey. I remember that Sunday because he was on *Meet the Press* and I tuned in to another program because I didn't feel like watching it. My mother-in-law called and said, "Senator Schumer mentioned Michael." And it must have been that week that Gonzales announced he was leaving.

**Kassop:** Do you know why you were high on Schumer's list in both cases, for the possible Supreme Court nomination and AG?

**Mukasey:** I don't know whether it was Schumer's chief of staff or one of his principal aides, who is now the U.S. attorney for the Southern District, Preet Bharara, had been an assistant U.S. attorney in the Southern District and knew me and had matters before me and thought that I was sound, I guess. Preet had friends in the White House counsel's office, of which more later.

**Perry:** We'll back up a bit from that time, back to 9/11. I wonder if you could tell us about that day and what happened and your thoughts.

**Mukasey:** On 9/11, I had turned 60 the summer before so I was doing what 60-year-old men do, which is having a colonoscopy, truth be told. I still had a detail of marshals from the trial. That lasted for 11 years, '94 to '05. I was coming out of the anesthetic and my wife and daughter walked in and told me. I thought they were there to provide moral support. And I asked the supervisor marshal on the detail, "Is this our guys?" And he said, "I think so."

**Perry:** Your doctor was in Manhattan?

**Mukasey:** In Manhattan. We went back home, picked up the dog, went to my mother-in-law's apartment. They didn't want me in my apartment. I stayed there for a couple of days and got in touch with district executive Cliff Kirsch. They were in the process of emptying the building and Mary Jo White, who was then U.S. attorney, and we arranged for them to—they were seeking material witness warrants at that point. By that time I was back in the apartment and I had the computer, and I was turning them out from my apartment.

**Perry:** Because you simply couldn't get to the courthouse, I presume, and you didn't have phone or electricity?

**Mukasey:** No, I think they had electricity. The phones were out because 7 World Trade Center housed the switch. They eventually did a patch that involved bouncing a signal off the Eastern District Courthouse, so we all had 718 telephone numbers for a couple weeks.

**Wilson:** The whole courthouse was actually closed for that time?

**Mukasey:** Yes. The whole courthouse was closed for three or four days, I think. I did an order involving the Speedy Trial Act, just sort of a blanket order, staying things that had to be stayed.

**Wilson:** Right.

**Mukasey:** I was chief judge by then.

**Perry:** Tell us about the material witness process that you went through and your thoughts about that.

**Mukasey:** Various material witness warrants were sworn out, based on everything from somebody having—there was somebody who was overstated, he stayed in a hotel. They took a look at the stuff that he checked into the hotel, which included one of those GPS [global positioning system] machines. There was somebody who had shown up near the scene of the Trade Center with fire department equipment or police department equipment that he couldn't quite explain. Two others. There was a whole series of them. I wound up hearing them eventually at the White Plains courthouse. I went up there and heard them in a closed courtroom. They all got lawyers, as the material witness statute requires.

**Perry:** Right.

**Mukasey:** And then one of three things would happen. Either they would testify before a grand jury, and then if they perjured themselves, they'd get indicted for perjury, or the government would accumulate enough evidence for a charge, or they would just be released and it would be "Sorry to trouble you, on your way." And this went on for a couple months.

**Perry:** Did you find that it was usually some element of their behavior or where they were or something they had in their possession that would usually trigger the concern and the suspicion? I'm thinking back to the men on the firing range.

**Mukasey:** Right.

**Perry:** Who happened to be Arab and so they could say, “Racial profiling or ethnic profiling, national profiling.”

**Mukasey:** Right.

**Perry:** Were you finding that most of these people were of a certain nationality, background?

**Mukasey:** They were all Muslims. Not necessarily all from the same country, but yes.

**Kassop:** How long does the material witness statute allow them to be detained?

**Mukasey:** The material witness statute allows somebody to be detained until—if they’re picked up as a material witness for a trial, you would have to find that they would not be available to testify at the trial. That’s the basis for issuing the warrant. Or they would not be available to testify before the grand jury. The grand jury sits all the time, so it would allow you to hold them until—give the government a respectable amount of time to accumulate enough background material to ask them questions, a week or two. Easy for me to say, I’m not the one in jail, but that’s pretty much the way it worked. This becomes important with the [José] *Padilla* case because it kept getting adjourned. Then the government would put him in front of the grand jury or they would—if it turned out there was something there and they cooperated, so they’d join “Team America,” as they used to say, and then I never heard about them again. Or it turned out to be a mistake and off they went.

**Perry:** Did you think the statute was working effectively?

**Mukasey:** Yes, sure.

**Kassop:** Do you have any idea how many of these material witness cases you had?

**Mukasey:** How many I issued?

**Kassop:** Yes. Or I guess you and then also perhaps other judges in New York in the same position.

**Mukasey:** I was the only one issuing them for a short time, I don’t know how long. Then when we finally got the part 1 schedule going again, Barbara Jones issued a couple, Judge [Loretta A.] Preska issued a couple, and I’m not sure about others. The total wasn’t—

**Kassop:** A ballpark figure.

**Mukasey:** Thirty maybe. What was being issued in other parts of the country, I have no idea.

**Kassop:** Right. But obviously, New York was the central location.

**Mukasey:** Yes, although it could be other places as well.

**Perry:** Was there any word coming from DOJ, any guidelines or precedents to follow for this action?

**Mukasey:** Were they submitting briefs?

**Perry:** Yes.

**Mukasey:** Yes, they were submitting briefs about the statute and what it took to get a material witness warrant.

**Perry:** Right, and you just followed it.

**Mukasey:** Followed the statute. The only difficulty I had was that most lawyers didn't want to talk about it publicly. What are you going to do, go out and say, "I'm representing a guy who got picked up as a material witness in connection with the worst atrocity ever committed." No. You don't want your client to be known that way, so the lawyers had an interest in keeping it quiet, other than one guy who wanted to go talk about it. Because the proceeding was ancillary to a grand jury proceeding, that was the basis on which you could close the courtroom. I could bar the lawyers from disclosing what had happened at the hearing, because it was ancillary to a grand jury proceeding, so it's confidential. Now, if you want to go out and talk otherwise, it's a free country. One lawyer got—he was a sort of cause lawyer.

**Kassop:** You referenced the White House counsel's office a few minutes ago and said there was a story attached to that.

**Mukasey:** This has to do with becoming Attorney General.

**Kassop:** OK, so that's later.

**Wilson:** But before we get there, your comments about Mary Jo White reminded me that she held over for quite some time, as U.S. attorney, from the Clinton administration to the Bush administration.

**Mukasey:** Right.

**Wilson:** How did that happen?

**Mukasey:** She's enormously competent, superb.

**Wilson:** Was there an effort?

**Mukasey:** I don't know.

**Wilson:** Did you have a relationship with her prior to now practicing together at Debevoise [& Plimpton LLP]?

**Mukasey:** No.

**Wilson:** Did you know each other coming up from the U.S. attorney's office or anything?

**Mukasey:** No. We didn't overlap in the office. And in fact, somebody at a tribute to her among other things had described her as having been on Clinton's short list for Attorney General, until he decided to go with the tall list. [*laughter*] Mary Jo is short.

**Kassop:** Sure, I got it.

**Mukasey:** Janet Reno.

**Wilson:** She also could have been appointed to the Second Circuit about several dozen times.

**Mukasey:** And didn't want it. Interesting story about those two. I know this is the Bush story but still.

**Perry:** Please go ahead.

**Mukasey:** The Abdel Rahman indictment was due to those two women, and all the men in the room were terrified about bringing the case, because they were nervous about we could lose it and this could happen and that could happen.

**Wilson:** Those two women being Mary Jo and who else?

**Mukasey:** Janet Reno.

**Perry:** The tall and the short.

**Wilson:** The tall and the short, interesting. But they wanted to go ahead with it.

**Mukasey:** Yes.

**Wilson:** Very interesting.

**Perry:** Shall we move to Mr. Padilla?

**Mukasey:** Yes.

**Perry:** And do you say "Pa-dee-a" or "Pa-dill-a?"

**Mukasey:** *He* initially said "Pa-dill-a." Or as his lawyer put it, "Rhymes with gorilla." His lawyer was a guy named Andy Patel.

**Kassop:** Andy Patel and Donna Newman.

**Mukasey:** Yes. Donna was representing him initially, I think.

**Kassop:** Right, exactly.

**Mukasey:** I issued the ongoing applications and they came in—this guy was coming into the United States and described—There were actually two affidavits. There was a sealed affidavit. They were both confidential but one of them was classified, the other was not, describing on

what basis they were issuing the material witness warrant. They wanted me to issue a material witness warrant for him. He was coming into Chicago and I issued the warrant. He landed in Chicago, they brought him to New York, and Donna was appointed to represent him. They kept showing up and the government kept asking to adjourn it. I was reasonably loose and at one point I said, "Next Tuesday is it." They said, "He's very dangerous," and I said, "We don't have a preventive detention statute in this country, and you can't use the material witness statute as a preventive detention statute. If you've got something to prosecute him for, prosecute him. You want to put him in front of the grand jury, put him in front of the grand jury. If you want to let him go, fine too, but next Tuesday is going to be the day you tell me what you're going to do."

That Sunday, I got a call from U.S. attorney David Kelley, asking to come to my house. I was in the country and he wanted to come to my house that night. I got back to the city, he came to my house and he had papers showing that the President had designated Padilla as an unlawful enemy combatant, asking me to dissolve the material witness warrant. The government was withdrawing its application for the material witness warrant and oh, by the way, there were people from the Defense Department on their way to New York to take him into custody. I said, "We're going to go ahead on Tuesday anyway." He said, "I understand, but they're taking custody of him and he's going to be transferred to the brig in Charleston. But we're going ahead on Tuesday anyway." To this day, I regret that I did not enter an order deeming his habeas petition filed at that minute, but I didn't.

**Perry:** Did it cross your mind to do it?

**Mukasey:** No. It crossed my mind to call his lawyer and I got warned off that because he had been taken out of New York.

**Wilson:** And you regret it because?

**Mukasey:** Because if I had deemed the habeas petition filed as of that moment, he was still in New York. That's another example of not being resourceful enough, like with the sentence.

**Kassop:** And the question of jurisdiction did come up.

**Mukasey:** Yes, did it ever.

**Kassop:** And this way it would have been clear but otherwise it was not.

**Mukasey:** Right. The following Tuesday we all show up in court, Donna shows up, the government shows up, and we're doing *Hamlet* without the prince because he's in Charleston.

**Kassop:** Would it have been appropriate for you to inform his lawyer? Because I recall her saying she had no idea that her client had been moved essentially until she read about it in the newspapers.

**Mukasey:** Right. Theoretically, the proceeding in which she had appeared was coming to an end because the material witness warrant was dissolved. Whatever was happening to him in Charleston was something else, but she wasn't yet representing him in connection with the something else.



**Kassop:** Did she know the material witness claim was being dissolved?

**Mukasey:** No, she didn't.

**Kassop:** At what point would it have been appropriate for her to find that out?

**Mukasey:** I think she found out on Monday but I'm not certain. In any event, she certainly found it out Tuesday when she showed up in court and he wasn't there. She by then of course knew that he had been moved, and the government had withdrawn its application for the material witness warrant. I said, "He's entitled to file a habeas petition."

The government said, "We want to have another hearing on that" and within a week, maybe less than that, we had another hearing, at which Paul Clement came up from Washington to argue in the district court, which was beneath his station. At that point I was starting to realize or to believe that I'd sort of been had and I didn't like it. I was starting to establish a schedule for the filing of the habeas petition and he said, "Judge, I think you should initially resolve the issue of whether you should be hearing his petition at all."

I said, "I'm very grateful for your advice. Now, this is the schedule." And he repeated it. And I said, "Is there a problem with the acoustics in here? We're going to brief it all at the same time." So we established a schedule in which all the questions were briefed.

Number one, did Donna have standing as next friend, such that she hadn't seen him, so that she could file the habeas petition. Number two is that I had jurisdiction to hear it. Could he consult with her going forward and what would be the—and this was my own insertion—what would be the standard for the habeas petition? What level of proof and so on, because all of this at this point was unknown territory. We went through the briefing, I issued a decision saying that yes, she could serve as his next friend; yes, I would hear the case. And it wasn't that he had a right to counsel. It was that under the All Writs Act, and I remember this because my law clerk thought I was crazy. The expression on his face was priceless. I said to him, "It's not that he has a right to counsel, it's that in order to figure out what I'm going to do I have to hear his—he has a right to file a petition, that's clear." The only practical way for him to file a petition is with a lawyer. The All Writs Act permits a court to issue any order in aid of maintaining its jurisdiction. That's why they call it the All Writs Act.

**Kassop:** Sure.

**Mukasey:** That's when they abolished forms of writs. I said under the All Writs Act, not as a question of right to counsel, I would issue an order saying that he would be permitted to consult with counsel solely for the purpose of preparing a habeas petition or determining whether he wanted to file one. And so that he would know how to decide that, I would tell him what the standard of proof was going to be. "This is what you need and you decide what you want to do." I issued that decision and then there was a period of time in which the government and the defendant should work out his consultation with the lawyer, the precise mechanics of it. I'll micromanage that if I have to, but work it out.

And then the government came back to me with another application to undo that decision, well after the initial decision saying that he would consult. I was out of time. And they said, "We

didn't take the initial decision as an order" or something like that. It was one of these—I said we weren't having a conversation, it said, "You will," and I wasn't using that in the predictive sense. There was something snotty about the second decision, I remember. You could look it up. Paul didn't like it. We resolved all of that later on. And the government took it up, and two to one the circuit found that the President did not have—one of the findings was that the President had authority to do this. The circuit found that absent further proof or findings or further authorization, the President didn't have authority to do this. That went up to the Supreme Court.

**Wilson:** Who argued that in the Second Circuit?

**Mukasey:** Paul Clement I think. I wasn't there, nor were my clerks. It was two to one in the circuit, with one judge who voted.

**Kassop:** If I recall, that was Rosemary Pooler.

**Mukasey:** Rosemary Pooler, Richard Wesley—the former state court judge from upstate New York.

**Kassop:** But on the question of the President's authorization, if I remember, you ruled that the September 18, 2000, AUMF [Authorization for Use of Military Force] is what gave the President authorization.

**Mukasey:** Yes.

**Kassop:** And I think the argument against that, that Padilla's lawyers were making, was that it had to be specific. And it wasn't that the AUMF was too broad or too general, and it had to be specific authorization to detain under Section, it was 4001, I think. I forget what the statute was, but there was a particular statute.

**Mukasey:** It didn't say anything about detention.

**Kassop:** Correct. And they were saying you have to have a specific statute that authorizes detention. It was a general versus specific question.

**Mukasey:** Right.

**Perry:** So pulling back for us nonlawyers, to see—

**Kassop:** The Non-Detention Act, I think it's called.

**Mukasey:** Right, exactly.

**Kassop:** Section 4001A or something like that.

**Mukasey:** Yes, which says you can't be detained except pursuant to a statute of Congress.

**Kassop:** Right.

**Mukasey:** Which Laurence Tribe thinks is unconstitutional.

**Kassop:** So why did you think that the larger, more general statute was sufficient in that you did not require the—

**Mukasey:** Because the power to wage war included the power to detain, included the power of a lot of things that are associated with—you didn't have to go through a whole laundry list of things that you can do in waging war. One of the things you do in a war is detain people. And in fact, that's currently the position of the government or was until the new statute got passed. They didn't want any further authorization.

**Perry:** Did you think about the concept of being an enemy combatant and just what that would mean going forward? Were you fearful of its misuse or wondering how many people this label would be applied to?

**Mukasey:** I was not. I thought this was a designation made by somebody who is politically responsible for the consequences. Was it theoretically possible that he would wake up one day and say, "I've had enough of Ted Kennedy and I'm going to designate him as an unlawful enemy combatant and take him out of the game"? Could he conceivably do that? Sure. But if there was no evidence of that, the standard that I said would apply in a habeas proceeding was "some evidence," a very low standard. But if there was no evidence, there was no evidence. And in any event, the President would pay the political price for doing that and in this country, that would be ferocious. Something that is theoretically possible is practically not possible because the political price is too high. Was I concerned? No. The President couldn't delegate that.

**Kassop:** Why did you set the bar at "some evidence" rather than a higher standard?

**Mukasey:** Deferential to the President's power to defend the country.

**Kassop:** And what would the choice of other standards have been if it wasn't "some evidence"?

**Mukasey:** Preponderance, clear and convincing.

**Kassop:** And you thought that there was too much of a gap between those.

**Mukasey:** It was also that the judiciary was equipped to make a lot of decisions, but decisions in this area were not among them. Those decisions were really committed to the political branches, so that unless he was doing something that was totally off the reservation, judicial officers should not be involved in that. I know a lot of federal judges, I have great admiration for them, probably not as much admiration as they have for themselves but great admiration, and I didn't see that this was a job for federal judges.

**Perry:** So this was a real separation of powers issue for you.

**Mukasey:** In large part for me.

**Kassop:** That is sort of a philosophical controversy, the role of the federal judiciary and how active it should be in setting the dividing line between government power and individual liberties.

**Mukasey:** Yes, and that's where I thought the line should be drawn in that instance.

**Kassop:** And there weren't any other federal judges you could really talk to about it, consult with. In other words, you were really the only one at that point.

**Mukasey:** No, I didn't talk to anybody else about that.

**Kassop:** Right. But in some respects you were really a lone person dealing with this very consequential issue.

**Mukasey:** There was *Ex parte* [Richard] *Quirin*.

**Kassop:** Which has its problems.

**Mukasey:** OK, but it was there, it still is. This was the case with the—

**Perry:** The Nazi saboteurs.

**Mukasey:** Right.

**Kassop:** But it's not quite similar. There are some similarities, but it's also distinct because they had actually been charged with the crime, which he had not.

**Mukasey:** You had the prize cases and a lot of other stuff. Luckily, we've had a history such that there's not a lot of law.

**Kassop:** That's true.

**Mukasey:** In a way it says very fortunate things about this country, that we don't have a developed body of law in this area, because if we did, things would have been a whole lot worse than they in fact were.

**Kassop:** Sure. That's an interesting point. So it allows you flexibility.

**Mukasey:** I made that in the *Padilla* case.

**Perry:** To go back to one of these grand philosophical discussions that we teach in undergraduate constitutional law classes and usually put essay questions on this balance between civil rights and liberties and national security. Had you thought through that as a law student? Had you thought about it in your constitutional law class and then did you see yourself changing your concept of the balance to be struck once 9/11 happened and after your experience with the '93 World Trade Center bombing?

**Mukasey:** No to all four. I don't remember thinking about it particularly in—I'm sure it came up in law school. I don't have an encyclopedic recollection of what we talked about in law school. If you put a gun to my head, I couldn't tell you one classroom conversation in constitutional law.

**Perry:** Maybe that just takes place in undergraduate common law, political science classes.

**Mukasey:** I'm trying to think of who taught it. It was mostly commerce clause.

**Wilson:** That was my con law class too, the entire time was on the commerce clause.

**Kassop:** Even separation of powers cases were really fairly few at that point in time.

**Mukasey:** Right.

**Kassop:** And certainly not dealing with weighty questions as you said, other than the World War II cases or Youngstown obviously.

**Mukasey:** Right, Youngstown. But no, I don't remember any conversations like that and I don't remember thinking—This says terrible things about me. I don't think things through in a comprehensive way, and I think that it's in a way mischievous—certainly for a district judge, leaving apart appellate judges—for a district judge to be thinking something through as a philosophical matter. What's this case about? What actually happened, number one. Number two, what are the legal rules that seem to apply? Yes, you use the larger picture and the larger implications of the case as a kind of reality check. If this is going to lead to something ridiculous, then you go back to the first principles; it probably isn't right, although sometimes you do it. But for the most part, it wasn't a question of having some overarching philosophical view of things and working off that. I don't remember ever doing that.

**Perry:** This might be a logical link then to the question we developed based on one of the articles that appears in the briefing book, about the fact that we understand you were interviewed for a seat on the Second Circuit?

**Mukasey:** Twice.

**Perry:** Oh. We only knew about once.

**Mukasey:** I didn't get either one.

**Wilson:** During the first Bush administration?

**Mukasey:** Bush two, twice.

**Wilson:** Bush two, twice.

**Perry:** What years? I think one we had, was it 2002?

**Mukasey:** I know who got the seats. I don't remember, you can check back from that. Reena Raggi got the first one and Dick [Richard Wesley], the judge from upstate New York, was the one who in fact voted to uphold.

**Perry:** So he got the second.

**Mukasey:** He got the second seat.

**Perry:** Tell us about that process, about the interviews and your thoughts about becoming an appellate judge.

**Mukasey:** I didn't thirst after it. I remember thinking, *By golly, after I've had the terrorism trial and so on, if they've got to pick somebody, why not pick me?* I was interviewed twice by my predecessor, Judge Gonzales.

**Kassop:** When he was White House counsel.

**Mukasey:** Right.

**Perry:** At the White House?

**Mukasey:** Yes.

**Perry:** Others in on the interview or meeting?

**Mukasey:** Yes, Tim Flanigan was there the first time around. I don't remember the second.

**Kassop:** Was anyone from Justice there?

**Mukasey:** No, neither time.

**Perry:** What kinds of questions did they ask you?

**Mukasey:** I only remember two questions. I remember thinking at the time, *You ought to know who I am, so we shouldn't have to have a conversation about my philosophy about this or that.* At the end of the first interview I was asked, "What does your wife say about you when you're not around?" That sort of snapped my head back. In the second interview, the question that ended the interview was, "You're very quiet and calm. What gets you really excited?" I remember thinking at the time that those didn't really have much to do with my suitability to be a Second Circuit judge.

**Wilson:** Were you asked any questions about cases?

**Mukasey:** Yes, but I don't remember what they were.

**Wilson:** Were you asked for your judicial or personal views about any social issues like abortion or other issues, the so-called litmus test questions?

**Mukasey:** I don't think so and I'd remember anybody trying to walk on that territory. I think I remember a discussion of *Roe v. Wade* and of its being the settled law of the land. It wasn't for a circuit judge to pick at it.

**Kassop:** Were you asked about the question of activism versus restraint and where you would stand on that?

**Mukasey:** I don't remember it in those terms.

**Kassop:** It might not be quite so blatant.

**Mukasey:** Right.

**Perry:** So each time it was Alberto Gonzales who led the interview?

**Mukasey:** Yes. He was the interviewer. I don't remember anybody else in the room at the time. It was one-on-one both times. The back report that I got, and I don't know whether this is reliable or not, was that my demeanor was such that I didn't come across as *really* wanting it, as being really eager to do it.

**Wilson:** How does your name end up getting before the White House for the Second Circuit vacancy? Did Rudy Giuliani play a role, for example?

**Mukasey:** Doubt it.

**Perry:** Probably Chuck Schumer. No, I'm just saying.

**Mukasey:** My good friend.

**Perry:** He kept recommending you for—

**Mukasey:** I have no idea, I really don't. For the circuit bench?

**Kassop:** Yes.

**Mukasey:** My mettle had been tested, I was one of the plausible—I tried this substantial case, right?

**Wilson:** Yes.

**Mukasey:** Critical if not box office acclaim.

**Wilson:** Right, so you were an obvious top of mind.

**Mukasey:** Well, I was an obvious candidate, not necessarily *the* candidate.

**Perry:** I think the article in the briefing book then ends up saying that it turns out that's one of the reasons why you didn't get the nod, that there was too much controversy swirling around the terrorism issue.

**Mukasey:** Right. I don't know. They don't tell you. You find out that somebody else was picked.

**Perry:** Right.

**Mukasey:** And they picked two superb judges. I can't think of two people I would rather have had picked instead of me than those two. They're excellent, both of them.

**Perry:** That's very gracious.

**Mukasey:** It's not gracious, it's the truth, it's the exact truth.

**Perry:** When I asked about the philosophical issue of civil rights and liberties versus national security, and I think you even said in part of that answer, "Maybe appellate judges—"

**Mukasey:** Think about things like that.

**Perry:** "—sit around and think about these philosophical things." When there was the possibility that you could go on the appellate bench, did you think in those terms about *Oh, I would like to do that. I would like to have the leeway that appellate judges have to think in those terms?*

**Mukasey:** I didn't think about having leeway. I've never thought about having leeway as a judge. People tell you it's a very powerful position. But you're very constrained. You look for the rule that's supposed to decide the case, that's what you're supposed to be searching for. You can't change the facts.

**Kassop:** How long were you in limbo between when you were interviewed and when you found out the ultimate decision?

**Mukasey:** I don't really remember if it was weeks, months, I'm not sure. I wasn't on tenterhooks, it wasn't anything like that.

**Wilson:** Did you have any perception that the White House might have been concerned about confirmation issues?

**Mukasey:** For the circuit positions?

**Wilson:** Yes.

**Mukasey:** No. I didn't think that was the issue. There were a lot of other things that applied.

**Perry:** We have just a few minutes before we break for today. We'll just ask you about the USA Patriot Act, and then tomorrow we can begin with your time in the AG spot.

**Mukasey:** OK, fine.

**Perry:** Tell us your thoughts.

**Mukasey:** The Patriot Act, I think was—and you have this in the material.

**Perry:** We do.

**Mukasey:** It's a ridiculous name, right?

**Perry:** Orwellian, I believe you said it was.



**Mukasey:** It's actually very Washington. You come up with an acronym and then fill in the words. Somebody had a \$50 bond for that, I'm sure.

**Perry:** *Wheel of Fortune*, I believe, is the game show.

**Mukasey:** Right. It was an agglomeration of a wish list of things that have been around before and it was mostly, I thought, very noncontroversial stuff. Roving wiretaps were already available in drug cases because drug dealers would ditch their cell phones. That wasn't available in other types of cases, including terrorism cases, so they made it available in terrorism cases. The most controversial part of it was Section 215, which was the ability to subpoena records from third parties. I didn't see anything particularly controversial about that. The librarians came out with the statement, "Nobody will—" which I thought was interesting for a number of reasons, including the fact that at the same session of whichever organization passed this resolution, they had been told about librarians who were in jail in Cuba, and they wouldn't pass any resolution condemning that. But they passed a resolution saying they weren't going to have records turned over.

Also, the Unabomber case was a perfect example of how records like that could be relevant. You have the story on that, so I'm not going to go over it. But I didn't see anything terribly controversial in the Patriot Act. Without any analysis, it became a rallying cry for people who thought that the tanks were about to roll and the government was now going to be keeping track of things and people, and nobody quite understood how or what or wanted to understand how or what but this was the central point. You get a statute with a goofy name like that and it's a perfect—

**Perry:** It's a foil.

**Mukasey:** It's a foil, exactly.

**Kassop:** Did that also clarify the material witness statute, I think it had an actual number of days that a person could be held without charge?

**Mukasey:** It did? I don't recall that.

**Perry:** I think I remember reading that in the speech, but we'll double check that tonight.

**Kassop:** So it actually said that there was a period of time, which previously there had not been.

**Perry:** But in other words for you, you had sat on the bench, you had dealt with this issue of terrorism, and you saw the limitations of the current statutes, you saw precedents in other areas of the law.

**Mukasey:** It seemed unremarkable to me.

**Perry:** Yes, it just seemed practical.

**Mukasey:** I didn't understand what all the fuss was about.

**Wilson:** Before you conclude for today, let me just go back to two things that you alluded to earlier on. One was you mentioned the CFO [chief financial officer] who was a woman?

**Mukasey:** Oh, the CFO of that company?

**Wilson:** Yes, and you said it gave you an idea.

**Mukasey:** Brooks Sloane.

**Perry:** The fact that they never used the pronoun.

**Wilson:** The pronoun, it gave you an idea for later.

**Mukasey:** Yes. The idea for later had to do with—and this goes back. There was an associate at Patterson who also had a name that didn't—

**Perry:** Reveal the gender.

**Mukasey:** Right, exactly. Franklin Stone. And we sponsored her for membership in the then men-only University Club and did the same thing.

**Kassop:** No pronouns used.

**Wilson:** And did it work?

**Mukasey:** Up to a point. [*laughter*] Part of the problem was she had gone to [H.] Sophie Newcomb [Memorial College], and you had to—go figure.

**Kassop:** A dead giveaway.

**Mukasey:** It was a dead giveaway, at which point I resigned from the University Club. In fact, that came up in my hearings before the Judiciary Committee, because somebody was convinced that that had all been a put-up stunt for the purpose of creating credentials that would then make me acceptable for the bench. Shows you how people think.

**Kassop:** What year was that approximately, when you resigned? It was early on.

**Mukasey:** It was early on.

**Kassop:** Before the cases came up in terms of offering membership in men-only clubs.

**Mukasey:** It was maybe '81 or '82. I submitted to the Senate committee the letter that I wrote to the University Club resigning.

**Wilson:** Wasn't then—well, she wasn't a D.C. Circuit judge yet but I think she was at Columbia law school then, [Ruth Bader] Ginsburg, involved in somehow—

**Mukasey:** She may have been.

**Wilson:** To challenge the University Club membership.

**Mukasey:** That was later.

**Wilson:** And now the other comment you made and you said you would get to later was you said you made some attempts to write either an op-ed or a press release.

**Mukasey:** Yes, that's within the last two years. The *Times* ran an article suggesting that Giuliani and I were providing material support to a terrorist organization called the MEK [Mujahideen-e-Khalq], which has just been removed from the State Department list of foreign terrorist organizations. It's an organization called Mujahideen-e-Khalq. Iranians belong to this group. They had kind of a camp in Iraq and they were under assault by the Iraqis and so forth. Anyway, a bunch of people, including me and Rudy and people ranging from John Bolton on the right to the former Vermont Governor.

**Perry:** Howard Dean?

**Mukasey:** Howard Dean on the left, to give you the span, right?

**Kassop:** Quite a range.

**Mukasey:** Have come out and said these people shouldn't be on the list of foreign terrorist organizations. When we've appeared to make speeches as opposed to just writing we've been paid. Somebody wrote—he was counsel in the case in which an organization that was providing advice to real terrorists was found to be providing material support to real terrorists, notwithstanding that it involved advising them on relatively neutral issues. And he said, “Couldn't Giuliani and Mukasey be prosecuted for material support to a terrorist organization for speaking out for this organization? Isn't it dangerous for them to be doing what they're doing?” And I wrote a column pointing out the various differences between what the people in his case had done and what we had done and saying we would be happy to rely on the—the First Amendment provided protection. We found that we didn't think the statute needs to be changed. He was using it as a basis for saying that if these people could be prosecuted, shouldn't we change the statute? I said the statute doesn't have to be changed, it has to be applied, good and hard when necessary but no, we'll rely on the First Amendment, thank you very much, we sleep very well. And the *Times* refused to run it.

**Wilson:** Really?

**Mukasey:** Yes. And their response to me was, “We never run articles answering other articles. You could write a letter, but it has to be very—” It had to be a hundred words or something. By the time you state the other person's argument, the space is up, which was false, because I had written an article way back in response to an op-ed piece attacking Giuliani, so don't tell me you don't do that, you did it.

**Perry:** All right.

**Kassop:** Thank you.

**Perry:** We thank you so much for our first session, which I think went swimmingly.

**Mukasey:** It's a lot of fun for me.

**Perry:** Oh, good.

**Mukasey:** I just hope I'm not wearing out the welcome.

**Perry:** Oh, my heavens, not in the least.

**Wilson:** No.

**Kassop:** It's just as much fun for the rest of us.

**Mukasey:** Sitting around like this garrulous old goat, sitting in a rocking chair with the old folks and telling stories.

**Perry:** We do not see you as that at all.

**Kassop:** We treasure oral histories.

**Perry:** We do.

**Kassop:** One of the things I've found out as well is that as administrations become more wary about putting things on paper, oral histories take on an added value and importance, because that may be the only way you can get that information. So this is extraordinarily valuable.

**Perry:** All of us who do law, political science, history are helped immensely by this. Imagine 50 years from now, people having access to this.

**Mukasey:** For example, you have a question in there about Cabinet meetings. I don't know whether you've spoken to any Cabinet officers?

**Perry:** Yes.

**Mukasey:** Nothing happens in Cabinet—they were set piece sessions. People gave reports on different things, but there was no deliberation that went on in Cabinet meetings.

**Perry:** That's important to know.

**Kassop:** But that's a trend that has been occurring over time, that Cabinet meetings have become far less important because policymaking gets done by the White House rather than by the Cabinet. Or if a Cabinet member wants to talk to the President, you'll make a one-on-one appointment.

**Mukasey:** Or you're in the Situation Room with the President and a representative of whichever other agency has a dog in the hunt, and you hash it out there.

**Kassop:** Right.

**Mukasey:** Rather than wasting everybody else's—If you look at the pictures of Cabinet meetings, there are all the Cabinet members around the table, right? The Vice President, the President. Then there's an outer circle of—

**Wilson:** Key staffers.

**Mukasey:** Exactly. So who's going to actually decide anything at a meeting like that? I never decided things—I made sure or tried to make sure that things didn't get decided at board of judges meetings for precisely that reason. There's always somebody who wants to orate.

**Perry:** We can check that question off then for tomorrow.

## **October 9, 2012**

**Perry:** Here we are for day two of our George W. Bush Presidential Oral History Project interview with Judge Michael Mukasey. We usually start day two by asking if anything occurred to you overnight or this morning that you wanted to elaborate on.

**Mukasey:** That I left out? No.

**Perry:** We'll go back to our last discussion yesterday. I think by then we had turned off the recorders and we probably won't go back to the question about Cabinet meetings. But we loved your anecdote about starting with a prayer at the Cabinet meetings for President Bush.

**Mukasey:** Yes, every Cabinet meeting started with a prayer, and a different Cabinet Secretary was charged with the responsibility of doing the prayer for each of them.

**Perry:** And you would be informed ahead of time that that was your day.

**Mukasey:** You'd be told ahead of time, yes. Actually, Secretary Rice was raised—her father was a minister, I believe, so she was able to improvise or do it extemporaneously or do it by heart. When the President decided these prayers all ought to be put in a little book, she was at something of a disadvantage, because she'd have to go back and re-create them. Other people had the piece of paper that they had used. She simply did it orally and very well, of course, as she did everything else.

**Perry:** So your day, you picked what to open with an invocation?

**Mukasey:** I picked the passage from—I forget which book it's in, in which there is a battle. Moses raises his hands and so long as his hands are in the air, the Israelites prevail, and when he lowers them, whoever the opposition was—I haven't looked at the biblical passage in a while so I forget who that was—prevails. And Aaron gets a rock and holds his hands up, and I pointed out

that the sun was setting on the administration and we were there to hold up the President's hands so that the right side would prevail in the various struggles that we were in.

**Perry:** Did the President comment to you about that?

**Mukasey:** I think he liked it. *[laughter]*

**Perry:** Very good. We have you, I think from yesterday, up to your appointment as Attorney General and when we asked if you had had any conversations with President George W. Bush, you said no, up until you were interviewed for that Cabinet position. So let's begin with that this morning and talk to us about how that all happened, the appointment itself and then your session with the President.

**Mukasey:** I told you the story about Schumer talking about the three people that he would propose.

**Perry:** Yes.

**Mukasey:** And then when Judge Gonzales resigned or made known his resignation on a Friday, that Monday, toward the end of the day, I was doing my timesheets and the phone rang. It was Fred Fielding and he said, "You know we've got a vacancy down here" and I said, "Yes, I heard." He said, "Would you be willing to be considered for this? Nobody is offering anybody any jobs at this point, we're just getting up the list of people."

I said, "There are a couple of people I have to talk to about that. One obviously is my wife." And I called her and I called the person who does our finances and I called Rudy Giuliani, who had been Associate Deputy when Levi was the AG, and he knew the department and I talked to him a little bit about it. And then they sent Bill Burke, who worked in the White House counsel's office, to see me on Wednesday and we talked about it and I said sure. But I didn't want to be simply a trial balloon. I said, "If this is serious, fine. If it's not, if you want my name to fatten the list, thanks but no thanks, I've had my turn in the barrel." He said, "No, they're serious." And I forget exactly what the timing was. It was close to the Labor Day weekend. I went down to D.C. and spoke to Fred Fielding and to Josh Bolten. There was more than one—

**Perry:** And what were these conversations like?

**Mukasey:** They were things like—I remember [Joel] Kaplan asking me, "What's your principal weakness?" And I said, "It's administration. I was chief judge of a court, but that's like being the ceremonial chief of a third-world country. There's not much administration. I had a district executive to help me with that and there really isn't that much to do, certainly not compared to being Attorney General." He said, "What would you do about that?" I said, "I'd get people around me who were good at administration but weren't tempted to figure that they were going to run the place themselves."

**Perry:** Right.

**Mukasey:** We talked about that. We talked about what I thought of the President, what I thought his strong points and weak points were.

**Perry:** Could we probe a little bit on that?

**Mukasey:** Sure.

**Perry:** Since yesterday we discussed the fact that you hadn't really known him up until— certainly when he ran in 2000 you weren't particularly supportive of him. What had changed, if it had, your impressions of him between when he ran in 2000 and by this time?

**Mukasey:** And 9/11?

**Wilson:** Yes.

**Mukasey:** It had changed a lot.

**Wilson:** His response to it?

**Mukasey:** His response to it. I said, "I think one of his strengths but one of his weaknesses is he's not a lawyer," he has a business background. This was my theory. I'd never met the man. "He's very good at making decisions, but it seems to me he's less good at making the case, whereas lawyers make the case." Josh Bolten bridled at that and said, "If there's a problem with that, that's our fault, not his."

**Perry:** A bit defensive. Were they talking to you in these conversations about the state of the department and the departure of Gonzales?

**Mukasey:** They didn't. They danced around that. We didn't talk directly about—I don't recall, we may have, I just don't remember a lot. I do remember at one point we were sitting on Fred Fielding's couch and he said, "You've never worked in Washington. Let me just tell you what kind of town this is." And he told me a story about Drew Pearson and a man named Richard Poff. At one point after [Richard] Nixon's two nominations of [Clement] Haynsworth and [Harold] Carswell went south, Poff was considered for the Supreme Court. He was a serious guy. He was the head of the House Judiciary Committee, he was a real lawyer, a conservative but serious person. And he got a call from Drew Pearson who said, "It must be exciting to be considered for the Supreme Court." He says, "It's great, a great honor." Pearson said, "I'll bet your family is excited too. Speaking of your family, you have an adopted son, don't you?" He said, "I hope you're not going to put that in the newspaper because he doesn't know he's adopted, and we were going to wait to tell him."

Pearson said, "What do you mean? You're up for the Supreme Court, your life should be an open book." And Poff said, "I *was* up for the Supreme Court," and withdrew his name. "I'm going to withdraw my name because I just don't want you to get into that personal stuff." And the punch line on the story was, to quote Fred, "The son of a bitch printed it anyway." He said, "So that's what kind of town this is, just you know."

**Perry:** What did you respond when you heard that?

**Mukasey:** I said thanks.

**Wilson:** When Fred first reached out to you, did you have an understanding of whether your name was one of several on a short list or whether it was yours to lose?

**Mukasey:** No, I was one of several on a list of indeterminate length.

**Wilson:** Did you know of anyone else who was on the so-called short list?

**Mukasey:** The so-called short list began with the person who was my candidate at the time, Ted Olson. But I was told that the Democrats on the Judiciary Committee wouldn't buy that because he had been the lawyer in *Bush v. Gore*. That was a sign of the times. The guy was acting as a lawyer for crying out loud, it wasn't that he did anything political.

**Wilson:** And he was confirmed as Solicitor General.

**Mukasey:** He had been before but that was just something they wouldn't tolerate. And then who were the others? I heard Billy Wilkins's name mentioned at some point. He is now former Chief Judge of the Fourth Circuit. What's his name, the former deputy, he was one of Schumer's three.

**Perry:** Was it Comey?

**Mukasey:** No, not Comey. Comey was named but Comey was never on the list. Larry Thompson.

**Perry:** Oh, yes.

**Mukasey:** He was at Pepsi and that's not the kind of job you leave for a year and half and then come back to, and he had a lot of money riding on it, so he didn't want it.

**Perry:** You said you consulted with your wife, of course. What was her response?

**Mukasey:** Her response was, "You've got to do it."

**Wilson:** Did Fred give you any sense of what issues would need to be tackled or might be especially sensitive coming to Washington, to head the department at that point in time?

**Mukasey:** No.

**Perry:** And they didn't talk about your handling of the terrorism cases or particularly *Padilla*?

**Mukasey:** A little bit, but it certainly didn't come up as an issue.

**Kassop:** Did you have policy discussions?

**Mukasey:** We had policy discussions. I don't recall in those sessions what they were. I know that subsequently—and we'll get to this—after the President offered to submit my name, I went down to meet with the heads of various conservative organizations, basically just to let them sniff my cuffs.

**Wilson:** Which organizations?



**Mukasey:** The Federalist Society. I'm trying to think of the people. Leonard Leo was one of them.

**Perry:** You can always add them when you get your transcript.

**Mukasey:** I will. And there were social issues, at least two, I think.

**Perry:** And how did they respond to you in these meetings?

**Mukasey:** They seemed fine. They just wanted to see me walk and chew gum at the same time.

**Kassop:** Was there some question that you weren't conservative enough?

**Mukasey:** Right.

**Kassop:** And that's what you needed to satisfy them about.

**Wilson:** And do you recall what the social issues were, if not the groups' names?

**Mukasey:** We talked a little bit about whether abortion should be recognized as a constitutional right or not. I don't remember much else.

**Wilson:** Were there national security gun control or national security-related issues that came up in connection with those meetings?

**Mukasey:** I don't remember them coming up, although it's hard to believe that they didn't. I don't remember Second Amendment issues at all.

**Perry:** What did you say about abortion rights?

**Mukasey:** I said I thought it was a state matter and that I understood the arguments for and the arguments against, but to me the due process clause had to do with process.

**Perry:** And how about your conversation then with the President?

**Mukasey:** That was funny.

**Perry:** Do tell.

**Mukasey:** No, it was great. I went down on a weekend. The idea was to keep the press from noticing that I was coming and going, so they met me at the airport, sort of cloak-and-dagger. I didn't have to hunch over in the back seat but I was met at the airport by Mike Scudder, who was also at one of the—it was Burck, Scudder, and Preet who were working for Schumer, the three little conspirators that made this happen, at least from my perspective.

We got to the White House and Bill Burck and I were waiting for the President. He had just been out bike riding, because we had to wait to get into the White House until the motorcade came. I was told he used that for bike riding. He came in and he was wearing black slacks and a black

short-sleeved shirt and Burck and I were both wearing blue suits and white shirts. The President looked around and said, "I guess one of us didn't get the memo." [laughter] It was very funny.

**Perry:** Where was the meeting held?

**Mukasey:** We went upstairs to the Residence. It was in the Treaty Room.

**Wilson:** East Room? The Treaty Room is in the Old Executive Office Building.

**Perry:** There's one there and then there's the one up on the second floor of the Residence.

**Mukasey:** When we got in the elevator he said, "You're about to have a job interview with the President of the United States. Are you nervous?" I said, "Actually, I was trying to forget that fact."

**Perry:** The President said that to you?

**Mukasey:** Yes. "You're about to have a job interview with the President of the United States. Are you nervous?" I said, "Yes, now that you mention it." We had a conversation that lasted for, it must have been 20, 25 minutes because Josh Bolten came in and had to pull him out. Playtime is over, you've got other things to do.

**Perry:** Can you share with us what part of the conversation you remember?

**Mukasey:** Yes. He asked me, "Why do you want this job?" and I said, "There are two things under attack. One is the country, the other is the Presidency, and I think I can help with that. I'd like to try." And we talked about why that was. And then we talked a little bit about my family, he wanted to know about my parents, where my father came from and so forth, working the American dream aspect of it all. There was still no offer.

**Kassop:** Did he ask about any of your visions for what you would hope to accomplish in the department?

**Mukasey:** I don't think so. What I said a number of times is, "I'm a lawyer, that's what I do, that's what the department does, and it's about time they got back to doing that, without having a lot of other diversions."

**Kassop:** Did anyone approach you about the investigations into the firing of the U.S. attorneys and the other investigations?

**Mukasey:** No, because those weren't yet investigations.

**Kassop:** OK, so they didn't start until under your watch.

**Mukasey:** Right.

**Kassop:** But did they suggest to you that those were going to be necessary?

**Mukasey:** No. Certainly *they* would not have suggested it. I was asked, I think, about the firing of the U.S. attorneys, and I said at the time I didn't understand what the fuss was about, because as I understood it, the President had the right to hire and fire anybody he wanted and people got hired and fired for all kinds of reasons. I thought one of their mistakes had been trying to suggest that some of these people got fired because they had performed badly, which was not necessarily the case, in virtually all instances. They wanted somebody else. It's a perfectly respectable thing to do. It's somebody else's turn.

The way they did it was terrible. I don't remember whether I mentioned that. I might have. What I heard is they had some lower-level person call up the U.S. attorney and say, "Clean out your desk by Tuesday" or whatever, instead of having the Attorney General call, thank them, maybe even visit, thank the person for his or her service. Say, "I'm going to pick somebody else but you did a terrific job," maybe a nice letter, suitable for framing. Not a telephone call from a GS [General Schedule] whatever, telling you to clean out your desk, because actually that's not—getting rid of a U.S. attorney is not within the authority of the Attorney General. It's a Presidential appointment. So it's not even the Attorney General who has the power to do that. Certainly some clerk doesn't have the power to do it, and I thought it was a huge mistake to do it that way.

**Kassop:** In addition to the way in which the firings occurred though, wasn't it also the fact that the evidence surfaced of political pressure through Senators and other Congress members, and that that itself was—

**Mukasey:** There was one instance of a Senator who had wanted a U.S. attorney to start an investigation. The U.S. attorney hadn't started it in time, or so the Senator thought. He started it eventually, and the Senator was upset and he wound up asking the White House to get rid of— [Dennis W.] DeConcini, I think it was.

**Kassop:** No, it was—you're right, it was Arizona.

**Mukasey:** Wrong Senator.

**Perry:** DeConcini was off. I don't think he was still Senator at that point. [Peter] Domenici.

**Mukasey:** Domenici, sorry. With Domenici, that was the only instance of that kind and that wasn't really the White House, it was a Senator.

**Kassop:** And then there was the Heather Wilson one as well.

**Mukasey:** She was in California?

**Kassop:** Heather Wilson, is she California?

**Wilson:** Yes, there was someone in California.

**Mukasey:** There was somebody in California who was told that she wasn't competent and that was wrong, she was.

**Kassop:** No, that was the Carol Lam one. I'm saying Heather Wilson was a member of Congress, and she was also one of the people who had been dissatisfied with the performance of the U.S. attorney, because that attorney was not moving fast enough in investigating some other partisan matter.

**Mukasey:** Right. But that was something that came from Congress, not from the White House. Obviously, the pressure was put on the White House, but the impetus came from Congress. All the others were simply a matter of them wanting to put in somebody who was a favorite of somebody, which is the only way you—That's the way I got to be a judge, right?

**Wilson:** Did you have any conversations with Fred Fielding or Josh Bolten or the President about who the client is for the Justice Department or what the appropriate relationships would be between the White House and the Department of Justice?

**Mukasey:** Yes. I said to the President, "In part the AG is the President's lawyer, but that's only in part, because the job to the extent that it involves interaction with the President is you can do this, you can't do that. My job is to the extent it relates to you, to give you the limits of what you can do, and you choose within them."

**Wilson:** Did you raise that affirmatively or was there a question that he asked?

**Mukasey:** There was a question.

**Wilson:** Do you recall what the question was?

**Mukasey:** Yes, "What's your view of the job?" Then there's what for me is a black box, which is running a department of a little over a hundred thousand people.

**Kassop:** Right. Did they ask you how you viewed your role vis-à-vis the White House counsel?

**Mukasey:** No.

**Kassop:** That never came up?

**Mukasey:** It may have.

**Kassop:** As far as whether the legal advice comes from the White House counsel or comes from you, and when there's a conflict in that advice and those sorts of questions.

**Mukasey:** If there's a conflict in that advice, the department does what the department does. The White House counsel can say what he wants or do what he wants and it's between him and the President.

**Kassop:** And Harriet Miers was the White House counsel by that time?

**Mukasey:** No, Fred Fielding.

**Kassop:** I'm sorry, so Fred was still.

**Perry:** You said that when the President asked you about why you wanted the job, you had talked about two things under attack, our country and the Presidency itself.

**Mukasey:** Right.

**Perry:** I'm wondering if you could spin that out just a little bit because yesterday we talked about your thoughts on some of the limits on the role of the judiciary. You have a very clear sense of separation of powers. I'm thinking about where that came from. Did that go back to your studies of history or purely from your work as a judge?

**Mukasey:** Purely from work as a judge. It was occasioned in part by the *Padilla* case. Interestingly, article 2 says the executive power shall be vested in a President. It doesn't say the executive power as to A, B, and C. It doesn't say all except for a little bit of the executive power, it says *the* executive power, all of it. Congress, on the other hand, has legislative powers that are enumerated. So it's obvious that somebody figured, number one, if anybody needed authority to act it was the President, if anybody was in danger of overstepping it was Congress. We went through that a little bit.

**Perry:** How did your conversation end with the President that day?

**Mukasey:** It was Josh Bolten basically saying, "You have work to do."

**Perry:** Did the President say, "You'll hear from us" or "we'll get back to you"?

**Mukasey:** Nothing.

**Perry:** Did he offer it to you at that point?

**Mukasey:** No, he did not. He was about to take a trip to Australia, I think, and I was told he was going to think it all over. I know at one point we went out on the [Harry] Truman Balcony ironically, which was outside whatever room we were in. Ironically because Truman was the one who said, "If you want a friend in Washington, get a dog." And I pointed that out to him and he nodded. He had two dogs, of course. We shook hands. I don't actually remember how it ended.

**Perry:** And then when did you get the word and from whom?

**Mukasey:** He took his trip and we were talking about when the decision would be made. It was the second day of Rosh Hashanah. I was told, "You'll get a telephone call at nine o'clock letting you know what the decision is," and I was not told what the decision was. He [Bill Burck] said somebody was going to call me and tell me it had been nice knowing me or—Sure enough, at nine o'clock the phone rang, I was on hold for the President. So I figured he wasn't going to call me to tell me—

**Kassop:** The bad news.

**Mukasey:** Right. He offered me the job, and I said I'd be honored. I forget exactly how he put it, something to the effect of "we'll fight to get you confirmed" or "we'll kick and scratch to get

you confirmed.” And I said, “I hope it’s not necessary.” I had no idea the way it was going to work out. Maybe he did, I don’t know, but it was a short conversation.

**Perry:** So you had a happy new year.

**Mukasey:** I had a happy new year.

**Wilson:** Did you have a sense of whether Rudy Giuliani played any role in suggesting your name? You mentioned Senator Schumer’s role, at least publicly.

**Mukasey:** I know that people talked to him. My sense is that it was a combination of what Schumer said on television, which of course locked in his vote.

**Wilson:** Right.

**Mukasey:** And Burck, who had been an assistant U.S. attorney and knew me, Scudder the same, both worked in the White House counsel’s office, and Preet. Three kids.

**Wilson:** Making the case.

**Mukasey:** Right, within the—and I know nothing about the conversations but my sense is that they were the—

**Perry:** Your preparation for the confirmation hearings. How did that go? What did you do, with whom did you speak?

**Mukasey:** Lots of forms at the beginning. The announcement that the President would submit the nomination was made on a Wednesday. This was after I had that session with the people from the groups. Right after that began what were known as courtesy calls on members of the Judiciary Committee, and the first in fact was a telephone conversation with—I’ve told this story but the Senator has always remained unnamed. We’re on the record here, so I’m going to name him. It was a call from Senator [Sheldon] Whitehouse. He got on the phone and said, “When a ship hits the rocks, the captain and the engineer go below to do a damage assessment, and the Justice Department has been damaged. I think that when you’re appointed, you should announce that you’re going to appoint a bipartisan blue ribbon commission to do a damage assessment on the Justice Department.”

*And I thought, That would be great. I’d get up in the great hall of the Justice Department after I’m sworn in, look down at these people, and say, “I’m going to appoint a bipartisan blue ribbon commission to do a damage assessment of you.”* Not exactly a morale builder. So I said it was a very thought-provoking suggestion, without telling him what thoughts it provoked. I told some people about it and they said, “Yes, you just got a taste of what he’s like.”

I had this series of meetings with Senators. You get tipped off in advance about what the issues are for some of them and what they want to hear, what they don’t. I remember with Senator [Dianne] Feinstein, I was told that one of the things she found very disquieting about Judge Gonzales’s approach was that at one point he had said that the Attorney General wears two hats. In one case he’s the President’s lawyer and otherwise he’s with Justice. “Don’t say you wear two

hats.” And I think during the conversation with her, she said, “How many hats do you think you’d wear?”

**Kassop:** That’s your question.

**Mukasey:** I said, “As Attorney General, I wear one hat that says Attorney General of the United States.” And she calmed down. Then there was a period of time when it was “Let Mukasey be Mukasey.” That lasted through my meeting with Senator [Richard] Durbin, when he asked me about Guantanamo. I said I didn’t see what the big deal is. As far as I understood it, they get three hats and a cot. And he had actually been to Guantanamo, but he was not happy with my—I did not regard it as a national disgrace or anything of the kind. When we got back, Harold Kim, who did Congressional Relations with the White House, was pale. It was the end of “Let Mukasey be Mukasey.” Kim said, “You didn’t see this but one of Durbin’s staff people was sitting there and literally could not sit still, was shifting from one side to the other,” while I was giving these answers. He said, “What did you think of the interview with Durbin?” I said, “I thought we had a terrific, spirited conversation,” and he said, “That’s not happening again.”

**Perry:** So was he briefing you?

**Mukasey:** Harold?

**Perry:** Yes. You said people were giving you hints about the pet issues of the Senators.

**Mukasey:** Right, of the Senators. He principally, there were others and I don’t recall precisely who but Harold was the—

**Perry:** And then he was going with you to the meetings.

**Mukasey:** Oh, yes.

**Perry:** That’s why he saw the reaction of the staffer to Durbin.

**Mukasey:** He was my handler.

**Kassop:** How did you react to the idea of their saying that you needed to sort of muzzle your thoughts?

**Mukasey:** Oh, it was fine. I understood it was a political process. I said, “I’ll dial it down if you like, but I’m not going to lie about anything and I’m not going to take a position that I really don’t agree with for the sake of getting confirmed.” This came up later on. I also had a conversation with Russ Feingold from Wisconsin, which was kind of spirited, but we wound up, I think, pretty good friends.

**Wilson:** It was probably FISA [Foreign Intelligence Surveillance Act] that Feingold was—

**Mukasey:** It wasn’t FISA. It may have been FISA connected. Some of it had to do with capital punishment, and he was trying to argue that one of the considerations of the Attorney General in determining whether to seek or not seek in capital cases should be whether a state had capital

punishment or not. And I said, “No, it’s supposed to be a national standard. Are you going to tell somebody from Texas, ‘You committed this crime in the wrong state, friend. If you had committed this crime in Wisconsin, we wouldn’t seek, but you committed it in Texas so we’re going to.’” I said, “That’s just no way to run a system that is supposed to be uniform nationwide.” He understood the argument.

**Wilson:** Were you asked about any environmental issues?

**Mukasey:** Not that I recall.

**Wilson:** How about civil rights issues?

**Mukasey:** Not that I recall.

**Wilson:** What role did Senator Schumer play during the confirmation process? Was he a helpful person across the aisle?

**Mukasey:** Yes, sort of. I think by the time the hearings were over, he was not happy with—people were demonstrating outside his house, but he had already painted himself into a corner. He and Senator Feinstein basically held hands and jumped, that’s the way that worked.

**Perry:** Tell us about the prep for the confirmation hearings. You did murder boards?

**Mukasey:** Yes, repeated, and I got briefing books rather like the one you gave me, except several of them on different issues and different people played the role of Senators.

**Wilson:** Was this done at the Justice Department?

**Mukasey:** No, I never set foot in the Justice Department until after I was confirmed. It was done at the Old Executive Office Building. But there were people from the Justice Department there. There was a woman named Beth Cook, who I later picked as head of the Office of Legal Policy, who was ferocious. She played Senator Feinstein. Apparently she had done this a number of times. The process of being questioned by her was known as being “Cooked.” [*laughter*]

**Kassop:** That’s wonderful.

**Mukasey:** The real hearings were child’s play compared to that.

**Perry:** She put the murder in murder board.

**Mukasey:** Yes, she really did.

**Kassop:** Who played [Patrick] Leahy, do you remember?

**Mukasey:** No. They sort of passed the dagger on that one.

**Perry:** So what was this like, having served on the bench all those years and asking the questions, to find yourself now on the opposite side of them?



**Mukasey:** It wasn't all that difficult. I was well prepared. With Senator Feinstein, there was one case I had decided early on, a sex discrimination case by a police officer who had told what I regarded and still do as a completely fantastical story about a date she had with another cop that went wrong. Supposedly he fired a weapon into the mattress or something. It was a very bizarre story. She claimed that she had gotten various notes from him. "Did you save them?" "No." She failed a lie detector test. In any event, she got a colossal jury verdict and I turned it around. It went up to the circuit and they sent it back. I turned it around again and they sent it back again. Senator Feinstein was not happy with that case. That was one principal concern, the [Karen] *Sorlucco* case. That and of course the interrogation techniques.

**Kassop:** You were asked a lot of questions about torture and whether your—

**Mukasey:** Right. This happened on the second day. But for the Dalai Lama I think I would have gotten through it in one day. But the Dalai Lama visited and Senator Leahy apparently knew the Dalai Lama. I don't know what the story was, but he absolutely had to go see his buddy the Dalai Lama, so we broke early.

Interestingly, when I came back the second day, somebody asked me, "Who did you meet with overnight? Who did you have dinner with?" I said, "I had dinner with my family." I was asked, "Did anybody call you?" I said no. In point of fact, what I believe is that people had called them and said, "You're going to let this guy get away." The second day was very tough.

**Perry:** They turned up the heat.

**Mukasey:** Yes, turned up the heat and it came down to waterboarding.

**Wilson:** Had you been prepared during your murder board sessions at the White House, on issues relating to torture or interrogation techniques?

**Mukasey:** Yes.

**Wilson:** And what do you recall about the preparation?

**Mukasey:** I recall I asked what gets done and was told, "That's classified and you don't have clearance yet." I decided if I didn't have clearance to find out what is actually involved, then I couldn't very well pronounce on whether it does or doesn't fit the statutory definition. That was what we danced with in the committee, largely because there were people out there who presumably had done it, according to the reports, and I would be getting up there and telling them they committed a federal felony. I was not about to do that, because I didn't know how what they did matched up with the statute. I did promise that I would review the memos of the Office of Legal Counsel and withdraw any that needed to be withdrawn. Did I have to review all the OLC memos? No. There's a whole library full of OLC memos, I could have spent the whole 18 months reviewing OLC memos and not doing anything else, but I promised that I would review the memos on interrogation.

**Wilson:** During your preparation sessions, were you asked to review any of the OLC memos?

**Mukasey:** They were classified, I couldn't see them.

**Wilson:** You couldn't see any of them?

**Mukasey:** No. Except one.

**Kassop:** The 2002 one was—

**Mukasey:** The one that was withdrawn, that I saw, right.

**Kassop:** [Jay] Bybee.

**Mukasey:** The Bybee Memo. Or I knew about it, I'm not sure I saw it.

**Kassop:** That was public.

**Mukasey:** It may have been but again, I'm not sure I saw it. I remember reading about it.

**Wilson:** Before your confirmation process.

**Mukasey:** Before, yes.

**Wilson:** And had you developed an opinion about it at the time that you read about it?

**Mukasey:** I think there was one passage in there where he talked about what kind of pain would qualify as severe. There was a statute that had nothing to do with defining torture. It was a health care statute that he drew on, and they said something about the pain associated with organ failure. I had a couple problems with that. Number one, the statute has absolutely zero to do with this kind of determination. I understand sometimes you draw analogies to statutes but there are limits to that. Number two, there's some organ failure that doesn't involve any pain at all. People can experience kidney failure and it's not painful, it just happens and you die. It was a ridiculous analogy to draw. But it was my understanding that after that memo was withdrawn, another memo replaced it that came to the same conclusion, just different grounds. I did promise to review the memos.

**Kassop:** You were also asked in the confirmation hearings about—because your predecessor had used the term “a Commander in Chief override,” so particularly, Senator Leahy asked you repeatedly, “What is your position on whether or not the President can override a statute?”

**Mukasey:** I said it depends on the statute. The President was granted certain powers in the Constitution and had certain obligations to the Constitution, including defending the country. If a statute infringed constitutional powers then yes, but not otherwise.

**Kassop:** There was something fascinating I remember reading in the transcripts of the confirmation hearings. I think you were referring to FISA but I think it might be applicable to other statutes as well, where there was a question of whether the statute was perhaps infringing on the executive power. And what you said was that the statute goes so far and you said there was a gap between where the statute ended and where the President's power begins. And it reminded me of Justice [Robert] Jackson's “zone of twilight,” that intermediate period where it depends on who gets there first or who has authority.

**Mukasey:** Funny, I don't recall that. I do recall at one point him saying, "You're putting the President above the law" and I said, "No, I'm putting the President within the law because the law includes the Constitution, which is the supreme law, and if the President has a power under the Constitution, he's obligated to exercise it, and if a statute infringes on that, then the statute is unconstitutional." I don't know whether I said that, but I remember drawing this distinction between putting the President above the law and putting the President within the law.

**Wilson:** Were there any questions that you had prepared for or had thought might come up that did not come up, that surprised you?

**Mukasey:** No. I don't recall that being my reaction. I didn't think that the waterboarding issue would be as intense as it was.

**Kassop:** But even in your conversations with Senators in advance, that didn't come up in their—

**Mukasey:** No.

**Kassop:** They did not mention it to you? So you weren't tipped off that it was important to them and they were likely to spend time talking about it.

**Mukasey:** Not the Judiciary people. I remember—and this was probably after the hearings, so by that time it was a big deal. Senator Bill [Clarence W.] Nelson from Florida—was it Bill Nelson from Florida?

**Kassop:** Yes.

**Mukasey:** I get the Nelsons mixed up.

**Perry:** Ben is the other.

**Mukasey:** Ben [Earl Benjamin III] Nelson is the other one, who became a friend, a nice guy. Bill Nelson stated at one point that he had tried to arrange to be waterboarded so that he could find out what it was like. I don't remember whether he actually did it. I think he didn't.

**Kassop:** But the White House and Leahy had not talked about this with you in their earlier—

**Mukasey:** The White House, certainly not; Leahy, certainly not.

**Kassop:** Really? In other words you're saying they sprung it on you.

**Mukasey:** They didn't spring it on me, I certainly anticipated that. There was nothing unfair about the fact that it was raised. That's their job. But what I did feel was unfair was they wanted me to do what they had been unwilling to do. The Congress had twice, not once, twice, refused to pass a statute saying that waterboarding is torture. They didn't want to be caught eliminating an interrogation technique if it turned out that it was necessary. But they were jolly well happy if I would do the work for them and I wouldn't, so we chased each other around the barn.

**Perry:** Any other questions on the confirmation hearings? So when they end, what were your thoughts? Were some parts a bit harder than you expected, but did you think you would if not sail through, you would be confirmed?

**Mukasey:** I thought I would be confirmed. I had meetings with Senators afterward and by the time of the vote, I knew that it was going to be OK. In fact I remember I was at home packing up to travel down and it was on television, I was getting dressed. I think C-SPAN [Cable-Satellite Public Affairs Network] had the roll call.

**Perry:** When you hear the vote is affirmative in your favor, what goes through your mind? This is real, this is going to happen.

**Mukasey:** Yes, now it's time to do the job, and I went down that night and was sworn in the next day.

**Kassop:** Really? Wow, that fast.

**Mukasey:** Oh, yes.

**Perry:** Tell us the process of putting together a team at DOJ.

**Mukasey:** That started well before, during the confirmation process. I was down there the next day. I don't remember if it was before or after the hearings. They introduced me to a number of people who would be candidates for this and that. I remember meeting Grace Chung [Becker], who was the head of the Civil Rights Division. I remember meeting the chief of the Criminal Division, whose name I can't think of at the moment, blonde hair. [Ed. Note: Alice S. Fisher?]

**Perry:** Again, you can add it later.

**Wilson:** And who was the deputy at that point?

**Mukasey:** There was no deputy at that point. There was no deputy, there was no Associate. There was an acting deputy, Craig Morford. I interviewed a number of people for deputy, including Craig, and I met Mark Filip and that was just an instant connection. We spent 15, 20 minutes together. The second smartest decision I ever made.

**Wilson:** The first was?

**Mukasey:** My wife.

**Wilson:** Just giving you an easy question.

**Perry:** What were you looking for?

**Mukasey:** I was looking for somebody who had the same values I had but was smarter and a credible person to work with. You get different kinds of advice. Some people said, "You ought to go down there with your own team because you don't know who you can trust and who you can't." And I thought, *If I do that, right away it's going to be an us-and-them situation.* If I had

been at the department at the time, the thing I would most have wanted would be for the Attorney General to succeed and for the Justice Department to stop being an item on the news in a negative way. So I joked with the people at the department, it was like a mosh pit, I just threw myself into it. Catch me, because it's in your interest to make sure I don't hit the ground. And they did. So I tried to get people from within the department. My chief of staff was somebody who had been at the department, Brett Gerry, and everybody else other than two of the counsel— You have four or five counsel or counselors who work for the Attorney General. I picked two former clerks who had been with me, and I wanted them down there, but there were people already in place and I kept them because I wanted as many people who were in place as possible.

**Perry:** You said you were getting advice from people, some saying, "Pick your own team." Were these people giving you unsolicited advice?

**Mukasey:** Yes.

**Perry:** And did you solicit advice from others specifically and particularly from any of your predecessors?

**Mukasey:** I didn't talk to any of my predecessors. I talked to Rudy.

**Kassop:** Did you talk to [John] Ashcroft at all?

**Mukasey:** No.

**Kassop:** And obviously not Gonzales you said.

**Mukasey:** Right. I talked to Gonzales the day of the announcement of my nomination. He congratulated me and that was that. I'm trying to think of who else.

**Kassop:** Did you talk to Larry Thompson?

**Mukasey:** No.

**Perry:** Ted Olson?

**Mukasey:** Yes, I did talk to Ted Olson, although I don't recall much of the substance. It was a telephone conversation.

**Wilson:** Did you have conversations with Janet Reno at any point?

**Mukasey:** No.

**Kassop:** Paul Clement?

**Mukasey:** Not until I got there.

**Perry:** What are your first days and weeks like in the office? What's landing on your desk, what isn't?

**Kassop:** Let the tape note a roll of the eyes.

**Mukasey:** It was a torrent. The people around me were really very good. I was very quickly taken in hand, it became obvious that I wasn't in control of my own schedule. There were people who were telling me what to do, when to do it, this is what you're going to do here, this is what you're going to do there.

**Perry:** I do remember reading in the press accounts that you found that jarring, because you had been in control of your own schedule and your own court and your own staff.

**Mukasey:** Right. No more.

**Perry:** How did you adjust?

**Mukasey:** The way any child adjusts to discipline, happily some days, unhappily others. I remember at one point we were on a trip overseas. I had made a mistake about when I was supposed to be up in the morning and it turned out it was either an hour earlier or a half hour earlier, and I flipped out. I said to Brett, "Damn it, I'm not a rat on a treadmill. You can't do that." He let it pass.

**Perry:** So there were occasional tantrums as you would have with a child.

**Mukasey:** Actually, that was the only tantrum, but I very much regretted it because he was a brilliant, dedicated guy.

**Wilson:** Did you make a decision about whether to have regular press briefings, or did you make a decision about whether and when to communicate with the press?

**Mukasey:** I remember being told, which seemed relatively early to me, "They want to talk to you so you'd better make yourself available." The first meeting was a brown-bag thing down in the cafeteria. We sat around and had lunch and I tried to pass myself off as a former journalist. "I'm your friend, right?" That didn't last. I didn't go out of my way to seek meetings with them.

**Perry:** Did it feel under siege? You said that you wanted to come in and help the department not to be in the news in a negative way, but when you got there and met with the press and talked to other people who were already there, did it feel, when you got there, that it was under siege?

**Mukasey:** I didn't. It didn't feel under siege, I think that overstates it a little. There were issues that clearly concerned the department itself. I was told about then-pending inquiries by the Inspector General relating to the U.S. attorneys. There was one thing that came relatively by surprise and that was the destruction of the CIA [Central Intelligence Agency] tapes, which I found out about one morning, and we had to make a decision about what to do about that, whether there was predicate for believing a crime had been committed. If so, I appointed somebody to investigate it. There were no special counsel appointments. People kept using that term and that's not what it is.

The third smartest appointment I made was a guy named John Durham from Connecticut. I interviewed a couple people for that and actually I heard from somebody not involved in the

process that he had been profiled in the *Hartford Courant*. One of the stories they told about him was that he went to mass three or four times a week. And this person told me that he got a call from his mother, wanting to know, “What about the other days?” I said, “That’s the guy I want.”

**Wilson:** So he’s the one you appointed to handle the CIA issue.

**Mukasey:** To look at the CIA tapes, right. And he was then asked by [Eric] Holder—

**Kassop:** To expand that investigation.

**Mukasey:** They reopened the cases that had been closed in the Eastern District of Virginia. I don’t know whether you want to get to that or not.

**Perry:** Yes.

**Kassop:** In other words, your appointment of him was to investigate the destruction of the tapes, and then the next question was that Holder asked him whether or not any crimes were committed during the interrogation process by CIA officials.

**Mukasey:** Correct. An issue that had already been determined and cases closed in the Eastern District of Virginia, with prosecuted memos.

**Wilson:** So what was the work product that you saw, and what role did you play with regard to the conclusion of his investigation during your tenure?

**Mukasey:** I didn’t play any role. Once I appointed him, he conducted the investigation.

**Kassop:** Was it concluded under your watch?

**Mukasey:** No, it was not.

**Kassop:** I think it was concluded later.

**Mukasey:** It was concluded there had been no crime.

**Kassop:** And then you also appointed Nora Dannehy as the other counsel for the firings?

**Mukasey:** Right.

**Wilson:** Tell us about that issue.

**Mukasey:** I think the issue came down to not so much the firings themselves but whether Congress was misled by people at the White House. She had to get documentation out of the White House relating to—there were claims of executive privilege and they eventually worked it out. That also was not concluded while I was there, I don’t think.

**Kassop:** I’m not sure about that one. I think that actually was the reason you needed to appoint her, that when Congress investigated the firings and tried to get evidence from the White House, it was closed out by executive privilege.

**Mukasey:** That there was executive privilege.

**Kassop:** And the idea was that if she put them under subpoena, they would have to provide the information.

**Mukasey:** Right.

**Kassop:** But then you did run into the contempt citation of Harriet Miers and Josh Bolten and Monica Goodling.

**Mukasey:** Goodling, I didn't recall that. I remember Miers and Bolten. The question put to me was if the claim of executive privilege was well founded then that case would not be prosecuted. I remember going around with Congress on that. I think it was an oversight hearing. I don't think that came up during confirmation.

**Kassop:** No, but your position on executive privilege was an interesting one. I was reading it, where you said that if it was the Justice Department that had given the advice to the President and to the White House officials, for the basis for executive privilege, how could the Justice Department then go back and prosecute?

**Mukasey:** Turn around and prosecute it, right, a contempt case. But otherwise, if it came from the White House counsel's office, I would also have to evaluate whether it was well founded and if it was well founded then that couldn't be prosecuted.

**Kassop:** The term was whether or not there was a reasonable claim of executive privilege, and I think that came up as a question, what determines whether it's reasonable.

**Mukasey:** I can go through my day if you want me to.

**Perry:** That would be excellent.

**Mukasey:** It started at 5:30 in the morning in the gym. A security briefing at 7:30, breakfast and so on. National security briefing every morning at 7:30 at the FBI that lasted a half hour or 45 minutes. Four days out of five, it was then over to the Justice Department for a staff meeting. Tuesdays we would go from the FBI over to the White House for terror Tuesdays, which was a meeting with the President, the Vice President, the FBI Director, the Homeland Security Secretary. I think the Director of National Intelligence, the DNI was there. There was a briefer from the CIA.

**Kassop:** NSC [National Security Council]?

**Mukasey:** Steve Hadley. I think Josh Bolten was at those meetings too. We'd gather around, listening to whatever the briefing was and the issue was.

**Perry:** Can you talk to us about the President's role in those? Did he ask lots of questions?

**Mukasey:** Asked questions. At times it stood out in my mind, because I would not have wanted to be the person on the receiving end, at times critical. Where'd he get that? The press



caricatured him as unfocused and not smart and so forth. I remember going to a meeting, not one of those but a meeting in the Situation Room, with at least three Cabinet-level people and a lot of other very smart people. All of whom thought we were there to confirm a decision, just to ratify a decision that everybody had assumed was a given. About two minutes into the presentation he asked three questions that turned it 180 degrees. We had come to confirm X, we walked out confirming non-X.

**Wilson:** Do you recall what the questions were?

**Mukasey:** No, and if I did I wouldn't say.

**Kassop:** Was the Vice President included in the terror meetings that you had every week?

**Mukasey:** Yes. He said very little.

**Kassop:** And was [David] Addington there as well?

**Mukasey:** No.

**Kassop:** Did the Vice President bring anybody from his counsel's office?

**Mukasey:** I don't recall him bringing anyone, and I don't recall whether there was anybody there who was identified to me as from his counsel's office.

**Kassop:** Was the White House counsel there?

**Mukasey:** No.

**Wilson:** Did you have a sense that there was a center of gravity within that close circle of advisors on national security issues? Was there a particular voice who was trusted by the President or a set of voices?

**Mukasey:** My sense was that a lot of talking had gone on outside that room that I wasn't privy to, and the discussants had been Steve Hadley and the Vice President. Now I don't know whether I got that sense because of things that I read or what. Some issues got resolved at those meetings, some issues didn't, but whatever did or didn't, I got the sense that a lot of conversations went on when the children were not in the room, and I was definitely one of the children. That didn't bother me—the paint was still wet.

**Perry:** On these terror Tuesdays, given your own direct experience twice with terror attacks, were you encouraged that we were making progress in this War on Terror or did you come out of those meetings thinking, *This is even worse than I thought?*

**Mukasey:** I had morning briefings before I got to not only the day of but every weekday, and the sense was that there was a lot more to this than even I thought, and I thought I had seen plenty. I was also very much encouraged that we had capacities to find out and overhear and know about things that were going on and to some extent act on them, beyond what I had any understanding

of. So it was on the one hand a lot of anxiety about what I was seeing, but on the other hand a lot of being encouraged by what I had seen because of what we were able to find out.

I also used to get, it seems like a couple times a week, applications to the FISA Court that I would have to review, and those were detailed and told me a lot about what was going on, who we were chasing down.

**Perry:** Are you able to share with us any of the complexities? Not specifics or things that are classified, but any of the areas that you thought, *This is more complex*—Are you able to describe in what way?

**Mukasey:** The interaction between the politics, it wasn't just that there were a bunch of bad guys out there, it was that there were a bunch of bad guys out there who have relationships with people in the government, including ISI [Inter-Services Intelligence] in Pakistan and other governments elsewhere, and picking that apart was a very complex thing. The whole tribal overlay was a very complex thing, but tribal relationships mattered a lot. None of that made it into the newspapers, but it was all certainly a major consideration if you were dealing with these people. It was very complex.

**Perry:** We're ready for a break.

[BREAK]

**Wilson:** Judge Mukasey, you were talking about your discussions with members of the President's Cabinet and the President himself on national security issues. Do you recall discussions about Osama Bin Laden during your tenure as Attorney General?

**Mukasey:** Yes. There were a number of people whose names came up quite a bit at the weekly sessions, at the daily sessions, several of whom I'm happy to say are deceased, Abu Yahya al-Libi was one of them, a number of others. Certainly Bin Laden was one of them.

**Wilson:** And having participated in those discussions, what is your perspective on public knowledge now about what's happened to Osama Bin Laden?

**Mukasey:** I don't know that it comes from those discussions entirely, or at all really, except to say that there were ongoing reports about where he was likely to be, and he was never off anybody's list of top 10 things to do. What's come out since, and I have written on this, is the way they ultimately got to him was through the name of a courier. The question was whether that was disclosed by KSM [Khalid Sheikh Mohammed] as a result of what are known as enhanced interrogation techniques, which I've said a number of times was probably the worst promotion since the New Coke. It sounds like a washday product, doesn't it? Enhanced interrogation techniques.

**Kassop:** Better than the old ones.

**Mukasey:** Exactly, enhanced. Get the new—

**Kassop:** New and improved version.

**Mukasey:** Right. Get your clothes cleaner or your teeth whiter or whatever it is. I should say as a general matter, it's impossible to know whether any particular piece of information resulted from those techniques because of the way they were applied. I don't know if this is going too far afield from your question.

**Wilson:** No, please.

**Mukasey:** The way it worked was that if somebody was uncooperative, and it was not just a matter of refusing to talk, it was a matter of lying. The way any good homicide detective questions a suspect is you ask him about things you already know, and if you're getting lies then you know you're not getting cooperation. And of course when they got lies, they weren't getting cooperation, and so things were gradually ratcheted up until they got to the enhanced interrogation techniques. The most intensive of them, i.e., waterboarding, was used on three people: Abu Zubaydah, Abd al-Rahim al-Nashiri, who was the fellow who planned the bombing of the *Cole* among other things, and KSM. When Abu Zubaydah broke—and this is something I found out afterward—he disclosed that doctrinally they had to resist until the limit of their resistance was reached, but once it was reached then it was permissible for them to talk.

**Wilson:** Under their code?

**Mukasey:** Under their code. So what he said was, “Do this for all the brothers,” and they took that lesson and did it to KSM, who when he broke it was like he did tutorials in the organization table, money raising, everything. He was a fountainhead of information. One of the names he disclosed was the name of this courier. He was not the first one to disclose it. That name was already in the files from somebody else.

**Kassop:** Was that name in the files from interrogation by the CIA or by the FBI?

**Mukasey:** I don't know. I know it was in a CIA file. Whether it was there because of questioning by the FBI or the CIA I have no idea, but it was unremarkable. There was a lot of information in a lot of files. That was one of the items of information. When it came from him, he was then asked, “What's the story on this guy?” And he was very quick to say, “No, he's not active anymore.” From independent information they knew that they were still getting that name coming up on intercepts, so they knew he *was* active. It was not simply the fact that he knew the name, disclosed the name, which was already known, but rather that he lied about it. That was what piqued everybody's interest, and then they of course traced him because he had the rhino on his spare tire. Drove a Rover.

**Wilson:** Were there similar attempts under the Bush Presidency to go after Osama Bin Laden?

**Mukasey:** No, because there was no specific information about where he was.

**Perry:** Was there talk about, as it turned out, whether he was in Pakistan? Were there discussions about what to do about that and how to work with the Pakistanis?

**Mukasey:** No, certainly not that I participated in.

**Wilson:** And do you have a viewpoint about whether it would only have been possible to get Osama Bin Laden, in your opinion, with that extra piece of information?

**Mukasey:** Yes, because that's what put everybody on to the fact that this was a significant person. If KSM took the trouble to lie about it, then it was a significant piece of information.

**Wilson:** Absent the use of those enhanced interrogation techniques, do you think that information would have been disclosed?

**Mukasey:** The information, the name *was* disclosed. There was a lot else that was learned as a result of the enhanced interrogation techniques. Do I think that that would have been learned without them? No.

**Wilson:** And do you think that what was learned as a result of the use of the enhanced interrogation techniques was a critical part of getting to Osama Bin Laden?

**Mukasey:** Yes, but that's not the only thing. There were numerous other plots that were broken up as a result of what was learned. There's a book that sets a lot of this out.

**Kassop:** *Manhunt*?

**Mukasey:** No.

**Wilson:** Was that the one done by the Navy SEAL [sea, air, and land teams/special operations force]?

**Mukasey:** Marc Thiessen.

**Kassop:** He's a *Washington Post* columnist.

**Mukasey:** Now, yes. Called *Courting Disaster*.

**Kassop:** When you say there were many types of interrogations that were conducted—as I said, there was the CIA but there were also the FBI investigations. Some of those I think were the earlier ones and perhaps they continued later. Do you have any thoughts about the relative value of the CIA interrogations versus the FBI interrogations, which used different techniques?

**Mukasey:** I don't know very much that came out of the FBI investigations. Fully half of the valuable stuff that they got—and this I got from Mike Hayden—came from the three people I mentioned.

**Wilson:** I was going to ask about your relationship with Mike Hayden during the administration. You mentioned the daily FBI briefings.

**Mukasey:** Right. He was not at those or at the weekly sessions for that matter.

**Wilson:** Understood. What kind of working relationship did you have with him?

**Mukasey:** Very friendly. We just get along in a personal manner.

**Wilson:** Did you meet him for the first time when you became Attorney General?

**Mukasey:** Yes. Interacted with him the first time when he called me about the destruction of the CIA tapes. That was the beginning of a lovely friendship.

**Wilson:** And what did he say, to the best of your recollection?

**Mukasey:** He said, “I think we’ve got a little problem and it’s not so little,” and we talked about what it was and I said all right.

**Wilson:** Was he on board with the notion of this investigation?

**Mukasey:** Yes. He was by the book, all of it, always. We worked on a number of things, but that was one of them. One of the things that was key is after I undertook to review the OLC memos, at the first oversight hearing the question was, “They’re going to ask me about the OLC memos.” I had drawn a conclusion but I didn’t want to have to talk about it. He allowed me to say that the enhanced interrogation techniques had stopped in 2003, which in fact they had, so this was a moot point.

**Wilson:** And how did that happen?

**Mukasey:** How did he let me do that?

**Wilson:** Yes.

**Mukasey:** We were getting ready for the hearings and going back and forth on exactly how I would put it. The question was already put in the letter before I went up, and somebody had put through a call to the Agency to find out whether that could be disclosed. He agreed.

**Wilson:** Whether it could be disclosed that the use of the interrogation techniques had stopped in 2003?

**Mukasey:** In 2003, right.

**Wilson:** And was that his decision?

**Mukasey:** Yes.

**Wilson:** Based on his own review?

**Mukasey:** Yes. He had the authority to do it and he said I could do it. We put that in a letter to the committee and they felt very much cheated of an opportunity.

**Wilson:** And so did that obviate the need for you to opine publicly about—

**Mukasey:** It did in my mind.

**Wilson:** Yes, and did you therefore not tell Congress what your conclusion was as a result of the review?

**Mukasey:** Correct.

**Wilson:** Are you able to share with us today what your conclusions were?

**Mukasey:** Yes, it's not torture. It didn't violate the torture statute. Understand, there were two other statutes, the Detainee Treatment Act and the Military Commissions Act, neither of which mentions waterboarding, of course. They don't do that because they weren't willing to do that before. It's C, I, D. The D is degrading.

**Kassop:** Cruel, inhuman, and degrading.

**Mukasey:** Cruel, inhuman, and degrading, right. Some of those definitions are formulated by reference to the torture statute, so it's all quite convoluted. The question is whether either of those statutes goes beyond the torture statute, notwithstanding the claims by the people who introduced the legislation, "Yes, we intended to do that." It's what's in the legislation that counts, not what you claim you intended to do. And I never had to pass on that because those statutes were not in force in 2003 and by the time I got there the practices had stopped, so there was nothing for me to opine about on that score.

**Wilson:** Did OLC or anyone else in the department analyze or prepare memoranda memorializing the department's review?

**Mukasey:** No. The way we did that—and this was a wonderful procedure that Brett mostly helped work out. There were three people, four including me, who had access to those memos for that review. Brett was one of them because he operated the switching mechanism. There were three copies, one for me and one for each of two people, both of whom knew that there was somebody else involved in helping me do the review but neither of whom knew who the other was, so that I would get independent advice.

**Wilson:** Both within the department?

**Mukasey:** Yes.

**Wilson:** Are you able to share their names with us or their roles?

**Mukasey:** I don't think I should, largely because one of them is currently and they both could be in the future in public life, and I don't want that to blow back on them.

**Wilson:** But the idea, the process was to get two independent viewpoints.

**Mukasey:** Yes, I would have access to two independent viewpoints and we would never all meet together. The thing to be avoided was some sort of consensus judgment. I had to make my own judgment, but I could call on either one of them to bounce ideas off and I did. But I was to make the determination. I didn't have to write a letter or anything, I just reached a conclusion.

**Wilson:** So there was no memorialization of your conclusion?

**Mukasey:** No, because this was all being done. My only undertaking to the committee was that I would review the letters and if I thought any of them had to be withdrawn, I would withdraw it. I reviewed them and I didn't think any of them had to be withdrawn, so I didn't and it stopped there. I didn't have to write an essay about it.

**Wilson:** You told us that you were preparing to testify before Congress and you expected this question to come.

**Mukasey:** For sure.

**Wilson:** But as a result of what the CIA Director, Mike Hayden, had done, that is, stopping the waterboarding technique.

**Mukasey:** Right.

**Wilson:** That you no longer felt the need to disclose affirmatively your viewpoint.

**Mukasey:** Right.

**Wilson:** Did any Congress members nevertheless ask you at the hearing what it was?

**Mukasey:** Did they ever. They were all over me like a cheap suit. But I said, "I don't have to answer an academic question, the question is not before me. If I ever have to answer it, I'll answer it, but all I can tell you is I didn't feel any need to withdraw any of the memos."

**Wilson:** Do you think that the inference was that at least the CIA and perhaps the Justice Department felt that it was torture, based on the cessation of the practice?

**Mukasey:** No, because the reason it was stopped had to do in part with pressure but also in part with the fact that it wasn't necessary anymore.

**Wilson:** Why wasn't it necessary anymore?

**Mukasey:** Because we knew enough about al-Qaeda to pursue leads and conduct interrogations in other ways. You didn't have three all-stars like Abu Zubaydah, KSM, and Nashiri, and tough all-stars. These were people, understand, who self-selected. This wasn't started with a try for openers and it gradually, like I said before, they increased the—

**Wilson:** And help me out with the chronology there. Mike Hayden stopped the practice in 2003.

**Mukasey:** Yes.

**Wilson:** And when was this information that we were talking about earlier, from these three all-stars, divulged as a result of the use of enhanced interrogation techniques?

**Mukasey:** In 2002, 2003.

**Wilson:** OK, so immediately before the cessation of the practice.

**Mukasey:** Yes.

**Kassop:** Going back to the question that you did not think it was necessary to withdraw any of the OLC memos after you reviewed them, but I thought I recalled remembering that toward the very end of the Bush administration, while you were still Attorney General, Steven Bradbury had either withdrawn from OLC memos or also had—

**Mukasey:** That was a different enterprise entirely. Steve Bradbury, at the end, went through several OLC memos and thought that there ought to be some trimming of the hedges, particularly before a new administration came in. He did that and I reviewed his work product.

**Kassop:** It was more like seven or eight of them, I think.

**Mukasey:** Yes.

**Kassop:** And I think his—

**Mukasey:** I don't think they had to do with interrogation.

**Kassop:** I think you're right. They were not specifically on interrogation, they were on other OLC opinions about the relationship with the President's authority.

**Mukasey:** Yes.

**Kassop:** And what it also said, I recall, is that he made a DOJ announcement that in fact there should be no further reliance upon those memos, that the legal analyses were flawed or whatever.

**Mukasey:** The memos, exactly.

**Kassop:** And that there should be no reliance on them in the future. Which is a strong comment to come out with on the work product of that particular office within the department.

**Mukasey:** Yes, but it's a responsible—the only thing worse than doing it is not doing it.

**Kassop:** Going back to the more operational side, when Sarah was asking you the question as far as what types of conversations had come up in the Tuesday terror meetings about operational and how could you go after Osama Bin Laden. Given the fact that we now know that targeted killings are a routine part of the current administration, and yet certainly reports have been that that's not only new to—the only new part of it with the way that [Barack] Obama is using it is that he's using it more than the previous administration has. Are you able to talk at all about the previous administration's position on targeted killings?

**Mukasey:** No. The position was the same, I think, i.e., that they are permissible, and the statute makes it clear that they are.

**Kassop:** Which statute?



**Mukasey:** The statutes that authorize covert operations on a Presidential finding.

**Kassop:** OK, the intelligence authorization statutes?

**Mukasey:** Right.

**Kassop:** And also the AUMF, would you include that as well?

**Mukasey:** For sure.

**Kassop:** I thought it was actually prescient in one of your speeches, when you were talking about the difficulties of Guantanamo and the detention problem, and you said, “At some point down the road it might become so difficult to determine how to handle detainees that the government just may go and instead of capture, go and kill, which in fact is—”

**Mukasey:** [Daniel] Klaidman had written a book called *Kill or Capture*, which I’m doing a review of when it comes out.

**Kassop:** Can we ask you what you think of it? I read the book over the summer.

**Mukasey:** I thought it was revealing, and not in a happy way, of the way a lot of decisions got made in the current administration. What troubles me most about the book is not necessarily that that’s the way it was done. Maybe it was done that way, maybe it wasn’t, but that it’s clearly an authorized book and this is the way they want you to think that it got done. That is very troubling because some of it is just—the influence that Harold Koh wields is *way* outside his lane. And some of the conversations as recounted in the book are not—we’re not talking about disciplined analysis; we’re talking about pep talks and a lot of other play acting that in my experience has very little to do with the way decisions get made or should get made.

Plus there were meetings he had where other stakeholders were not—he was invited basically to speak to the President out of the presence of other people who should have been stakeholders in those decisions. That’s not, in my experience, the way an administration makes decisions. The interagency process sounds very tedious, but if you think about it, it’s the only proper way to make decisions. That is that everything works up through agencies and at a lower level they interact and if they can reach a consensus, fine, but if they can’t it gets to principals. But all the principals have to be in on it and if they butt heads, there’s a chief executive who decides it.

Now as a practical matter, it often stopped at Josh Bolten’s desk, in my experience. He had conversations with the President, I’m sure, but it’s not as if everybody got face time with the President over every interagency disagreement, but certainly up until then everybody got to interact.

**Kassop:** It’s interesting that you mention that because again, as political scientists, we study the interagency process and we place great faith and reliance on that. From what I’ve read about the Bush administration, some of the commentary on it is that interagency process did not work well in the first Bush administration in the first term, and that by the second term they had recognized that it was necessary to pay much closer attention to this.

**Mukasey:** In that case somebody is going to rediscover the wheel.

**Kassop:** But particularly after 9/11, it was much more of a closed council of advisors who were making decisions, and it was not through the interagency process. As you say, stakeholders who should have been included in those discussions were not, and that was unfortunate, but by the second term there was the correction. You obviously can't speak to the first term because you weren't there.

**Mukasey:** I wasn't there.

**Kassop:** But what you are saying is that you believe the interagency process worked well during the period when you were there.

**Mukasey:** I don't know if it worked well, because I lost a couple of those. *[laughter]* But the need for it I understand, because at a minimum if there's more than one stakeholder and there were disagreements, then there was going to be disappointment with an outcome in some location that is in part responsible for carrying out the decision. You don't want to have that in a situation where they haven't been heard or they think they haven't been heard, because at best it's demoralizing and at worst you set the stage for sabotage and God knows what all.

**Kassop:** Or a decision that might not be well thought out.

**Mukasey:** Exactly, you're not getting the other point of view.

**Perry:** Can we ask about the outcomes where you lost and what they were about?

**Mukasey:** Yes, one of them was about what steps we were going to take with respect to an organization that was essentially Russian organized crime. We wanted to do one thing and other people wanted to do something else, and we did something else.

**Wilson:** What was the other agency?

**Mukasey:** There were a couple of other agencies. One of them was the DNI. I think Commerce was involved in it too.

**Wilson:** The Solicitor General's Office, if I'm remembering correctly, resolved interagency disputes regarding positions that were going to be taken in court, on behalf of agencies, by the Department of Justice.

**Mukasey:** Right.

**Wilson:** Do you recall any particularly hot disputes during your tenure that were resolved by the Office of the SG [Solicitor General]?

**Mukasey:** Not that I recall. If they were resolved, I guess they were resolved such that whoever lost was disappointed but not rebellious.

**Wilson:** Were there any Supreme Court cases in which you were involved, to help the government come up with its position?

**Mukasey:** I argued one case.

**Perry:** Reviving an old tradition. Tell us about that.

**Mukasey:** You get presented to the court as the new Attorney General. There's nothing to do except to say, "Good morning, Mr. Chief Justice." That's it. I managed to carry that off and I carried it off so well that on the way back to the department Paul Clement asked me if I wanted to argue a case, because it had been a tradition before.

**Wilson:** Right.

**Mukasey:** So I tossed my cap over the wall, yes.

**Wilson:** So you said yes in the abstract.

**Mukasey:** I said yes in the abstract and he luckily came up with a case that was appropriate to my level of—

**Wilson:** Authority.

**Mukasey:** No, that wasn't the word I was looking for.

**Perry:** Expertise.

**Mukasey:** Right, my level of accomplishment. It wasn't very difficult and it was also something I could prepare for without having to basically scrap everything else. It had to do with statutory interpretation. It was a terrorism case too, *United States v. [Ahmed] Ressam*. That was a lot of fun.

**Wilson:** Did that case hold a particular symbolic significance?

**Mukasey:** For me?

**Wilson:** No. I meant for the Attorney General to be presenting argument on that case could be viewed as meaning something extra to the Supreme Court and to the Supreme Court watchers.

**Mukasey:** No, I don't think so. I think it was strictly a matter of this is—

**Wilson:** What case was going to yield off.

**Mukasey:** Right. It could just as well have been out of the Lands Division.

**Kassop:** You said it was a statutory interpretation case.

**Mukasey:** It was a statutory interpretation case.

**Kassop:** So it was not a constitutional case.

**Mukasey:** Not a constitutional case, a statutory interpretation case, something nice and a little bit even.

**Perry:** Was the bench hot that day?

**Mukasey:** Yes, it was pretty warm.

**Wilson:** Was there any question that really stumped you, or how did you deal with it?

**Mukasey:** This was a statute that said if anybody carries a—he was convicted of carrying nitroglycerin. At the time he was carrying nitroglycerin, he had also filled out false papers to get into the country. So was he carrying an explosive in the course of committing a felony? Did there have to be a relationship between the explosives and the felony? And the government’s position was no, there didn’t. The statute says “while committing a felony.” Theoretically, you could be mailing a fraudulent tax return while carrying a vial of nitroglycerin and there you were.

I said, “That’s the sort of thing to call for the exercise of discretion.” I forget exactly how I came up with it. I said, “I think I’m pretty uniquely situated to determine that in a case like that no, we wouldn’t prosecute.” And then the Chief Justice asked me whether I could envision any situation in which—because arguably, there was a relationship between the false application and the explosives. Could I envision any situation in which there really was no relationship where we might prosecute anyway, and I said I couldn’t. I was on my way to lunch and I thought of something. I think the French call it *l’esprit d’escalier*, which is what you think of on the staircase going down. What if Ressam, instead of filling out or in addition to filling out a false form, had had a roll of counterfeit 50s, and some eagle-eyed immigration officer saw that there was something funny about them, grabbed them, and it turns out he was carrying explosives at the time. I would have told the U.S. attorney to go for it, because that’s the way the statute was written.

There was a dissent from Justice [Stephen] Breyer, and the joke going around the department at the time the decision was issued was that the Solicitor’s Office had arranged with Justice Breyer to dissent so I wouldn’t think I had gotten a rollover of a case. [*laughter*]

**Kassop:** Talking about the Supreme Court, were you consulted by the Solicitor General on any of the U.S. positions in advance of cases?

**Mukasey:** Yes. We used to meet weekly or monthly. I forget exactly how often, but I met regularly with the Solicitor to talk about pending cases, and I did get actively involved on the Second Amendment cases.

**Kassop:** And the [Lakhdar] *Boumediene* case, were you actively involved in that as well?

**Mukasey:** I used to get briefed on it almost every morning at the staff meetings, about what was going on generally at Guantanamo.

**Kassop:** But that would have been a case that you would have had great interest in.

**Mukasey:** Yes.

**Kassop:** And felt was wrongly decided.

**Mukasey:** Yes. The whole issue of the Guantanamo detainees and how their cases were being handled was something that came up literally daily. Greg Katsas described himself as the captain of the Department of Justice javelin-catching team.

**Perry:** Speaking of Gitmo [Guantanamo Bay], you're there. Speaking of the body politic in the midterms in 2006, is there conversation in any of the meetings at the White House about what had happened in those elections in 2006 and what to do to try to mollify what's happening in the body politic regarding issues about Gitmo?

**Mukasey:** Not in those terms, certainly not by reference to the 2006 election. If I ever heard that mentioned, I don't recall it. I do recall conversations about Gitmo and me taking the minority—I visited Guantanamo in February of 2008.

**Perry:** Describe that trip.

**Mukasey:** We went over and visited Guantanamo, and we were taken over in a Navy—because you go across the bay to the facility. I thought it was one of the best—when I was a district judge I visited, forget maximum, I visited medium-security facilities in this country that did not at all measure up to Guantanamo. It was well run, clean, orderly. They had the high-value detainees on closed-circuit television, and I got to see all of them except for Khalid Sheikh Mohammed, who was out visiting. The day I visited, he was meeting with a visiting delegation from the International Committee of the Red Cross, so that he could complain about how badly he was being treated. But I did get to go to his cell. And adjoining his cell was an exercise room that had in it the same make and model elliptical machine as the one I used in the gym at The Lansburgh in Washington when I was Attorney General. It was precisely the same make and model, except he didn't have to compete with Eleanor Acheson to be the first one to the machine. [*laughter*] Blew my mind.

**Perry:** So there were more than “three hots and a cot”?

**Mukasey:** Yes. You had your own elliptical machine if you were KSM. I don't know whether any of the others did, but he had his own. There was a medicine ball in there too. I remember thinking, *What's he going to do with that? He's in solitary.*

**Wilson:** Setting aside the issue of facilities, do you recall being involved in discussions or deliberations about the ability of Guantanamo detainees to meet with lawyers?

**Mukasey:** Not directly. You mean when I was down at Guantanamo or just generally?

**Wilson:** Just generally, when you were in the department.

**Mukasey:** In their ability? No, I don't.

**Kassop:** Were there any restrictions on lawyers meeting?

**Mukasey:** There were bound to have been restrictions in the sense that it's on an island.

**Kassop:** Security, yes.

**Mukasey:** But not other than that. And some of those people we wouldn't want to put in the same room as a lawyer because they would try to kill them. The guards wore plastic face shields. Whenever they walked in the corridors feces and semen, urine or God knows what all was thrown at them. I ate a detainee's meal and I'd eaten worse in the Justice Department cafeteria as a matter of fact.

A funny thing happened on the way back. We had this relatively slow vessel going there. Coming back we were on two speedboats and they were the kind used at one time in combat, because there was a 40-millimeter machine gun on the front and there was another Defense Department speedboat alongside ours, taking pictures. I was standing there in a life vest and a suit. And the captain asked me whether I wanted to go up and not shoot the gun but pose with it, get a picture. And Brett Gerry, my brilliant chief of staff, leaned over and whispered two words in my ear: "Michael Dukakis."

**Perry:** You weren't wearing a helmet, I hope.

**Mukasey:** I was not wearing a helmet, but you know, "There's the AG."

**Kassop:** Sure, yes.

**Mukasey:** Right. So I decided to stay where I was. Think about what the Defense Department could do with that photograph. You may have to decide what position we take in some scrimmage with the Defense Department. You don't want them to have that photograph when you're making a decision.

**Wilson:** Did you ever have scrimmages with the Defense Department on any issues?

**Mukasey:** I was against the closing of Guantanamo. The President had already said we should close Guantanamo. When I came back, I proselytized in favor of keeping it open.

**Kassop:** Your relations with Jim [William J.] Haynes, who was the Pentagon general counsel?

**Mukasey:** Excellent. My relations with Haynes were fine. It was the Secretary that to the extent there were disagreements with, rather than with Jim.

**Perry:** With [Robert] Gates.

**Wilson:** What kinds of disagreements are you referring to?

**Mukasey:** Over Guantanamo.

**Kassop:** Right. Yes, he's been opposed to Guantanamo.

**Mukasey:** I think they were interested in offloading that as quickly as they could.

**Kassop:** Can you gauge the relative sentiment within the administration? Was it more in favor of closing Guantanamo? Were you in the minority of that position?

**Mukasey:** This was not as a result of anything that was directly said. My sense was State wanted to close it, the Defense Department wanted to close it, and I could understand why. It's not part of their mandate. They blow stuff up and kill people and that's what they're supposed to do, not run a prison or a parallel justice system for that matter. I think the Vice President agreed with me, but we were in the minority.

**Wilson:** Did it ever reach a point where the issue had to be elevated as a result of dispute between the—

**Mukasey:** No, because there was nothing—it came up once or twice in a tangential way. There was the Yemeni who was Bin Laden's driver.

**Kassop:** [Salim] Hamdan.

**Mukasey:** Hamdan came to the end of his sentence. What do you do when Hamdan has served his sentence? Do you then move him to another cell down the cell block and say, "Now we're detaining you as an unlawful enemy combatant" or do you release him? And the decision was made to release him.

**Kassop:** Your relations with the Vice President? How often did you have interactions with him and what were they like?

**Mukasey:** Not often. We saw each other at the weekly briefings and it was more the unspoken than the spoken. I didn't talk to him a lot because he didn't talk a lot, but I think we saw eye to eye about a number of things.

**Perry:** Did Gitmo come up at those meetings, where the President would have been witness to these—

**Mukasey:** No, because those dealt with national security issues, and this really wasn't a national security question.

**Perry:** You mentioned yesterday, when we talked about Cabinet meetings as being much more pro forma than anything else, but you said if a—

**Mukasey:** They were completely pro forma.

**Perry:** Completely. If a Cabinet Secretary needed to meet with the President—Did you ever want to do that?

**Mukasey:** Yes.

**Perry:** Can you tell us the topics and how often you did?

**Mukasey:** Actually, I was called to the White House once for a discussion with the President, and you just felt like the principal wants to see you, right? I was scared out of my mind. I have a picture of it, it looks very cordial. I've got a little briefcase sitting to the right, a pad out in case I have to write something down. But he wanted to talk about some issue and this one interagency thing that I lost. Other than that—

**Perry:** Meeting in the Oval or in the Residence?

**Mukasey:** In the Oval.

**Kassop:** Who else was in the room at the time you were meeting with the President?

**Mukasey:** When he called me over?

**Perry:** Yes.

**Mukasey:** Just the two of us.

**Kassop:** Bolten was not there?

**Mukasey:** No. He came in later.

**Wilson:** And what was the discussion about?

**Mukasey:** I can't talk about that.

**Perry:** Can you characterize the President's discussion with you in terms of was it pointed questions, commands, seeking information?

**Mukasey:** It was something he wanted me to think about and wanted to know whether I had thought about it up until then, which I hadn't much, and I was little bit caught off guard. I saw some issues and said I would think about it. I keep thinking maybe it was just done so that we could have a photograph together, because I hadn't had a souvenir so he came up with an occasion for a photograph.

**Perry:** Did he sign it for you?

**Mukasey:** That one? No. I have a lot that are signed. I think that one is not signed and there's one other where he has—it's right after the Cabinet picture. He's got his arm around me. We were walking away from the Cabinet pictures because the photographer was there all the time. That one is not signed either but it was the most memorable moment I had with him.

**Wilson:** And what was that moment?

**Mukasey:** I had just finished an oversight hearing; I forget whether it was Senate or House. It was probably Senate because those got more attention. I had a lot of back-and-forth with the Senators and he put his arm around my shoulder and said, "You've got balls." [*laughter*] And it was the highest compliment. I walked out of the White House that day about that high off the ground.



**Wilson:** What was the Senate giving you grief about at that hearing?

**Mukasey:** I forget exactly. You can go back and look at the hearing.

**Wilson:** Do you remember approximately what time frame? Was this your first oversight hearing or was this down the line?

**Mukasey:** It was either my first or second. I had two oversight hearings with each of the Senate and the House during my tenure.

**Kassop:** They wanted the review of what the department was doing or was it specifically pointed that they were looking for certain issues in particular?

**Mukasey:** This was a process of negotiation between the Justice Department and the Senate and the House. The ritual was you got two of them a year unless there was some particular hearing, and usually the AG didn't go up on them.

**Kassop:** The deputy?

**Mukasey:** The ad hoc. The deputy or the associate or assistant AG who is in charge of particular units would go up. We tried to keep them diminuendo. Those were always a negotiation between the staff and whichever house it was.

The first request for an oversight hearing came like the second day I was there. I told somebody and nobody got it, because I was the only Orthodox Jew in the room. After Yom Kippur, when the holiday is over, you then say the evening prayer. One of the prayers you say every day asks forgiveness of sin. My God, you've just finished Yom Kippur, theoretically, you got it all done. What sins have you committed between then—and this was sort of like that. Nobody got it.

**Perry:** It's incumbent upon us, and since we've been talking about the President, to ask this question. Did he have a nickname for you?

**Mukasey:** A nickname? Not that I know of.

**Kassop:** It was classified.

**Mukasey:** Unprintable. He used to call me Mike, notwithstanding that my preferred form is Michael. He apparently got the word, because some of the autographed pictures say Michael and some say Mike. We were knee deep in Mikes. There was Mike Hayden, the DNI was Mike [John] McConnell.

**Wilson:** Mike Chertoff.

**Mukasey:** Mike Chertoff and me. We were overstocked.

**Wilson:** Did you have a relationship with Mike Chertoff during the administration?

**Mukasey:** A little bit because we knew each other casually beforehand. We didn't overlap at all but we—

**Wilson:** Former judges.

**Mukasey:** Right.

**Wilson:** Serving in the administration as Cabinet officials.

**Mukasey:** Yes, but also mostly former DOJ people. It was a little bit strained in the sense that I thought and still think the whole DHS [Department of Homeland Security] thing is dubious. Their mandate is odd. It's what—natural disasters and homeland security. It's like the Marshals Service. They do judicial protection and apprehension of fugitives, and those two things have nothing to do with each other, other than that they've got to be put someplace, so they're put in the Marshals Service. And also they've got a big budget, because they were formed in the aftermath of 9/11, as a result of which you can see a lot of blood coming out. They have a big budget and they can and do send people overseas to tell other countries that their mandate is a lot bigger than it actually is. We wound up at odds at times over it.

**Wilson:** Did you do any restructuring within the department? Sometimes you can have a swan song, there's a period of relative freedom at the end of an administration to get some things accomplished that might not have been able to be accomplished.

**Mukasey:** At the end of an administration?

**Wilson:** Sometimes, yes. There are lots of things that you can't get accomplished because of the late stage.

**Mukasey:** In fact, I thought of it exactly the opposite. That when you go in at the end of an administration, you don't go in with—

**Wilson:** An eight-point plan.

**Mukasey:** Exactly. For one thing, doing five priorities. If you have 12 priorities, you'll have no priorities at all.

**Wilson:** Right.

**Mukasey:** And it was mostly tamping it down and maintaining order. You asked about restructuring. It wasn't really restructuring. The allocating of reporting responsibilities as between say the deputy and the associate was something that we did from scratch.

**Wilson:** Really?

**Mukasey:** Yes.

**Wilson:** What did you come up with?

**Mukasey:** I wanted OLC definitely to report up through Mark Filip. I interacted with them directly, but Mark has a big brain and the idea was to have a big brain interacting with the other big brains.

**Wilson:** So the OLC went up through the DAG [Deputy Attorney General] and then to the AG.

**Mukasey:** Right.

**Wilson:** And what was your view of the role of the Associate's office?

**Mukasey:** The Associate had programs, which was a potential source of enormous embarrassment, corruption, this and that, it was something you had to really keep track of, especially at the end of the administration, when all sorts of grant moneys are going out the door and you wonder you're going to read on the front page that there was some grant or golfing program or some other boondoggle.

**Wilson:** Did you have any involvement in pardon issues directly? Because that's a type of activity that generally picks up at the tail end of an administration.

**Mukasey:** Yes.

**Kassop:** There was the Scooter [Irve Lewis] Libby case. Were you involved in that?

**Mukasey:** No.

**Kassop:** You had no input?

**Mukasey:** No.

**Wilson:** So that decision was made by the White House alone.

**Mukasey:** Yes. Fred was involved in that.

**Kassop:** In terms of restructuring or changing the process, you tightened up the contact situation between the White House and the Justice Department.

**Mukasey:** Yes. There was a very short list of people who could have contact with the White House on things other than legislation.

**Kassop:** Right.

**Mukasey:** The legislation you have to have on an ongoing basis.

**Wilson:** Was that centralized out of the DAG's office?

**Mukasey:** What do you mean "centralized"?

**Wilson:** Was there an official DAG's office person who channeled communications from the White House?

**Mukasey:** I don't recall it being the DAG's office. I think it was my office.

**Wilson:** In other words, White House contacts had to be made to the Attorney General's Office?

**Mukasey:** The Attorney General, the DAG, and there were a couple of others who could have—I think the SG could have direct contact with the White House. I know that came up because in the Second Amendment case there was some back-and-forth with the SG.

**Wilson:** I'm glad you brought that up again, because I wanted to ask—you implied that there was some sort of interagency dispute over the government's position.

**Mukasey:** I think that some of the groups were a little bit unhappy about the way the government's position initially was formulated in the Second Amendment case.

**Wilson:** Was that something along the lines of the Justice Department not being willing to take the position that this was an individual right to bear arms?

**Mukasey:** No, because they did take that position, but I think it had to do with other things.

**Wilson:** Was the group that you were referring to the NRA [National Rifle Association]?

**Mukasey:** I think so. I didn't have contact with them, the White House did.

**Wilson:** How did that discussion take place? Was it the White House and the Solicitor General's Office, or were you directly involved in the resolution of the position?

**Mukasey:** Yes. And I was called over.

**Wilson:** To talk with folks in the White House?

**Mukasey:** Yes.

**Wilson:** And with whom did you talk about the Second Amendment case?

**Mukasey:** I talked to Kaplan.

**Wilson:** Josh Bolten's number two?

**Mukasey:** Yes.

**Kassop:** Anybody in the counsel's office?

**Mukasey:** No. I think I talked to Fred a little bit but not a lot.

**Wilson:** And the issue was what would be—

**Mukasey:** It was the way the government's position was formulated.

**Wilson:** Had already been formulated or was to be formulated in the Supreme Court?

**Mukasey:** I forget whether the brief had already been filed, whether there was a draft circulating or what. I think it had already been filed.

**Wilson:** It had already been filed. How did that work? Were the drafts generally shared and would you get edits from the White House or share drafts with the White House?

**Mukasey:** When you say generally, that's the only case I know of in which there was any back-and-forth between the White House and the department, and ultimately it came down to the fact that the SG's position was the position we took.

**Perry:** Paul Clement resigns, I believe, in May of '08 and I think you were sorry to see him go.

**Mukasey:** Very.

**Perry:** Understandably. How did you handle his successor?

**Mukasey:** I recall Greg Garre being the obvious candidate. In fact, I called him on a cell phone and we had a bad connection and he didn't quite get what I was calling about. It was funny, I was shouting, "I'm calling to ask—" I finally got a yes.

**Perry:** In the timeline, you make a fair number of trips abroad.

**Mukasey:** Really?

**Perry:** You do. To meet with counterparts, meet with members of the EU [European Union], to talk about, we presume, counterterrorism issues. There's also a trip to Iraq.

**Mukasey:** Yes. To meet with the rule-of-law people from the department who were over there.

**Perry:** Exactly. Can you talk to us a little bit about that?

**Mukasey:** A terrific group. Both the military people I met, and there was a man there who was in his 50s, who was up in the wilds of I forget exactly where. It was dangerous and he was out there alone. His son was in the military, he was also over in Iraq and he was having a ball, he loved it. I met the Chief Justice of Iraq. There had been an assassination attempt on him that morning or something like that, and he showed up for lunch. It's all pretty raw.

**Perry:** Did you come away optimistic for the future of Iraq and the rule of law?

**Mukasey:** Militarily? I met with General [David] Petraeus, but that was with Ambassador [Ryan] Crocker, who was really impressive. Wow.

**Perry:** We've interviewed him. He is indeed.

**Kassop:** Politically, did you feel that there was a good chance of success?

**Mukasey:** When I was in the same room with people like the Chief Justice, you have to believe that he's not the only person like that and if there are other people like that, then, yes, there's hope. But I also felt that it was necessary for us to be there as a stabilizing—After all, we were meeting in a U.S. facility.

**Perry:** Did we still have detainees?

**Mukasey:** Yes.

**Perry:** And did you have to do an inspection?

**Mukasey:** No, I didn't.

**Perry:** Any issues related to them?

**Mukasey:** No. I did run into Lindsey Graham, who was over there doing his Reserve thing.

**Perry:** His Reserve service.

**Mukasey:** So he was in camo [camouflage]. I was not in camo.

**Kassop:** And your meetings with counterparts in the EU or foreign dignitaries at a Justice level?

**Mukasey:** The only one I felt I developed a really close relationship with was [Eduardo] Medina-Mora from Mexico, and that was the first meeting that I had. He came over and that was within a couple weeks. His name came up in connection with Fast and Furious, because it was suggested that I had been briefed on gun-walking. False. First of all the meeting concerned principally cooperation between the two countries, but what we were trying to do was to get eTrace, which is a method of tracing weapons, and the idea was to get it to the Mexicans but to get it to vetted units of the Mexican military and police because corruption was a *huge* problem in Mexico. So how you do that, and also getting a Spanish-language version of eTrace.

I was supposed to include it in the briefing materials, with reference to what was called a "controlled delivery" that had been attempted unsuccessfully. The lack of success wasn't explained, although I assume it was because somebody found out about the operation and blew the whistle on it. But controlled delivery is done in narcotics cases and counterfeiting cases all the time. You intercept contraband and then either you flip the courier or you substitute another courier and substitute other stuff, and deliver it to the person who is expecting to get it, at which point you make an arrest. And the law enforcement are right in the vicinity, such that when the delivery is made, they jump in and make the arrest—hence "controlled delivery." It's got nothing to do with gun-walking. You don't let anything, certainly not guns, walk out the door. That was referred to in the first briefing memo that I got before Medina-Mora visited. And I later went to Mexico. He couldn't have been more gracious. In fact, he entertained me at his home and arranged for a kosher caterer to cater the meal. He was just super.

**Perry:** That's great.

**Wilson:** I wanted to ask about any involvement you had in the administration's dealings with the economic crisis. Did you have any discussions with [Henry] Paulson or others in the Treasury Department, within the White House?

**Mukasey:** I talked to Paulson a little bit. I remember going over the Fannie Mae seizure with people at OLC, which is really what it was, discussing that.

**Wilson:** Was that a decision that you made?

**Mukasey:** I didn't make it, no. It was proposed by others and the question for OLC was simply whether we could do it, but the policy decision about making it or not was not a Justice Department decision, it was Treasury.

**Perry:** Before the crisis moments, I think mortgage fraud also showed up on your plate.

**Mukasey:** Yes. And the question was do we appoint a task force or not. In order to have a task force, you have to have a task. I was familiar with organized crime task forces, they were a disaster, and I thought that from what I knew of mortgage fraud, it varied from jurisdiction to jurisdiction. There were loan brokers and people who were setting up loans, and they were Polish in Chicago and they were Hispanic in the Southwest, they served the local communities. There was fraud up and down the chain, it was in everybody's interest to commit it because the incentives were all perverse. And in that circumstance, I thought that the people who ought to be investigating this were individual U.S. attorneys, not a centralized task force. I got some flak for that.

**Perry:** So when the crisis appears on the horizon in the fall of '08, do you think back to the mortgage fraud discussions and begin to connect dots on that? Or were there dots to connect between what's happening with Fannie Mae and Freddie Mac?

**Mukasey:** No dots for *me*. It seemed apparent that Fannie Mae and Freddie Mac had been guaranteeing on loans they had no business guaranteeing, because the incentives were built into the statutes that were supposed to encourage homeownership.

**Perry:** Are there Cabinet meetings then, in that I'll call it a crisis of the financial collapse in the fall of '08. Are there Cabinet meetings or other, smaller meetings, to discuss TARP [Troubled Assets Relief Program] and the auto bailout, and are you a part of any of those?

**Mukasey:** I recall TARP coming up at the Cabinet meeting, because the Secretary of the Treasury reported at that meeting on what was going on with the financial crisis.

**Perry:** Would that have been an example of any time when there was a genuine discussion?

**Mukasey:** Not to my recollection.

**Perry:** At that meeting? Still pro forma.

**Mukasey:** There were comments. Cabinet meetings were pro forma.

**Wilson:** As a person coming from New York within the administration, with the ties that you had with Giuliani and others, were you receiving any entreaties or getting any questions from New Yorkers, members of the banking community or others?

**Mukasey:** No.

**Wilson:** Any suggestions about what the administration should be doing or not?

**Mukasey:** No.

**Kassop:** Were you brought in on the questions of legality of how to address the financial crisis? Were you sought out for advice?

**Mukasey:** No.

**Kassop:** So the policy was made without your input?

**Mukasey:** I was certainly present for discussions of the policy. Was I asked whether TARP was lawful?

**Kassop:** Or what legal—

**Perry:** Ramifications.

**Kassop:** Yes, or what legal you could use, what statutes were the ones.

**Mukasey:** The only decision I recall participating in was the one involving Fannie Mae.

**Kassop:** Was there a series of discussions or was it just one time?

**Mukasey:** There was a series of discussions.

**Perry:** We haven't spoken about immigration and your role in that.

**Mukasey:** Very limited, because it's more DHS than it is DOJ, although we enforce the immigration laws, and there was a lot of pressure from people along the border to bring cases and some pushback from the court, principally in Arizona, where a lot of these cases were being brought. There was a project called Streamline, which sounds streamlined except it was the judges who were bearing the brunt of all these cases and they were justifiably—It's not like criminal court in New York, it's not a volume operation. I had to try to explain to them the whys and wheres. And I remember at least one session with the court in Arizona. When I visited anyplace, I would always meet with the judges of the district court in that city.

**Kassop:** Gang violence and urban crime. That's a traditional Justice Department area.

**Mukasey:** Right. Mostly more international gangs, because it wasn't just our local people, domestic. There were gangs, most Latin American but also Russian. The former Soviet Union was a rich source of illegality in a variety of ways.

**Kassop:** And did that impact the United States?

**Mukasey:** Yes. A lot of cybercrime out of Romania, where people had a lot of time on their hands and a lot of talent.

**Kassop:** Misdirected talent.

**Mukasey:** Yes. They would be recruited at cafés and so on to do this stuff. There was a time when eBay wasn't doing any transactions with Romania at all because the system was so corrupt.



**Perry:** You spoke yesterday, in the context of sentencing, about the woman who had been caught with a backpack full of cocaine she was to deliver for her boyfriend. And I think also something that came across your desk was the sentencing disparities for crack versus powder cocaine. Since you had seen that on the bench and had to impose sentences, did you have strong opinions about it?

**Mukasey:** I felt there was a qualitative difference between powdered cocaine and crack cocaine, in the degree of addictiveness and the speed with which one becomes addicted to crack, which is virtually instantaneous. As a result, the violence that accompanied it was much higher with crack, so I could understand why the crack guidelines were a lot higher. I also had a problem with the retroactive change that was proposed in cutting the disparity, such that a large volume of people, many of whom were very violent, were going to be released fairly quickly, and the question was whether the supervised release system could cope with it.

**Perry:** Any concerns over the comments about racial disparities that seemed to flow from the disparities in sentencing?

**Mukasey:** There was a debate and because I thought there was a qualitative difference, I didn't see it as a racial issue. Others did.

**Wilson:** I wanted to ask you about honors program hiring. There was certainly a lot of press about whether the system had been altered during the early part of the Bush administration. What was your viewpoint and did you take any steps to make any changes?

**Mukasey:** Yes. There were people who should have gotten offers who were turned down by the honors program because of the political considerations. I contacted several of those people. I didn't call them, but I did send them individual letters and a number of them took the offers.

**Wilson:** And how did you come to make that determination? Did this issue get put on your plate either by Congress or by some folks within the department?

**Mukasey:** It was involved in the whole discussion of what we do about setting it right, and the way you set it right is to try to make up for it to the extent that you can. You don't just send them a letter of apology. Let's see if we can offer jobs to people who should have gotten them. Obviously, some of them have moved on to other things.

**Wilson:** Did you go into the honors program applicant files?

**Mukasey:** Did I review individual files?

**Wilson:** Yes.

**Mukasey:** I don't think so.

**Wilson:** Who did that review for you?

**Mukasey:** I don't recall. The only individual files I remember going through were in capital cases.

**Wilson:** Tell me about that process because, if I'm not mistaken, the prior Attorney General had created some sort of task force for extra review of whether the government should seek the federal—

**Mukasey:** There was a review process in place when I got there that as far as I know had been there for a while. I don't know when it was established, but there was a regular committee that reviewed. In all potential capital cases, whether it was seek or no seek, the committee reviewed the decisions of individual U.S. attorneys against a set of criteria: number of victims, criminal history of the person involved, and so on. They came up with a recommendation, and the procedure required that I review each of those files and either agree or disagree with the outcome.

**Wilson:** And were there any recommendations to seek during your tenure?

**Mukasey:** Oh, yes. There were some situations where the U.S. attorney had said no seek and I changed it to seek, or the other way around.

**Wilson:** In other words there were instances where you essentially reversed the U.S. attorney's decision.

**Mukasey:** Right. In those situations, I would call the U.S. attorney and tell him or her, "Sorry, but this is the way it comes out."

**Wilson:** And what was the basis of your determination to go the other way? Were they fact-specific?

**Mukasey:** Yes. The one really notable case involved was in West Virginia. They took a plea from somebody where ordinarily we would have pushed for the death penalty, and one of the considerations was that it involved some sort of sexual relationship between the murderer and the victim—Her children were very young and they would have had to hear about all of that, and it was a small town—thinking, *We've got to get a respectable plea out of this and not make the kids go through that.*

**Perry:** Were you consulted either within the department or from the White House counsel's office about any lower federal judgeships? You had no Supreme Court appointments, of course, during your tenure but for circuit or district?

**Mukasey:** Yes. I interviewed circuit candidates.

**Perry:** All of them?

**Mukasey:** Not all of them, I don't think.

**Perry:** Was that at your discretion or were you called upon by the—

**Mukasey:** I think I was called upon but I can't remember. There were not a lot, but I do recall interviewing some. Then there was a decision about whether to bring a sexual harassment case against an Article III judge in Texas that I was directly involved with.

**Wilson:** What was the ultimate decision?

**Mukasey:** To prosecute. He pleaded, a matter of public record.

**Wilson:** So that was the application of Title 7 to—oh, no, you're saying that was a criminal.

**Mukasey:** It was a criminal case.

**Wilson:** Oh, that's interesting.

**Mukasey:** It was pretty awful.

**Kassop:** Just going back to the judicial nominations process. As scholars we've heard that in some administrations there is a working group of a combination of Justice Department officials and White House counsel officials.

**Mukasey:** Yes.

**Kassop:** To continually go through whatever the longer lists are and bring them down to short lists. Was that still in operation?

**Mukasey:** Yes. We had meetings at the White House.

**Kassop:** And what officers from the Justice Department were there?

**Mukasey:** I went. I know Beth Cook was involved in that. I'm trying to think of who else. There were other people I can't remember.

**Kassop:** She was Office of Legal Policy?

**Mukasey:** Yes.

**Wilson:** She was the AAG [Assistant Attorney General]?

**Mukasey:** Yes. I was told, "She's very young." OK, fine, there's a cure for that, she'll get older.

**Perry:** And she'll have lots of energy.

**Mukasey:** She's amazing.

**Kassop:** How large was this group approximately?

**Mukasey:** A half dozen.

**Kassop:** And you said you met weekly.

**Mukasey:** Not weekly, no. We met intermittently but certainly more often than two or three times.

**Kassop:** But toward the end of the administration.

**Wilson:** This is in Fred Fielding's office?

**Mukasey:** No. It was in the Roosevelt Room, which is the Franklin Roosevelt Room during Democratic administrations and the Theodore Roosevelt Room during Republican administrations.

**Wilson:** If I remember correctly, Teddy Roosevelt's portrait remained over the mantelpiece during the administration.

**Mukasey:** Really?

**Wilson:** Yes. Because I remember that being part of the tour. I'll have to double check that.

**Mukasey:** The word I got was that it's the Roosevelt Room, and which Roosevelt depends on the party.

**Wilson:** But I think because it was against tradition it was part of the tour.

**Perry:** It was noteworthy.

**Wilson:** Let me ask a question first and then make a comment. Given that your tenure as AG was at the end of the administration, were you involved in transition tasks or activities in connection with the White House?

**Mukasey:** Yes. The instruction was to do it in as orderly—this was one of the President's, it sounds corny—"sprint to the finish" was one, and that we were to "turn square corners" in all of this and do it in as orderly a way as possible. That was the word that went out. I'm trying to think of who came in from the incoming administration. Tom Perrelli and David Ogden were the transition people that I remember. I actually didn't meet either one of them but they met the people just under me, my chief of staff, Brian Benczkowski. Brett had left and Brian took over.

**Wilson:** So they were tasked with dealing with the transition effort.

**Mukasey:** Yes.

**Kassop:** Did you meet with Holder at all?

**Mukasey:** Yes, as a matter of fact, he paid a visit. He told me that he thought history would treat me kindly and I said that I wasn't interested in kindness, I thought fairness would do.

**Wilson:** Do you recall what you told him, what observations or insights you had?

**Mukasey:** No. It wasn't that kind of meeting.

**Perry:** Did he have questions for you?

**Mukasey:** No. He hadn't been confirmed yet. He hadn't even been nominated.

**Kassop:** Just a courtesy call.

**Mukasey:** I guess. I found it really odd, because I didn't cross the doorstep until after I was confirmed.

**Perry:** Can we ask you about the 2008 election and the GOP [Grand Old Party/Republican] primaries? Your friend Rudy Giuliani ran for the nomination and we know that you would have—so let the record show there was a downward motion of the hand. But I also seem to recall that in 2000, you said you were leaning toward McCain.

**Mukasey:** Right.

**Perry:** Thoughts about the 2008 campaign, John McCain, his views on torture and the War on Terror.

**Mukasey:** I had real problems with some of his views. This sounds condescending, but I think I know that some of it is very well due to his experience, but his experience doesn't make the law. He has his point of view, I have mine.

**Kassop:** Had you had conversations with him at all about it?

**Mukasey:** Not directly.

**Kassop:** With his staff?

**Mukasey:** The reason I say that is I wrote a column in May, after Bin Laden was killed.

**Kassop:** Of 2011, yes.

**Mukasey:** Right. McCain said that he went to the floor of Congress. What I said essentially was they wouldn't have gotten Bin Laden without it, and he went to the floor of Congress to say that I was wrong, and I went wherever I could go to say that he was wrong. So we didn't speak directly but we did have—

**Wilson:** A public dialogue.

**Mukasey:** Exactly.

**Perry:** Have we talked about the revision of FISA?

**Mukasey:** No, we haven't talked about the revision of FISA or the FBI guidelines.

**Perry:** Let's make sure we do that.

**Mukasey:** There's one other thing that you don't know about, that nobody knows about actually.

**Perry:** We definitely like to hear about those topics.

**Mukasey:** Only because it's come up in connection with what has been acknowledged to have been conversations that took place between the Egyptian government and the current administration, about transferring Abdel Rahman to Egypt. When I visited Iraq, I had to pass through Qatar. I was supposed to see the Emir, the Emir was busy. I was supposed to see the Vice Emir, he was too busy to see me, so I got passed off to the Attorney General of Qatar, a guy who came from a much lesser tribe than either the Emir or the Vice Emir. He was coming to the United States a couple weeks after that.

I said, "Come by the Justice Department." Didn't know whether the treaty he was coming to initial would in fact be ready. I said, "Regardless of whether it's ready or not, if you're coming here, stop by," and he did. He said, "Can we talk privately?" I said no and so he had his guy, I had my guy. I'll send you the document that comes slithering across the table at me. He pushes a brown envelope across the table and says, "I hope this doesn't come as a personal embarrassment to you." In it was a letter on his letterhead, in Arabic and in English, requesting that in my capacity as Attorney General I transfer the blind sheikh to Qatar to serve out the remainder of his sentence, for humanitarian reasons, because his family is worried and they don't think they're ever going to see him again and he's old and tired.

**Perry:** Did he know of your role in the trial?

**Mukasey:** He has to have known, because that accounts for the comment, "I hope this doesn't come as a personal embarrassment to you." I said, "No, it's not a personal embarrassment, but understand that we do have treaties with some countries that permit the transfer. First of all if it's in the discretion of the transferring country. It doesn't require it. It just says that it's permitted. Second, it's only as to nationals. We don't have that kind of a treaty with Qatar, so we can stop there. And it's only as to nationals of that country and he's not from Qatar, he's an Egyptian, as your letter points out. Finally, we don't do it in terrorism cases. But other than that, we'll give it serious consideration." That was the end of it.

**Wilson:** So all this was discussed right there, in real time.

**Mukasey:** In real time, in the conference room at the Justice Department. And it frankly freaked me out. The biggest U.S. military base in the world, Al Udeid, is in Qatar. What are they doing carrying water for—? And I disclosed it to the Bureau, I disclosed it to the CIA, and I got shrugs.

**Kassop:** Were you in contact with the State Department about that?

**Mukasey:** No, oddly I wasn't. I should have maybe but I wasn't. I never did tell [John B., III] Bellinger about that visit. Early on, he and Secretary Rice—this was I think really early, right after I visited out there. She invited me to lunch and I thought how nice, and it was really a matter of, in her view, trying to set right the relationship between the State Department and the Justice Department about who had supremacy in interpreting treaties. I listened politely. And Bellinger also tried to roll me on a couple of issues.

Fast-forward a little bit. I got a Reuters dispatch one morning, which said Bellinger was overseas in front of a foreign audience and said that he would have some pretty stern—I forget exactly the way he put it. Stern or strict words for the Attorney General about detainee treatment, I think it was. When he got back I hit the ceiling and went to see Hadley about it, and we managed to tamp

it down. At some point, he duly made a pilgrimage to my office and presented me with a folio of all his speeches in which he had defended the administration positions.

**Kassop:** And your relationship with Secretary Rice?

**Mukasey:** I called her about it.

**Kassop:** Right. But I'm saying just generally.

**Mukasey:** It was fine.

**Kassop:** Even though he was certainly a close confidant of hers.

**Mukasey:** My relationship with him eventually was fine too. It's just that I didn't like getting a Reuters story here, and he was going to be wagging his finger in my face when he got back.

**Kassop:** You raise an interesting question in terms of how to draw the dividing line between his legal issues and the Department of Justice's legal issues.

**Mukasey:** My view was that the Department of Justice determined what the United States' view of anything was going to be, or position in any forum was going to be. He could provide whatever legal advice to the Secretary of State that he wanted to, but it wasn't binding on me. I'm sure he has a different view of it.

**Kassop:** And Harold really has a different view of it.

**Mukasey:** Harold for sure has a different view.

**Perry:** So shall we go to FISA? Yes, and revisions. Your thoughts about that?

**Mukasey:** That and the FBI guidelines were the two biggest deals that we got put in place, enormously important, worked very hard on it. Lots of telephone calling to members of the House. This was part of my—I'm not the master of my schedule. I'd be on my way back from someplace and hear, "You're going to call these 14 people during this airplane ride." And they were all told to expect calls from me. It was nice because apparently there had been very little direct contact between Attorneys General and members of the House particularly.

**Perry:** So they were pleased to have your call.

**Mukasey:** I guess. There was a lot of back-and-forth with people and somebody said, "It's a big deal for them to get a call from a Cabinet member." It didn't strike me as a big deal. They had all done something that I could never do, which is get elected. I never did that and never could. There were a lot of good conversations, mostly with Blue Dog Democrats, to get the support in the House that we needed.

**Perry:** Did they have concerns that they voiced to you about the current statute or the revisions?

**Mukasey:** Yes. There was a fair amount of concern about why we need immunity for the carriers. I had to go through that and explain, "We rely on people in private industry all the time

and if their reaction is going to be ‘Well, no,’ or ‘Write me an indemnity letter before I do any of this,’ then a lot of things that we do can’t get done.” Private industry should not be put in a position of having to—plus the fact that if they are—let the government take over the cases. No, because then the discovery is the same, the depositions and so forth, and stuff gets disclosed that shouldn’t be. They really needed to get immunity.

**Perry:** Right.

**Mukasey:** For some people it was a hard sell.

**Kassop:** But ultimately there was a deal.

**Mukasey:** Yes.

**Kassop:** So each side got something out of the compromise.

**Mukasey:** I don’t recall that we gave up.

**Kassop:** OK, so you actually made out pretty well.

**Mukasey:** No, in the area of immunity.

**Kassop:** It was immunity and it was also a relaxation of the standard for the court warrant or that it didn’t have to always go before a judge if it were under certain circumstances.

**Perry:** The FBI guidelines as well?

**Mukasey:** The FBI guidelines is a different story. In an emergency, the Attorney General would authorize and then within a certain period of time there had to be an application to the FISA Court. I don’t recall that being a great issue, because if you couldn’t get to a judge you needed to do something. These things often were very hot and you needed to act. More than once I authorized intercepts when later we’d go to the FISA Court with the package. The dispute with Ray Kelly made it into the papers. I don’t know whether you followed that one.

**Kassop:** I don’t recall that one.

**Mukasey:** He took the view that we weren’t being aggressive enough in applications to the FISA Court, and he wanted a separate—because New York was ground zero, in more senses than one, he wanted more relaxed standards for getting warrants. At one point he said we didn’t really understand probable cause or the Justice Department wasn’t acting quickly enough or with enough understanding of it or had too high a standard of what to bring to the FISA Court. I think he wrote me a letter that got leaked to the papers, and then I wrote him a letter that got leaked to the papers.

We have since become very good friends. Pointing out among other things that we submit a lot of applications to the FISA Court. If they start to get the impression that we’re pushing the envelope, then things are going to slow down quite a bit and it’s going to cost us a lot, because they take a lot on the credibility of the office that presents the applications. If all the applications



are done up properly, then you get a certain level of credibility. And if you start to push that, you wind up really hurting yourself.

**Kassop:** But they had not denied any applications, correct?

**Mukasey:** Correct. And it's not because they're a rubber stamp. It's because you get pulled up to the—it's like grand juries. You say, "Wow, the grand jury can indict a ham sandwich." I think it's because you have to come up to a certain standard. The grand jury is, you shouldn't seek an indictment unless—forget probable cause, unless there's proof beyond a reasonable doubt, so you have to try the case. But the FISA Court brings you up to a standard and you deviate from it at your own peril, because even if a particular application gets granted, if they think you're pushing it then you're going to find people drawing the line. Plus the fact that the court rotates, it's not the same people all the time.

**Kassop:** That's true.

**Perry:** The FBI guidelines.

**Mukasey:** The impetus for that was that after 9/11 the FBI had to be brought into the intelligence community and had to be an intelligence-gathering organization in addition to being a law enforcement organization. The wall that separated the intelligence gathering from the law enforcement turned out not to have been necessary at all and we lost—I won't say 9/11 would have been prevented but it could have, because two of them were being sought by law enforcement. I think the intelligence people lost sight of them, and there was no communication between the law enforcement side and the intelligence side. The two guys were on the plane that hit the Pentagon.

But the FBI had to get an intelligence-gathering function, and all its tradition and all its mechanisms were—the mechanism wasn't there, nor was there even a promotion track for intelligence gatherers as opposed to people who go out and arrest bad guys. They had to design standards and a table of organization for how you do that. Beth Cook did a lot of that. She headed up the effort to draft those, but [Robert] Mueller had to drag along a lot of people. A lot of the brass hats at the Bureau were not people who would fit easily within that kind of an operation. It was difficult.

**Perry:** Did you have to do personal pushing on that or did you leave it up to the Director to bring those people around?

**Mukasey:** A little personal pushing, not through direct interaction with them but because there was a committee out of the White House involved in getting all of this done. I kept being pushed, "Where are the guidelines, where are the guidelines?" and "We've got to get this out." There were people in Congress who wanted me to delay the effectiveness of them so that they could be studied. "Look, they've been studied." That was one of my few head-butting disagreements with Russ Feingold, over whether I was going to sign off on the guidelines or not. And he wanted me to—"You ought to give us time to conduct hearings."

**Perry:** No time.

**Mukasey:** Right. “Why don’t we see how they work without your hearings?” P.S., they’re in place and nobody’s—

**Perry:** Toward the end of your tenure, terrorist attacks in Mumbai occur and there’s a notation about the prosecutions because of six Americans who lost their lives in that. Do you want to talk a little about that as something that occupied you a bit at the end?

**Mukasey:** There’s not a lot to talk about. It didn’t involve me all that much. I remember I talked to the Director, and we found out it was LET [Lashkar-e-Taiba] that had done it.

**Perry:** Right.

**Mukasey:** And what their connection was to the other people, but other than that I didn’t really direct it at all.

Maybe we should talk about the OPR [Office of Professional Responsibility].

**Wilson:** Oh, the professional responsibility issue.

**Mukasey:** Into [John] Yoo and Bybee, because that was a big—

**Perry:** Absolutely.

**Mukasey:** That really was at the end, and internally that was a very big issue. The Justice Department is the only department that’s got both an Inspector General and an Office of Professional Responsibility that deals with lawyer–lawyer issues. There was always pulling and hauling between OPR and the Inspector General. The Inspector General always wanted to pick up pieces of OPR’s mandate and some of his investigations necessarily did. Glenn Fine wasn’t bashful about trying to grab off pieces of authority. This investigation of Yoo and Bybee was in place before I got there, and we had regular meetings with Marshall Jarrett, the head of OPR. “Where’s the report, where’s the report?” “Oh, it’s coming.” I used to meet regularly with both him and Glenn Fine to find out what was percolating and where it was. “Oh, it’s coming.”

**Wilson:** Were they working on it together?

**Mukasey:** No.

**Wilson:** They were each working on their separate pieces?

**Mukasey:** That was all Marshall. They worked together on the U.S. attorneys, that was a joint effort. There were other things that were exclusively Glenn Fine’s, but the U.S. attorneys was the two of them. I can’t remember if it was the U.S. attorneys or the hiring issues. No, I think it was the U.S. attorneys.

**Wilson:** Could it have been both?

**Mukasey:** It could have been both. In any event, “It’s coming, it’s coming,” and the suggestion was that it’s going to be unremarkable. December 23, 2008, two days before Christmas, he

plunks down a close to 300-page report on my chief of staff's desk and says that he wants to get my comments by January 7, with a public release on January 12, just before the new administration, recommending that both Yoo and Bybee be referred for discipline to the state disciplinary authorities, because they violated the ethical standard that requires that you practice competently. In other words, their opinions were not only wrong but they were incompetent. There were two younger people who worked on the report and it was a hatchet job from start to finish. It cited the work of a professor who had never practiced a day in his life, cited an article—we're talking about important citations—by the lawyer who had represented John Walker Lindh.

**Kassop:** Scott Horton?

**Mukasey:** Not Scott Horton. But without disclosing that the lawyer in fact had represented John Walker Lindh and was a committed partisan on that issue. Citing unreported cases from circuits that barred the citation of their cases in unrelated cases and so on. What do you do? So I met with them briefly and told them, "We're going to push ahead."

I got together a small team of people, and Mark Filip and I signed off on a letter that ran 13, 14 pages. Do you have it?

**Perry:** I don't think we do.

**Mukasey:** I'll provide you with a copy of that. Pointing out some of the major flaws in this report. They had also, we found out in the course of the discussion, told both Yoo's and Bybee's lawyers that they could see a draft of the report before it was issued because they had cooperated. And they apparently were not planning on making good on that unless they were directed to do it.

**Wilson:** So they had been interviewed during the process of the ongoing investigation.

**Mukasey:** Yes, they had been interviewed during the process and they'd been promised in return that they would see the draft of the report before it was issued. So I directed that they make good on that, that it not be filed in its current form, certainly not until they had had an opportunity to comment and that in any event our letter be attached to the report when it got filed.

That and the guidelines and the FISA I regard as the three most satisfying things where you had a definite result in the same way that a long distance truck driver has a definite result. You carry the load from point A to point B and it gets there, no ambiguities. A lot of the job involves ambiguities. You don't know whether what you've done affects anything or not.

**Wilson:** So what was the end of the OPR investigation under your watch? Was it your response of a 13- or 14-page letter?

**Mukasey:** Yes, because we were already in January of '09. The new administration takes over and the Congress is already aware that there's some kind of pulling and hauling going on, there's a letter. It came up during one of Holder's oversight hearings. It was a Senator who asked, "Are you going to give us the letter?" and he said, "I'll disclose it if Mukasey and Filip are agreeable to having it disclosed." Somebody told me about the testimony, I looked at the testimony, I called Mark, but wrote a letter the next day, "I've spoken to Mark Filip, we both want it

disclosed.” Got a letter back from him saying, “When the report is made public eventually, whatever the outcome, we’ll publicize the letter as well.” It goes through review process after review process. Ultimately, the recommendation is turned around by David Margolis, who really ought to be bronzed.

**Kassop:** So you’re saying that the Inspector General’s report said one thing and the OPR report said something else.

**Mukasey:** No, there was no Inspector General’s report.

**Wilson:** David Margolis is a career, long-term DOJ employee.

**Mukasey:** Right, in the deputy’s office and just outstanding. And after [John C.] Keeney is gone, David’s kind of the repository. He eventually wrote a long report describing why their conclusion should be rejected, which essentially follows the letter. When the department released a report—this was done on a Friday—they sent it up to the Hill without the letter. And when they were asked why the letter hadn’t been attached, it was, “Sending it up to the Hill isn’t making it public.” So there had been no commitment.

**Wilson:** They sent up the revised report?

**Mukasey:** Yes.

**Wilson:** And not the initial one.

**Mukasey:** I think the initial one went with it too, but the letter did not go with it. So I engaged in a little self-help, having taken a copy of the letter with me.

**Perry:** Any other questions about that? We should probably pause for some lunch and then wrap up after that. Unfortunately, Sarah must leave us to go do some client work.

[BREAK]

**Perry:** All right, Nancy had a question.

**Kassop:** In your 2001 *Wall Street Journal* op-ed talking about the *Padilla* case, and in many of your other writings as well as some of your speeches, you have taken very clear positions about the controversy over whether to use federal courts versus military commissions and also the whole habeas corpus process itself. Could you perhaps discuss a little bit on that?

**Mukasey:** OK, but you’ll ask questions, please.

**Kassop:** Sure.

**Mukasey:** Because at this point it's a binary choice. It's either Article III courts or military commissions. It's like debating which of two chimpanzees is the better violin player. The short answer is neither, for different reasons. Article III courts, because of a large number of things including the fact that—to start with the larger issue—it's perverse to take people who are at least charged with being unlawful combatants and put them in a better situation than they would be in if they were lawful combatants. You give them an Article III trial and all the—plus the expense, plus the hazard, security and otherwise. For KSM the hazards for New York would have been multiplied, plus the disruption, which was what ultimately undid it. The hazard to the jurors, to the judge, to everybody. The risk of exposing classified information in a setting where you can't really protect against it.

The other choice is military commissions, which have been part of our history since the Revolution and they've been used even when courts were open. In fact, the plotters who assassinated Lincoln—other than [John Wilkes] Booth, who was killed in the chase, but the others were tried before a military commission, notwithstanding that the Civil War was over. So we've done it, but we've never done it on a continuous basis. It's been done episodically.

So the question of whether this is a task that should be assigned to the military, particularly when it's being done in a way—the civilian side doesn't want to deal with this so it's sort of “Here, go do it.” As I said before, they're not in the business of running a prison system, and they're certainly not in the business of running a parallel justice system. That's not what they're there for. And I don't think that that's a task they find particularly congenial to their way of thinking and background. As far as I know, you get battlefield promotions based on winning wars, not on trying cases. It's a different setting completely and one that is at odds with the task that they really have. I think burdening them with it on a long-term basis is a mistake.

So, OK, wise guy, what's your answer? The answer is, I think, a national security court. That's a court that could deal with what the FISA Court deals with now. It could deal with these cases and a whole bunch of other things, but that requires Congress to pull its act together and do it, and Washington is a town where decisions get made in response to crises. There has to be a precipitating event, not just a matter of good government. That's not the way it should be, but that's the way it is, and I guess there hasn't been a precipitating event.

**Kassop:** You're not the only person to suggest the idea of a national security court.

**Mukasey:** Heaven knows.

**Kassop:** OK. Then why hasn't it gotten steam?

**Mukasey:** Because there's been no precipitating event, except that it's a better choice than the other two things. I'm stating my view.

**Kassop:** Except that the federal courts have become burdened with habeas cases, as you know, and they're not dealing with them on a very efficient level. You make a very good point about the fact that there needs to be one judge in charge of the rules, to make sure that there's consistency, but even so it's been a rather inefficient, ineffective system, so why isn't that—

**Mukasey:** Why isn't that enough of a precipitating event? Because inefficiency and ineffectiveness don't rise to the level of a crisis.

**Kassop:** OK, but if you have the federal district courts burdened with 200 cases of detainees trying to get their habeas rights established, then isn't that a judicial crisis?

**Mukasey:** Then you have n-different judges with n-different procedures. Who would be behind the effort to change it?

**Kassop:** I know there have been some think tanks where that has percolated.

**Mukasey:** Sure. So if the think tanks and the federal judges could use their *massive* influence—

**Kassop:** Was there any opportunity for you to make this point in your Congressional hearings or to suggest to Congress that this is something you should—

**Mukasey:** Not really. I suggested it in an article and I may have made comments here and there, but it didn't go on anybody's list of things to do, even in the administration, let alone in Congress.

**Kassop:** So the concept of a crisis starting with 9/11 also does not have enough force to push Congress.

**Mukasey:** Nine-eleven could have been the crisis that did it. As it happens, there were a lot of other things that 9/11 did, including creating a new Cabinet-level agency cobbled together out of a lot of component parts. It was a pretty busy project when you stop and think of it, plus a war. That filled up a lot of plates.

**Kassop:** But another way to look at it too is that there was a time gap between the occurrence of 9/11 and when those cases started coming to the courts. The *Padilla* case was one of the very first cases coming through the federal courts.

**Mukasey:** Sure, although the *Padilla* case was not obviously the first terrorism case tried.

**Kassop:** No, that's true.

**Mukasey:** We had the '93.

**Kassop:** Sure, but nobody thought about national security courts as a result of the '93 case.

**Mukasey:** No, but what might have happened, I suppose, if a light bulb had gone on, would be to think back from 9/11 to '93, to '96, to '98, to 2000. There's been a whole string of these things. Do we need a national security court?

**Kassop:** Right. Who would have done that?

**Perry:** Or even in that period of '05 and '06, when the concept of military commissions gets all the way to the U.S. Supreme Court and Congress is acting out. Would that have been the time most propitious to this idea?

**Mukasey:** I think not, only because everybody's energy was being directed at getting military commissions approved. The President had said, "We're going to try them before a military commission." There wasn't a whole lot of effort being put into the details of how that was going to work.

**Perry:** And there wasn't anyone you knew of at the time in the administration who would have been arguing for these national security courts or some concept like that. It was an either/or proposition and a binary proposition as you said.

**Mukasey:** Correct.

**Kassop:** The idea of Congress creating a whole new set of courts is massive. It's huge. Never been done before, other than creating the courts martial, I guess.

**Mukasey:** We have bankruptcy courts.

**Kassop:** That's true.

**Perry:** Magistrates.

**Mukasey:** You've got all kinds of—

**Perry:** Specialized.

**Mukasey:** Right. The Article III, such courts as Congress made from time to time. The only court that's provided for in the Constitution is the Supreme Court.

**Kassop:** Right. But I'm saying of more recent vintage, perhaps bankruptcy courts might have been the last time that Congress established a substantial set of new courts.

**Perry:** There was talk back in the '80s, I think, about creating a level between the circuits and the U.S. Supreme Court to take care of the flood of—

**Mukasey:** The JV, junior varsity Supreme Court. But that died.

**Perry:** But that of course died.

**Mukasey:** The Court of Appeals of the Federal Circuit was created to review that.

**Kassop:** When was that, was that 1925?

**Mukasey:** No, it's much more recent than that.

**Kassop:** Oh, really? OK.

**Mukasey:** But you're right, it's not a whole system of courts, it's a court to deal with a category of cases. This could be a court to deal with a category of cases too. You could draw the judges from Article III courts by designation of the Chief Justice. Making it up now as I go along.

**Kassop:** For that matter, the court that was put together, a special division under the Ethics in Government Act, for *Morrison v. Olson*.

**Perry:** Special counsel.

**Kassop:** Special division.

**Perry:** Special division but to name the independent counsel.

**Kassop:** So it was a temporary court. Article III judges were used in that.

Some of your arguments are very interesting ones. There were a couple of things you said regarding why the Article III federal district courts are not the best place for these cases. I asked you this question a little earlier, but this is another opportunity to talk about why CIPA would not be sufficient in protecting classified information in these kinds of cases.

**Mukasey:** CIPA protects only one category of classified information, and that's classified information that is contained in some document or body of information that's identifiable beforehand. It doesn't involve on-the-fly determinations involving testimony that might call for disclosing sources and methods. It's best used for things like the transcripts that I had in the *Abdel Rahman* case, where there's a bunch of things that a judge can look at, at relative leisure and review and make a decision one way or the other, but one group of them in one set of envelopes, another group in another and it's pretty easy. Doing that on an ongoing basis during a trial, in response to objections, and having to have hearings on every question or every other question is not a workable method.

**Kassop:** A couple of other things. You said that the rules from criminal court really don't apply to the military commissions and that the rules from the criminal court system have too high a bar for the prosecution of terrorists. On the other hand, if you try to go the other direction and relax those rules for terrorists, then they would end up watering down the rules for criminal prosecution as well.

**Mukasey:** Yes, because you're talking about a body of law in Article III courts and you're talking about a body of law that applies across the board. What happens is that there's almost a hydraulic effect of terrorism cases, because on a suppression motion in a terrorism case I suppose it's the natural inclination of a judge to want to try to find a reason not to suppress evidence that's vital. But once that rule gets fashioned, it is going to be applied in all kinds of other things. The Fourth Amendment cuts across all sorts of cases, so it's going to wind up distorting.

**Kassop:** That's the first time I've really heard that argument. I think it's a very sensible argument to make and I've never really heard anybody else make that, so I was actually impressed by it. I happen to be one who tends to favor criminal courts, but I understand the reasoning behind that logic and I think that's definitely a persuasive line of reason.

You said there were only—and maybe this was at a point in time—three dozen criminal convictions of terrorists in federal courts. I've heard numbers more like in the hundreds of successful prosecutions. Now that may not be—and some of them could result in plea deals.



**Mukasey:** That also depends on what you mean by a successful prosecution of a terrorism case.

**Kassop:** Yes.

**Mukasey:** That would take into account cases involving immigration violations, cases involving credit card fraud by somebody who is in custody because he is believed to be a terrorist and what you've really got him for is some cockamamie violation. It's not like a whole bunch of these go to trial. I don't know when I wrote about that number.

**Kassop:** Actually, I think that was 2007. I think that came from the same article. So the definition of what's a terrorism case—

**Mukasey:** Is elastic.

**Kassop:** Can be variable.

**Mukasey:** Right. Is it any case against somebody who could be described as a terrorist? If that's the case, then you've got a large population and it's not necessarily terrorism cases as one would—

**Kassop:** The defenders of the use of Article III courts do use that as one of their arguments: we have been successful in this large number of cases, so why should they be discounted?

**Mukasey:** Let's start with the initial argument that I made, which is really a moral argument. This kind of behavior should not result in this kind of a case.

**Kassop:** The law enforcement versus the military model.

**Mukasey:** Correct. It creates a negative incentive, a perverse incentive.

**Kassop:** Going to habeas corpus. Senator [Arlen] Specter actually had a back-and-forth with you during your confirmation hearings on the constitutional versus the statutory right of habeas corpus and which one you view more broadly and more narrowly. Do you recall that?

**Mukasey:** I recall that there was a back-and-forth. I also remember being questioned by him in his office about is habeas corpus a constitutional right. Yes, in the negative sense that there's a provision that says that habeas corpus shall not be suspended. It provides for—except by an act of Congress—

**Kassop:** Suspended, except for times of—it doesn't say who.

**Mukasey:** Right, exactly. Obviously it's assumed that there is a right. He filed his own brief in *Boumediene*.

**Kassop:** I think so, yes.

**Mukasey:** In which he took the position that habeas was a constitutional right.

**Kassop:** If I get this straight, the whole succession of the back-and-forth between the court and Congress over this question of habeas corpus was essentially 2004, with the [Shafiq] *Rasul* case, dealing with Guantanamo detainees, giving them essentially a right to challenge their detention in federal courts, and then the response by Congress.

**Mukasey:** Based on something that had to be close enough to habeas. It didn't have to be habeas, but it had to be something analogous.

**Kassop:** Right. But at that point there wasn't anything else until the administration created the CSRTs, the Combatant Status Review Tribunals.

**Mukasey:** Right.

**Kassop:** And then the Detainee Treatment Act in 2005 actually took away jurisdiction from the federal district courts over habeas cases, with the exception of the *Hamdan* case, which was the one case that went forward with jurisdiction.

**Mukasey:** Right, notwithstanding the fact that Congress had—right.

**Kassop:** Then Congress comes back in the 2006 Military Commissions Act, doing two things: setting up the military commissions on a statutory framework, which at least gave them a stronger legal basis than being based on the President's Executive order, but also basically saying to the courts, no, we really meant what we said in the detainee treatment cases when we said that there should be no federal court jurisdiction over habeas corpus. Consequently, the CSRTs get challenged essentially in *Boumediene* as being the alternative or the substitute for habeas corpus, in which *Boumediene* says no, they're not good enough.

**Mukasey:** Do better.

**Kassop:** Now we are back to the habeas corpus cases that are currently in the federal district courts and having a difficult time making their way through, with a fair amount of inconsistency, but then the D.C. Circuit, as I understand it, currently has not approved the release of any of the detainees from the cases below.

**Mukasey:** Right, yes.

**Kassop:** And the Supreme Court has essentially said, "We're not going to hear any more of these cases."

**Mukasey:** "We're tired of playing with this toy, on to something else." Justice [Anthony] Kennedy said, "I'm sure that the federal courts will be able to fashion a procedure," meaning "I don't have the discipline, or the right frankly, to sit down and fashion a procedure, so I'm going to skip that as unimportant." Please.

**Kassop:** Yes, *Boumediene* essentially established the right but not the steps and the process and the rules of evidence.

**Mukasey:** Right. That's a mere detail.

**Kassop:** Right. But it's also left a huge confusion and again, back to ineffectiveness and inefficiency. One other thing, this is going back to the *Padilla* case, that in some ways although again it never came to fruition, the [Ali Saleh Kahlah] *al-Marri* case would have been another opportunity to litigate essentially the same issues that were in the *Padilla* case, and al-Marri was a legal resident alien, a university student in Illinois, essentially was arrested in the United States for terrorist activities. It would have been an opportunity to take where *Padilla* left off and never came to fruition.

**Mukasey:** What was al-Marri's nationality?

**Kassop:** Qatari. And eventually they released him back to Qatar, putting him under house arrest there or something like that.

**Mukasey:** House arrest. Those houses have a front door and a back door, in my experience.

**Kassop:** The other thing too is that there seemed to have been a succession of cases where, and I don't know whether this was necessarily all under your time as Attorney General, as those cases got closer either to the Supreme Court or closer to the need for some kind of decision, the government pulled them or they found some way of either finding a location to send the detainee to or to get them out of the United States, or in *Padilla*'s case transfer him into the actual criminal justice system and charge him with a crime. As if there was this worry about having them set in law any particular outcome.

**Mukasey:** I agree that that's the way it seems to have happened. The *Padilla* case developed before I got there, so I wasn't in on any of the back-and-forth. I was told later that as to the initial *Padilla* case, there was one point of view within the Justice Department that said, "We've got a good enough decision as of right now. There's no need for us to try for better," and the Defense Department wanted to try for better. But I was not in on any of those.

**Kassop:** In some ways, the *Padilla* case and/or *al-Marri* are like the ultimate nightmare in the sense of the kind of effect of the law on American citizens on American soil.

**Mukasey:** Yes, although how many cases of that sort of event? Two?

**Kassop:** And then the domestic terrorisms, which are slightly different but still the same sort of thing. It's still American citizens being charged with domestic terrorism, like Oklahoma City, but that was a criminal.

**Mukasey:** Yes, it was a straight criminal case.

**Kassop:** But the two cases are really *al-Marri* and *Padilla*.

**Mukasey:** Right. That's not a lot.

**Kassop:** No, but there's also the potential there could be more.

**Mukasey:** There could be more only if a President is willing to pay the political price for having more, so there won't be more.

**Kassop:** What I'm thinking is that particularly because terrorism has morphed even more now to being amorphous, and the fact that you find these efforts by terrorist groups abroad trying to train American citizens who have been disaffected here and gone abroad, and the idea is to get those that are their prime candidates to come back into the U.S. and to commit acts of terrorism on American soil.

**Mukasey:** My view is the answer to that was provided in *Quirin*, which is if you join up with the enemy, then you will be treated, for all purposes, as the enemy, including—

**Kassop:** American citizens.

**Mukasey:** Exactly, including American citizens or once American citizens. I think it was [Herbert] Haupt who was alleged to have been a U.S. citizen, and the Supreme Court said it didn't matter.

**Kassop:** But he was also charged with a crime at that point, which has not been the case in either *al-Marri* or *Padilla*. They were not charged. They were simply indefinitely detained without charges.

**Mukasey:** Right.

**Kassop:** Which is a new concept in some ways or maybe not new but it was—

**Mukasey:** Although Haupt was ultimately executed, which is still regarded as—

**Kassop:** Because he was convicted of a crime.

**Mukasey:** Right, he was convicted of a crime.

**Kassop:** Of a crime with which he was charged.

**Perry:** Just two quick follow-ups. Is there anything that you wanted to talk about that we did not get to yesterday or today?

**Mukasey:** No, I think we got pretty much—

**Perry:** That's what we like to hear. As Russell always says, we may not exhaust all of the opportunities and questions, but we exhaust the interviewee, we are sure of that. The last question is about a bird's-eye view of the Bush Presidency. Let's take it from the arc from when you looked at that person in 2000 and said, "I think I'm leaning toward McCain," to your meeting with the President for your interview, to serving as his Attorney General until the end of the second Bush term. What is that arc in your mind of the Bush Presidency, and then given that you were a history major in college, now four years on, any other thoughts about how history will treat the George W. Bush Presidency.

**Mukasey:** The personal arc is one of greater and greater admiration for the man, in the nature of his decisions, the quality of his decisions, the amount of criticism he took, the kind of criticism he took, that was thrust at him, a lot of which was enormously distasteful and did not seem to get

at whatever was the middle of him. Now I didn't understand. I'm not a personal confidant of his, I don't consider myself a close personal friend. I consider myself a friend but not—I can't say I know him well, but from what I saw he bore up under tremendous criticism of a really distasteful kind and did his job every day and was perfectly comfortable with that, understood that that was, for him, just part of the process and it didn't seem to cut that deep.

**Perry:** What was it about him do you think, at his core, that caused him to be able to withstand that level of criticism?

**Mukasey:** I don't know. A good family life, religious faith, both of which he had the full measure. He seemed to have a very comfortable sense of who he was.

**Kassop:** Were there any weaknesses that you could identify?

**Mukasey:** Only the one that I talked to Josh Bolten about when I was talking to him, that he then discounted but I still think it's not having the lawyerly skill of making a case.

**Perry:** Would you say that's part of what works against him in the public image?

**Mukasey:** Sure.

**Perry:** And it's both not having the legal mind as well as perhaps the communication skills, if he did have a legal bent, to make the case. Is it a twofold weakness perhaps?

**Mukasey:** I think he's got communication skills. He's perfectly capable of communicating in a room full of people and functioning very well at that.

**Perry:** I've seen that firsthand, and I always wondered why that didn't come across through the medium of television, for example.

**Mukasey:** I don't know. That's the only—that to me is the weakness.

**Perry:** And how about history? How do you think it will treat him and his Presidency?

**Mukasey:** I'm not expert. Being a history major doesn't make you—

**Perry:** How about the Presidency? You mentioned before your concerns about it being under attack as you came in to the Attorney Generalship. What does the Presidency as an institution look like at the end of the Bush eight-year term?

**Mukasey:** I think his successor has gone him several better or worse, depending on your point of view, in exercises of executive power prerogative. I think that the independence of the executive has largely been compromised by a number of things, including the institution of Inspectors General in various departments. They not only report to the Cabinet member in whose agency they serve, but they also report to Congress. Think about this. You have a representative of the Article I branch burrowing into an Article II agency, what's that about? And yet it's become institutionalized. To the extent there was a unitary executive, it seems to be gone.

**Perry:** We just want to thank you so much for your participation.

**Mukasey:** Thank you very much.

**Kassop:** Yes, this has been wonderful.

**Perry:** It's been so informative as well as entertaining, and we again thank you for your distinguished service to our country. You've simply extended that distinguished service by participating in this project.

**Mukasey:** Thank you for the chance. I felt very much privileged to serve and to participate in something like this is a great privilege too.

**GEORGE W. BUSH ORAL HISTORY PROJECT**

**FINAL EDITED TRANSCRIPT**

**INTERVIEW WITH MICHAEL MUKASEY**

October 8–9, 2012  
Washington, D.C.

**APPENDICES**