

September 23, 2007

Nuance in Rulings by Attorney General Nominee

By [ADAM LIPTAK](#)

In his 18 years on the federal bench, Judge [Michael B. Mukasey](#) issued more than 1,500 decisions concerning matters as cataclysmic as the Holocaust and as mundane as milk, beer and cigarettes.

In his opinions, Judge Mukasey comes across as fiercely intelligent, prickly, impatient, practical and suspicious of abstractions.

He was quick to chastise and impose sanctions on lawyers who tested his patience or, much worse, lied to him. He did not hesitate to rule against the powerful, including President Bush's uncle, or people with sympathetic cases but no claim to legal relief. His decisions often crackled with an acerbic and sometimes aphoristic wit.

He was tough at sentencing but not uniformly so. He showed leniency to people convicted of [immigration](#) offenses but little mercy to white collar criminals.

Judge Mukasey's opinions reveal a temperament and legal philosophy more complex than the one suggested by the handful of terrorism cases that prompted his nomination last week for attorney general.

In those cases, Judge Mukasey was largely unyielding. And he showed little sympathy to people held as material witnesses after the Sept. 11 attacks.

But overall, Judge Mukasey's median sentence was 24 months, compared with the 18-month median sentence imposed by the more than 70 other judges who sat with him on the Federal District Court in Manhattan from 1988 to 2006, according to statistics compiled by the Transactional Records Access Clearinghouse at [Syracuse University](#).

In drug and weapons cases, Judge Mukasey's sentences were more similar to those of other judges. But his median sentence in immigration cases was just 75 percent of the overall rate, while his white collar sentences were double that of the other judges.

A separate analysis by [JudicialReports.com](#), published by the Institute for Judicial Studies, looked at how often the federal appeals court in New York reversed Judge Mukasey in the last seven years.

In criminal cases, he was reversed 20 percent of the time, compared with an overall reversal rate from his court of roughly 15 percent in 2006. But in civil cases, his 24 percent reversal rate compared favorably with the overall rate of roughly 30 percent.

Last year, when the Justice Department sought his permission to force a mentally troubled defendant to take psychotropic drugs to render her competent to stand trial, Judge Mukasey expressed a visceral disgust for the idea, even though the [Supreme Court](#) had endorsed it.

"It is not inappropriate to recall in plain terms," he wrote, "what the government seeks to do here, which necessarily involves physically restraining defendant so that she can be injected with mind-altering drugs."

"There was a time when what might be viewed as an even lesser invasion of a defendant's person — pumping

his stomach to retrieve evidence — was said to ‘shock the conscience’ and invite comparison with ‘the rack and the screw,’ ” he added, quoting from a 1952 Supreme Court decision.

His writing was consistently cogent, lucid and self-assured, owing something to George Orwell, a hero of his. Indeed, Judge Mukasey kept a framed photograph of Orwell in his chambers.

“He is a particular idol of mine for his clear writing and complete disdain for cant,” Judge Mukasey told a reporter for The Financial Times in 1989, not long after becoming a judge. “I try to recognize when some spongy abstraction is trying to cover up an excuse for thought or analysis.”

His decisions almost always start with an exceptionally detailed account of the facts, often coupled with a keen awareness of how hard it is to know anything for sure.

His writing benefited from a stint at United Press International, the news agency. “It was good practice in writing fast and making things comprehensible,” he told The Financial Times.

In a 1989 copyright case brought by Kennett Love, a former New York Times reporter who claimed that too much of an unpublished manuscript of his had been used in the defendant’s book, Judge Mukasey revealed a deep knowledge of history and journalism.

“It was once accepted,” Judge Mukasey wrote, “for journalists not to print information they believed disserved the national interest.” He went on to cite coverage of President [Franklin D. Roosevelt](#)’s disability, of the overthrow of the Iranian government in 1953, of the 1961 Bay of Pigs invasion and of the Cuban missile crisis in 1962.

Judge Mukasey then quoted ruefully from an article by [Max Frankel](#), a former executive editor of The Times, discussing how things changed after President [John F. Kennedy](#)’s assassination and as the Vietnam War progressed: “The essential ingredient was trust, and that was lost somewhere between Dallas and Tonkin.”

Judge Mukasey has attracted occasional criticism for what was said to be a hardhearted and overly formal application of the law.

In 2004, for instance, he dismissed a class-action suit against an Italian insurance company brought by the estates and survivors of people who died or lost property in the Holocaust.

He said he was deferring to “a federal executive branch policy favoring voluntary resolution of Holocaust-era insurance claims” through a private commission.

Thane Rosenbaum, who teaches law at [Fordham University](#) and is the author of “The Myth of Moral Justice,” was critical of that decision and said it was suggestive of how Judge Mukasey might approach the job of attorney general.

“The fact that Mukasey ruled in favor of executive pre-emption in a case that was crying out for legal and moral relief,” Mr. Rosenbaum said, “might reveal his sentiments when it comes to the ultimate power of the presidency, for instance, in fighting terrorism.”

In 1993, Judge Mukasey ruled against Prescott S. Bush Jr., a brother of the first President Bush. Mr. Bush had responded to a breach of contract claim from a Japanese company by saying he had been defrauded because the company, he asserted, was a front for a crime family.

Even if the company was “a Japanese mob organization,” Judge Mukasey wrote, Mr. Bush and his own company “could and did contract with it.”

The officers of the Japanese company, he added, “were not applying for membership in a country club.”

In 1998, he ruled against several songwriters who claimed authorship of “The Lion Sleeps Tonight,” saying they had filed their suit too late.

He allowed a contract case against the poet Maya Angelou to go forward in 2005 despite her protestations that she had become disgusted with her partner in the greeting-cards venture and felt it “morally wrong” to proceed.

“None of these reservations,” Judge Mukasey wrote, “had anything to do with the terms of the contract Angelou signed.”

Similarly, he dismissed a lawsuit by Anastasia Myskina, a tennis star, over the publication of nude photographs of her, finding that she had signed a valid release and that the photographs were newsworthy.

In a 1997 securities fraud case, he reversed his own earlier decision and allowed the case over a cigarette company’s asserted lies about nicotine to go forward.

Judge Mukasey did not tolerate sharp conduct in litigation before him. “There is a school of thought that teaches that the best defense is a good offense,” he wrote in imposing fines on a lawyer and his client for submitting an affidavit that he said contradicted the facts.

“That school of thought may prevail on a battlefield or the athletic field; it should not prevail in the courthouse.”

In 1995, he denied a request for a trial adjournment. “It is hard to credit a claim that counsel do not have the time to prepare for trial when they have used their energies to produce on the eve of trial 65 tendentious pages of argument” seeking the adjournment, Judge Mukasey wrote.

When a former publicist for Marla Maples, [Donald Trump](#)’s second wife, filed a series of frivolous lawsuits, Judge Mukasey barred the courthouse door, forbidding him to file “any civil lawsuit in a court of the United States, regardless of the subject matter, without first obtaining leave of such court.”

For good measure, he ordered the publicist, Charles Jones, “to staple a copy of this opinion to any future complaint.”

Judge Mukasey’s court, the United States District Court for the Southern District of New York, handles more than its share of major commercial disputes, securities fraud cases and complex criminal prosecutions. But some of Judge Mukasey’s cases concerned quotidian matters.

In 1992 he refused to halt a television commercial that mocked Coors Light.

“The parties have vigorously disputed whether the taste of beer, unlike the taste of milk, is adversely affected by pasteurization,” Judge Mukasey wrote, responding with some newly coined legal Latin.

“De gustibus cerevesiae non scit lex,” he wrote, meaning, presumably, that the law takes no account of taste in weak beer.

[Copyright 2007 The New York Times Company](#)

[Privacy Policy](#) | [Search](#) | [Corrections](#) | [RSS](#) | [First Look](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Site Map](#)