

**November 11, 2007**

EDITORIAL

## Abdicate and Capitulate

It is extraordinary how President Bush has streamlined the Senate confirmation process. As we have seen most recently with the vote to confirm Michael Mukasey as attorney general, about all that is left of “advice and consent” is the “consent” part.

Once upon a time, the confirmation of major presidential appointments played out on several levels — starting, of course, with politics. It was assumed that a president would choose like-minded people as cabinet members and for other jobs requiring Senate approval. There was a presumption that he should be allowed his choices, all other things being equal.

Before George W. Bush’s presidency, those other things actually counted. Was the nominee truly qualified, with a professional background worthy of the job? Would he discharge his duties fairly and honorably, upholding his oath to protect the Constitution? Even though she answers to the president, would the nominee represent all Americans? Would he or she respect the power of Congress to supervise the executive branch, and the power of the courts to enforce the rule of law?

In less than seven years, Mr. Bush has managed to boil that list down to its least common denominator: the president should get his choices. At first, Mr. Bush was abetted by a slavish Republican majority that balked at only one major appointment — Harriet Miers for Supreme Court justice, and then only because of doubts that she was far enough to the right.

The Democrats, however, also deserve a large measure of blame. They did almost nothing while they were in the minority to demand better nominees than Mr. Bush was sending up. And now that they have attained the majority, they are not doing any better.

On Thursday, the Senate voted by 53 to 40 to confirm Mr. Mukasey even though he would not answer a simple question: does he think waterboarding, a form of simulated drowning used to extract information from a prisoner, is torture and therefore illegal?

Democrats offer excuses for their sorry record, starting with their razor-thin majority. But it is often said that any vote in the Senate requires more than 60 votes — enough to overcome a filibuster. So why did Mr. Mukasey get by with only 53 votes? Given the success the Republicans have had in blocking action when the Democrats cannot muster 60 votes, the main culprit appears to be the Democratic leadership, which seems uninterested in or incapable of standing up to Mr. Bush.

Senator Charles Schumer, the New York Democrat who turned the tide for this nomination, said that if the Senate did not approve Mr. Mukasey, the president would get by with an interim appointment who would be under the sway of “the extreme ideology of Vice President Dick Cheney.” He argued that Mr. Mukasey could be counted on

to reverse the politicization of the Justice Department that occurred under Alberto Gonzales, and that Mr. Mukasey's reticence about calling waterboarding illegal might well become moot, because the Senate was considering a law making clear that it is illegal.

That is precisely the sort of cozy rationalization that Mr. Schumer and his colleagues have used so many times to back down from a confrontation with Mr. Bush. The truth is, Mr. Mukasey is already in the grip of that "extreme ideology." If he were not, he could have answered the question about waterboarding.

Mr. Bush said Mr. Mukasey could not do so because it would reveal classified information about Central Intelligence Agency interrogation techniques. That is nonsense. Mr. Mukasey was not asked if C.I.A. jailers have used waterboarding on prisoners, something he could be expected to know nothing about. He was simply asked if, as a general matter, waterboarding is illegal.

It was not a difficult question. Waterboarding is specifically banned by the Army Field Manual, and it is plainly illegal under the federal Anti-Torture Act, federal assault statutes, the Detainee Treatment Act, the Convention Against Torture and the Geneva Conventions. It is hard to see how any nominee worthy of the position of attorney general could fail to answer "yes."

The real reason the White House would not permit Mr. Mukasey to answer was the risk to federal officials who carried out Mr. Bush's orders to abuse and torture prisoners after the 9/11 attacks: the right answer could have exposed them to criminal sanctions.

The rationales that accompanied the vote in favor of Mr. Mukasey were not reassuring. The promise of a law banning waterboarding is no comfort. It is unnecessary, and even if it passes, Mr. Bush seems certain to veto it. In fact, it would play into the administration's hands by allowing it to argue that torture is not currently illegal.

The claim that Mr. Mukasey will depoliticize the Justice Department loses its allure when you consider that he would not commit himself to enforcing Congressional subpoenas in the United States attorneys scandal.

All of this leaves us wondering whether Mr. Schumer and other Democratic leaders were more focused on the 2008 elections than on doing their constitutional duty. Certainly, being made to look weak on terrorism might make it harder for them to expand their majority.

We are not suggesting the Democrats reject every presidential appointee, or that the president's preferences not be taken into account. But Democrats have done precious little to avoid the kind of spectacle the world saw last week: the Senate giving the job of attorney general, chief law enforcement officer in the world's oldest democracy, to a man who does not even have the integrity to take a stand against torture.

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