MUKASEY'S MUDDLE

Say what you will about Michael Mukasey, but usually he can craft a fairly logical argument.

That's not, however, true of this muddled op-ed in the WSJ. The op-ed attempts to draw an equivalence between lawyers—but not civil liberties organizations—that have represented Gitmo detainees and Yoo and Bybee (and, by association, though he doesn't admit it, Michael Mukasey). But the muddle that results demonstrates as well as anything how conflicted and illogical Mukasey's own position is.

Mukasey starts by asserting a parallel between three different sets of lawyers:

- Bernie Madoff's lawyer
- Yoo and Bybee "for legal positions they took as to whether interrogation techniques devised and proposed by others were lawful—a campaign that also featured casual denunciations of them as purveyors of torture"
- Lawyers in private practice who represented detainees and "have been portrayed as in-house counsel to al Qaeda"

Now, Mukasey misrepresents why Yoo and Bybee are being attacked. It's not because of the legal positions they took, it's because of the process by which they purportedly came to those opinions.

But look how quickly claiming a parallel between these three groups of lawyers—two engaged in antagonistic proceedings, the third not—to this step.

> A lawyer who represents a party in a contested matter has an ethical obligation to make any and all tenable legal arguments that will help that party. A lawyer in public service, particularly one dealing with sensitive matters of national security, has the obligation to authorize any step or practice the law permits in order to keep the nation and its citizens safe.

Mukasey moves from legal representation of a client to—in Mukasey's own words—"authoriz[ing] any step or practice the law permits … to keep the nation … safe." Mukasey is now saying that Yoo and Bybee authorized torture, rather than analyzing statutes such that their client (whoever Mukasey wants to claim that is, because it changes) can authorize torture, based on Yoo's legal advice. (Note, as AG, Mukasey may well have authorized such things, but the arguments folks have made to defend Yoo all presume he didn't do the actual authorization, which would suggest he made the policy decision.)

And never mind the unquestioned assumption that lawyers are obligated to do this "in order to keep the nation … safe," suggesting that the purported efficacy of the torture somehow changed the legal obligations involved.

In other words, these are not at all parallel cases. One is protecting the law, the process of the law. The other is claiming to protect the country, with a pretty twisted definition of the role of the lawyers involved.

From there, after Mukasey makes another false parallel—suggesting those opposing Yoo and Bybee are equally motivated by politics as those attacking lawyers who represent detainees—Mukasey sees fit to tell SCOTUS that it got several rulings wrong.

> I think the Supreme Court decided wrongly in several key cases regarding

> the war on terror and our national security. They include *Boumediene v. Bush* (2008), in which the Court found insufficient protection for Guantanamo detainees that had not yet been put to the test, and *Hamdan v. Rumsfeld* (2006), in which the Court applied to detainees a provision of the Geneva Conventions that was intended to apply only in civil wars on the territory of a signatory to those Conventions. While I disagree with the Court's decision in these cases, I stop well short of blaming the outcome on lawyers who argued successfully.

Again, what happened to legal process here? Yes, Mukasey notes that the lawyers who argued their case successfully here are not to blame. But what's with the insinuation that anyone is to blame? Even former Attorneys General don't get to make their own law, though it sure sounds like Mukasey wants to.

Then Mukasey makes this veiled attack on civil liberties organizations.

> I agree that lawyers who, like the head of one self-described public interest organization, threaten to achieve their desired outcomes by overwhelming the courts with thousands of lawsuits in behalf of detainees, or those who adopt publicly the agendas of their clients, deserve every bit of condemnation they get.

Because while Mukasey is allowed to disagree with settled law, some organizations are not allowed to use the process of law in this country to argue for the rule of law.

And here's perhaps the funniest paragraph in this confused op-ed.

> It is plainly prudent for us to assure that no government lawyers are bringing to their public jobs any agenda driven

> by views other than those that would permit full-hearted enforcement of laws that fall within their responsibility—whether those laws involve prosecution of drug dealers, imposition of the death penalty, or detention of those who seek to wage holy war against the United States. It's also prudent that Congress exercise its long-established oversight responsibility to provide that assurance.

"It is plainly prudent for us to assure that no government lawyers are bringing to their public jobs any agenda driven by views other than those that would permit full-hearted enforcement of laws that fall within their responsibility." Note the example Mukasey doesn't mention in his list of those who might bring a bias to their job as a government lawyer? Those who—as most people who commented on the OPR Report concluded had happened—bring radical notions of executive power into the OLC and apply those notions to questions of torture. Even the most conservative commenters on the OPR Report agree that Yoo has fairly radical views about Commander-in-Chief authority. In fact, that's the means by which Yoo apologists excused the obviously flawed process by which he wrote the memos. If John Yoo really believes no laws can limit the President, Yoo defenders argued, then he can't be faulted for the Bybee Memo. But Mukasey, in theory at least, says he can.

And the notion that Congress should have the power to exercise oversight over these government lawyers? That is coming from Michael Mukasey who, as Attorney General, repeatedly refused to give Congress these OLC memos, which would have been the first step to them exercising oversight over a government lawyer whose bias had tainted his work.

Now, I'm happy that Mukasey has joined the long list of people opposing Liz "BabyDick" Cheney's McCarthyism. But even using his own logic here, Yoo's embrace of torture was legally problematic.

Not to mention Mukasey's own role in—among other things—preventing the kind of Congressional oversight Mukasey himself admits needs to happen.

Update: David Luban takes issue with Mukasey's false equivalency, too.

> *But in fact, the parallel is completely bogus. What makes the Cheney attacks McCarthyism is guilt by association, wrapped in innuendo, and cynically appealing to paranoia: Because you represented a detainee, you very likely sympathize with Al Qaeda, and we need to smoke you out.*
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> *Nobody ever criticized the torture lawyers because of who they represented, and nobody questioned their loyalty. The criticisms were on three completely different grounds: first, that they made frivolous arguments to get around the law; second, that they violated their ethical and constitutional obligation to give candid, independent advice to the president; and third, that they facilitated a misbegotten plan to torture captives. My own writing focused on the first two arguments; other critics*

> *focused on the third. Obviously, many people reject these criticisms on the merits, but that isn't the point. Whether the criticisms are right or wrong, they don't traffic in guilt by association, they don't blame lawyers for who their clients are, and they don't hint at treason.*
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> *There is simply no parallel between criticizing lawyers for violating the law and assassinating their characters for representing the "wrong" clients. (To be clear: I am not objecting to Mukasey's defense of the current DOJ lawyers. His willingness to put his considerable authority on the line deserves applause. I'm objecting only to his "moral equivalence" argument.)*