MUKASEY’S TROUBLING HISTORICAL ARGUMENT

Mukasey’s defense of John Yoo in his commencement address at Boston College Law School has drawn a lot of attention.

> Today, many of the senior government lawyers who provided legal advice supporting the nation’s most important counterterrorism policies have been subjected to relentless public criticism. In some corners, one even hears suggestions—suggestions that are made in a manner that is almost breathtakingly casual—that some of these lawyers should be subject to civil or criminal liability for the advice they gave. The rhetoric of these discussions is hostile and unforgiving.

But few people have examined Mukasey’s rationale for defending Yoo.

Essentially, Mukasey is making an argument that everyone concluded after 9/11 that timid lawyering had contributed to 9/11, and so if we criticize Yoo (and Addington and Gonzales and—I would argue, John Rizzo, Acting Counsel for CIA when the torture tapes were destroyed) for their decisions made under pressure to make lawyering less timid, our nation will be less secure as a result.

To make this argument, Mukasey relies on Jack Goldsmith’s discussion of risk aversion in his book *Terror Presidency*. But Mukasey grossly misrepresents what Goldsmith describes as the primary root of risk aversion. Repeatedly, Goldsmith compares the difference between the legal means Roosevelt used in World War II with those the Bush Administration uses, and goes on to suggest that the rise of human rights in the intervening years had constrained presidential action. Goldsmith mentions, among other things, prohibitions on torture (most of them

international) and assassination. Significantly, of the many legal developments he cites specifically as creating new limits on presidential action, only one–FISA–was a law passed in the US in response to intelligence operations gone legally awry (Goldsmith also mentions EO 12333, which is an order signed by Saint Ronnie, not a law passed by Congress or an international body, and he mentions "an aggressive post-Watergate Congress … crafting many of the laws that so infuriatingly tied the President's hands in the post-9/11 world").

That's important because, rather than attributing this legal timidity to Goldsmith's more general trend of human rights over the last 60 years, Mukasey picks a few historical events as the source of risk aversion.

> Intelligence excesses of the 1960s led to the Church committee reproaches and reforms of the 1970s, which led to complaints that the community had become too risk averse, which led to the aggressive behavior under William Casey in the 1980s that resulted in the Iran-Contra and related scandals, which led to another round of intelligence purges and restrictions in the 1990s that deepened the culture of risk aversion and once again led (both before and after 9/11) to complaints about excessive timidity.

Now before I rip apart the historical logic of this passage, here's how Goldsmith discusses the effect of those same historical events.

> The main problem was the effect that the legalization of warfare and intelligence had on lower-level officials in the Defense Department, the CIA, and the National Security Agency. The White House couldn't execute its plans to check al Qaeda without the cooperation of the military and intelligence bureaucracy. But these bureaucracies –

> especially in the intelligence community – had in the 1980s and 1990s become institutionally disinclined to take risks. The Church and Pike investigations of the 1970s and the Iran-Contra scandal in the 1980s taught the intelligence community to worry about what a 1996 Council on Foreign Relations study decried as "retroactive discipline" – the idea that no matter how much political and legal support and intelligence operative gets before engaging in aggressive actions, he will be punished after the fact by a different set of rules created in a different political environment.

Note the difference: Goldsmith describes how several historical investigations, taken together, have created concerns within the intelligence community that, however much legal and political support intelligence communities may have when a program is instituted, there's always risk the individuals implementing the programs will be held legally liable after the fact. Goldsmith is not describing a cyclical process–aggressive program, reform, risk aversion, aggressive program, reform, risk aversion. He's simply saying those several investigations, together, have taught the intelligence community to insist their activities get bright legal sanction before they do them. This is consistent with the larger argument in his book: because lawyers at CIA and NSA wanted specific legal authorization before they engaged in programs deemed legally risky, the Administration (and John Yoo especially) wrote opinions that were legally suspect but nonetheless functioned as "get-out-of-jail-free cards."

But for Mukasey, there is a causal relation between these events: aggressive programs (COINTELPRO and Iran-Contra) led to an intrusive investigation and subsequent reforms (Church and Iran-Contra investigations), which led to risk

aversion, which led to criticism of the intelligence community for its excess timidity, which led to other aggressive programs. This causal relation is utterly central to Mukasey's defense of Yoo.

> No doubt, there is some sense in which this cycle, or something like it, is healthy. The sometimes competing imperatives to protect the nation and to safeguard our civil liberties are undoubtedly worthy of public debate and discussion. And oversight and review of our intelligence activities—by the Congress, within the executive branch, and, where possible, by the public—is important, vitally so.
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> But it is also important—and equally so—that such scrutiny be conducted responsibly, with appreciation of its institutional implications. In evaluating the work of national security lawyers, political leaders and the public must not forget what was asked of those lawyers six-and-a-half years ago. We cannot afford to invite another "cycle of timidity" in the intelligence community; the stakes are simply too high.

Mukasey accepts (he says) that there may be some value to debating the balance between civil liberties and national security and reviewing events of the past. But if such discussions are conducted irresponsibly, Mukasey argues, it will lead to another "cycle of timidity" and—the suggestion is—potentially another attack.

The implications of this view are disturbing. Mukasey is arguing that, if John Yoo is held responsible for the shitty opinions he wrote, then in the future some OLC hack writing get-out-of-jail-free cards won't be so rambunctious in his opinions. Me, I consider that a **good** thing. But Mukasey implies it will lead to another terrorist attack.

The implications of Mukasey's view get still more disturbing when you assess it as historical fact. I certainly agree that the Church and Pike investigations drastically changed the scope of CIA ops. But that didn't prevent Jimmy Carter from initiating two of the most important programs behind our winning the Cold War: funding Eastern European and Russian dissident groups, and funding the mujahadeen in Afghanistan. Furthermore, it was not a reaction to the reforms of the 1970s that led to the failures of the 1980s. Rather, it was partly the work of Team B type analysis that distorted intelligence on Russia and the Middle East. It was partly the inability of the CIA and FBI to find the spies (Ames and Hanssen) who were devastating the country's intelligence ranks. It is historically inaccurate to attribute the William Casey-led ops to **general** complaints that the intelligence community had become too risk averse. How could it be?!? Casey's actions were instead an attempt to evade the oversight and limitation of those—you know, like Congress—who wanted the CIA to continue to uphold the standards imposed after Watergate scandals. I have no doubt that some within the Reagan Administration thought those rules were too restrictive and led to timidity, I have no doubt that people within and outside of the Reagan Administration questioned the CIA's competence. But that does not equate to the kind of generalized consensus—like that of post-9/11 analysis—that the CIA was incompetent **because** it was too timid.

Moreover, the pre-9/11 timidity was not a response, per se, to Iran-Contra (except in the narrow sense Goldsmith describes of CIA officers realizing they could be held legally liable for operations conceived of and authorized by the President). Rather, the things the intelligence community did not do that might have prevented 9/11 (specifically, to take out bin Laden in the late 1990s and to trace the calls between 9/11 hijackers and a known safe house in Yemen) were reactions to post-Watergate reforms, EO 12333 and FISA, respectively, not post-Iran-Contra

reforms.

Mukasey has basically turned Goldsmith's argument—that Iran-Contra made intelligence officials worried about the legal repercussions of their activities—into an event in which investigators conducted irresponsible oversight which, somehow, contributed to 9/11.

Think about the implications of **that** for a moment.

Mukasey's insinuation that the investigation into Iran-Contra was irresponsible has two very dangerous implications. First, it suggests it is improper for Congress to conduct an inquiry into the executive branch after the executive branch ignores a very clear law passed by Congress. Of course, a couple of guys made that argument back in 1987, in the Minority Report on Iran-Contra. Dick Cheney and David Addington argued that the Boland Amendment and the investigation into Iran-Contra were just attempts by Congress to improperly usurp the executive branch's powers to conduct foreign policy. Mukasey's inclusion of Iran-Contra in his historical description of the causes behind legal timidity must be read as an endorsement of Cheney and Addington's famous ideological expansion of the unitary executive (because it's the only way it makes any historical sense). And with it, Mukasey suggests he believes a Congressional investigation into Bush's clear violation of both FISA and the Convention against Torture might be irresponsible.

But that wasn't the only investigation into Iran-Contra, after all. There was also Lawrence Walsh's investigation, as Independent Prosecutor, into the events. I certainly understand that the unitary executive ideologues believe Independent Prosecutors to be unconstitutional. And at that level, the inclusion of Iran-Contra in Mukasey's historical description may explain why he has had John Durham—with no independence whatsoever—investigate the torture tape destruction rather than appoint an Independent

Prosecutor. But the suggestion that the Walsh investigation was irresponsible is troubling for another reason: the big fall-out at the CIA, after all, was that Duane Clarridge and Clair George were indicted (and then pardoned) for lying to Congress; Clarridge was fired by William Webster and a slew of agents left with him. Is Mukasey suggesting it would be improper to hold John Rizzo or Alberto Gonzales responsible for lying to Congress, which both have been alleged to have done? Does an expectation that Administration officials tell the truth to Congress lead to risk aversion in intelligence operations?

Now, I'm not sure whether Muaksey's inclusion of Iran-Contra in his description of the causes of risk aversion implies all of these things, up to and including a disinclination to prosecute officials for lying to Congress. But it certainly makes the John Durham investigation–in which Mukasey directly oversees Durham's investigation into events that may well include lying to the 9/11 Commission and Courts–all the more dubious.

I find Mukasey's public (though implicit) defense of Yoo to be unfortunate. But I find the logic on which he based that defense to be downright dangerous.