Introduction: Law, Torture, and the "Task of the Good Lawyer" – Mukasey Agonistes

Daniel Kanstroom
Abstract: Following September 11, 2001, there was a challenge to the role of law as a regulator of military action and executive power. Government lawyers produced legal interpretations designed to authorize, legitimize, and facilitate interrogation tactics widely considered to be illegal. This raises a fundamental question: how should law respond to such flawed interpretation and its consequences, even if the ends might have seemed necessary or just? This Symposium examines deep tensions between competing visions of the rule of law and the role of lawyers. Spurred by a controversy over the selection of then-Attorney General Michael Mukasey as commencement speaker, the goal was to examine such basic and challenging questions. What is the optimal relationship among policy, legal interpretation, and ethics? What ethical norms should guide government lawyers? Attorney General Mukasey agreed to publish his commencement address as part of the Symposium. Participants were asked to read it and, if they wished, to use it as a touchstone for their analyses of the questions it raised.

States face immense difficulties in modern times in protecting their communities from terrorist violence. . . . That must not, however, call into question the absolute nature of [the prohibition against torture and inhuman or degrading treatment or punishment].

—The European Court of Human Rights

History will not judge this kindly.

—Attorney General John Ashcroft

“Security,” wrote Justice Robert Jackson, “is like liberty in that many are the crimes committed in its name.” What if the same were
true of law? Consider this simplified scenario: John Smith is a lawyer with experience in criminal and tax matters. A former client comes to him and says that he has just lost his job. He is in absolutely desperate circumstances: he is about to lose his home; his children need new clothes; his wife is pregnant with another child. He has just realized that, in addition to everything else, he must pay $1000 with his income tax return. Smith tells the client that he does not actually have to pay the taxes and he writes a long, well-cited legal memorandum explaining why. “In fact,” says Smith, “you should file a return that claims a $1000 refund and pocket the money. Consider it a loan from the government.” “Is that legal?” asks the client, “I don’t want to do anything illegal.” “Don’t worry,” says Smith, “I am your lawyer. I know tax law in all its complexities and I am telling you, in writing, that it’s legal. Furthermore, you need to do it in order to protect your family. So it is not only legal; it’s right and necessary.”

When the client gets prosecuted, do you think the case should be dismissed? If not, should he be able to argue to a jury that he was misled so profoundly that it renders him not guilty? And what of Smith? Should he be ethically sanctioned? Prosecuted?

One immediate consequence of the September 11, 2001 attacks was a challenge to the role of law—especially international humanitarian and human rights law—as a regulator of military action and executive power. This challenge targeted both the law’s ability to punish transgressions, as well as the law’s role in conceptualizing the limits of power. Indeed, a mere three days after the attacks, Stewart Baker, the former general counsel of the National Security Agency, said, “We have judicialized more aspects of human behavior than any civilization in history, and we may have come to the limit of that.”

Soon thereafter, Colonel Charles J. Dunlap, Jr., provocatively asked whether so-called “lawfare” and the norms of international law were, “undercutting the ability of the U.S. to conduct effective military interventions?” He further questioned whether law was, “becoming a vehicle to exploit American values in ways

---


that actually increase risks to civilians,” and whether law might be, “more of the problem in modern war instead of part of the solution?"6

One possible solution, it turned out, was to maintain the form of legality while using complicated interpretations to achieve results that seemed consonant with the executive’s conception of security needs. These methods, along with remarkably broad assertions of executive authority, became dominant aspects of politico-legal discourse in the following seven years of the Bush administration. They supported many of the Bush administration’s tactics in the “War on Terror,” including the designation and detention of so-called unlawful or enemy combatants, the establishment of “black sites” for detention outside the United States, the military tribunals at Guantánamo Bay, unlawful rendition, and the use of harsh interrogation methods such as waterboarding.

Some, including former Vice President Dick Cheney, are unrepentant; indeed, they are proud. As he recently stated,

When we get people who are more concerned about reading the rights to an al Qaeda terrorist than they are with protecting the United States against people who are absolutely committed to do anything they can to kill Americans, then I worry . . . . If it hadn’t been for what we did—with respect to the . . . enhanced interrogation techniques for high-value detainees . . . we would have been attacked again.7

Others, like President Barack Obama, argue that what is at stake is not only national security, but a fundamental clash of values that undergird legal and constitutional questions. As President Obama put it in March, 2009, “I think that Vice President Cheney has been at the head of a movement whose notion is somehow that we can’t reconcile our core values, our Constitution, our belief that we don’t torture, with our national security interests . . . .”8

This is a powerful way to frame the dispute, but it is not completely accurate. The troubling reason why is that some lawyers in the Department of Justice’s (DOJ) Office of Legal Counsel (OLC) apparently did seek to reconcile core values and the Constitution with national security. Jay Bybee, John Yoo, and others produced a superficially plausible

---

6 Id.
legal interpretation that sought to authorize, legitimize, and facilitate a range of interrogation tactics widely considered to be illegal torture. This raises a fundamental question: how should law respond to its own transgression by flawed interpretation and reckless advice? Put another way, how should law respond to the misuse of legal reasoning to authorize unlawful actions even if the ends might seem necessary or just?

The problem is greater than the Bybee and Yoo “torture memos.” Indeed, as I write this Introduction, the revelations come faster than ever. An April 2009 New York Times article, contradicting prior assertions of the rarity of waterboarding, reports that waterboarding was in fact used hundreds of times on two terrorism suspects.

One cannot overstate the concern caused by such practices across the ideological spectrum. Professor Douglas Kmiec, former head of the OLC during the Reagan and George H.W. Bush administrations, is now calling for:

[A] Nuremberg-style citizen-conducted ethics inquiry in which all of the opinion writers—and the opinion demanders in the Pentagon and former White House—would be required to self-critique why the Nation they most assuredly would say they love is today embarrassed if not appalled by what was authorized.

Many others demand criminal prosecutions of the lawyers. As David Cole argues, “These documents are irrefutable evidence that government officials, including [OLC] lawyers . . . set out to manipulate the law to reach repugnant, illegal results . . . .”

The concern is not just about torture; it is about a pattern of legal advice given by those described by Prof. Kmiec as, “either too young to have perspective, too academic to have practical wisdom, or too political to be capable of judgment.” It has now been widely reported that other secret memos issued to the CIA in 2003 and 2004 endorsed waterboarding and a range of other harsh techniques. The concern at

---


13 Kmiec, supra note 11.

the CIA, as one lawyer put it, was, “whether we had enough ‘top cover.’”

This is a critical point: many in the Bush administration, ranging from the interrogators themselves all the way up to Secretary of State Condoleezza Rice, were deeply concerned about whether the harsh measures were lawful. The resulting legal analyses were designed to put their minds at ease on that score, and to encourage them to go forward with the program. This required exceptionally detailed and convincing legal work, because many in the Bush administration had deep qualms. As ABC News reported, after the capture of Abu Zubaydah, George Tenet proposed to combine certain “enhanced” techniques in a single interrogation plan. Vice President Cheney reportedly approved, but Attorney General John Ashcroft argued that while the tactics may have been legal, senior advisers should not be involved in the grim details. As he rather presciently worried, “History will not judge this kindly.”

A report by the International Committee of the Red Cross, obtained by Mark Danner, calls even Attorney General Ashcroft’s legal conclusions into question. It graphically describes a range of brutal—and arguably illegal—interrogation tactics undertaken by the CIA. The report documents not only waterboarding (described as “suffocation by water poured over a cloth placed over the nose and mouth”) but also:

- Prolonged stress standing position, naked, held with the arms extended and chained above the head.
- Beatings by use of a collar held around the detainees’ neck and used to forcefully bang the head and body against the wall.
- Beating and kicking, including slapping, punching, and kicking to the body and face.
- Confinement in a box to severely restrict movement

---

15 Id.
16 See id.
17 Greenburg et al., supra note 2. See generally Jane Mayer, The Dark Side: The Inside Story on How the War on Terror Turned Into a War on American Ideals (2008).
• Prolonged nudity . . . last[ing] for periods ranging from several weeks to several months.
• Sleep deprivation . . . through use of forced stress positions (standing or sitting), cold water and use of repetitive loud noise or music.
• Exposure to cold temperature . . . especially via cold cells and interrogation rooms, and . . . by the use of cold water poured over the body or . . . held around the body by means of a plastic sheet to create an immersion bath with just the head out of water.
• Prolonged shackling of hands and/or feet.
• Threats of ill-treatment to the detainee and/or his family.
• Forced shaving of the head and beard.
• Deprivation/restricted provision of solid food from 3 days to 1 month after arrest.\(^\text{20}\)

Precious few, if any, credible legal scholars now seek to defend the reasoning of the torture memos. Indeed, the authors may be called upon to defend their work in courts far more serious and formal than those of public and scholarly opinion.\(^\text{21}\) Criminal proceedings have begun in Spain against six former Bush administration officials, including Jay Bybee and John Yoo,\(^\text{22}\) for torturing detainees in Guantánamo Bay. Baltasar Garzón, known as a “counter-terrorism judge,” has reportedly referred the case to the chief prosecutor.\(^\text{23}\) Though the latter seems disinclined to proceed as of this writing, court documents allege that, without the legal advice given in internal administration memos, “it would have been impossible to structure a legal framework that supported what happened [in Guantánamo].”\(^\text{24}\)

Further, the chair of the U.S. Senate Judiciary Committee, Patrick Leahy, has recently called for a “non-partisan commission of inquiry” to investigate, “how our detention policies and practices . . . have seriously

\(^{20}\) Id. at 8–9.
\(^{21}\) It is quite possible that similar work product still remains hidden from public scrutiny.
\(^{23}\) Id.
\(^{24}\) Id.
eroded fundamental American principles of the rule of law.”25 As Leahy piquantly noted, “We cannot turn the page unless we read the page.”26

This Symposium, which took place at Boston College Law School in October 2008, aimed to examine these deep underlying tensions between two competing visions of the rule of law and the role of lawyers. It was spurred by a controversy that had engulfed the law school over the selection of Attorney General Michael Mukasey as commencement speaker. That controversy mostly involved Attorney General Mukasey’s legal positions regarding torture and waterboarding, subjects that I have addressed in a separate article that is being re-published as part of this Symposium.27 The main goal of the Symposium was not to re-visit the controversy surrounding the selection of Attorney General Mukasey as a speaker. The hope, rather, was to engage—on the merits—some of the most basic and challenging questions of legal ethics and lawyering raised by the Attorney General:

• What is the optimal relationship among policy, legal interpretation, and ethics?
• What does (or should) it mean to be an “aggressive” lawyer in this context?
• What ethical norms should guide government lawyers in particular?
• What message should a law faculty send to our students?

Attorney General Mukasey was cordially invited to attend, with assurances that the aim of the Symposium was to engage—as dispassionately, rationally, and respectfully as possible—with the range of questions described above.28 Unfortunately, he declined. Nevertheless, he did agree to publish a version of his commencement address as part of the Symposium. Participants were asked to read it and, if they wished, to use it as a touchstone for their analyses. To help situate the reader, what follows is a very brief exegesis of what I believe are the major points raised by the Attorney General.

26 Id.
27 See generally Kanstroom, supra note 9.
28 The organizers also sought, without success, to invite speakers who would defend the OLC interpretations.
Attorney General Mukasey made two related, basic jurisprudential assertions about the nature of law. First, that there is a clear divide between morality and the law. As he put it, echoing many legal positivists: “It is the task of the good lawyer to tune out all this white noise, to give the best reading of what the law is—and not to confuse what the law is with what that lawyer, or someone else, thinks the law ought to be.”

Second, that a good lawyer can, and should, “separate what are legal questions from what are political questions.” Attorney General Mukasey’s concern in this regard was largely with unnamed critics of certain policy decisions who, he asserted, conflated legality with policy preference. As he put it, “critics of a policy decision much too rarely draw distinctions between whether a course of action is permitted as a matter of law, and whether that course of action is prudent as a matter of policy.”

This concern was supported by a dialectical historical vision. Attorney General Mukasey adopted a meta-theory, derived from Jack Goldsmith, of “cycles of timidity and aggression,” which, he said, are misunderstood by the public. As he stated, “The narratives produced by [post September 11th] investigations were, in many instances, stories of missed opportunities. The subtext of these narratives—in fact, at times, the text—was that risk-aversion can have grave costs.”

The key message about legal culture that Attorney General Mukasey believed was sent to national security lawyers in the immediate aftermath of September 11 was clear, bipartisan, and “all but unanimous.” The message was that legal culture, “was too risk-averse. It needed to be more aggressive, it needed to push to the limits of the law, to give policymakers and operators the most flexibility possible to confront the existential threat of international terrorism.” Although it is not entirely clear from his commencement address whether Attorney General Mukasey actually endorsed this message at the time, one can

30 *Id.* at 180.
31 *Id.*
33 Mukasey, *supra* note 29, at 182.
34 *Id.* at 183.
35 *Id.*
discern from other speeches and writings that he did, and probably still does.\textsuperscript{36}

Attorney General Mukasey went on to state that many critics simply do not appreciate the unique difficulties faced by government lawyers.\textsuperscript{37} As he said, “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.” He worried that, “decisions made in the heat of crisis may be second-guessed under radically different conditions: in the comparative calm of a hearing room or an editorial board room, with the well-known but rarely acknowledged benefit of perfect hindsight.”\textsuperscript{38}

Finally, Attorney General Mukasey argued that the boundaries of law are not sufficiently well-defined to provide definitive answers to certain hard questions (implicitly including waterboarding). He explained that:

The questions are complex because, in this area, the limits of executive power are not clearly defined by the Constitution or by well-settled precedent; because the laws Congress has enacted often speak in general terms and do not provide clear answers to the novel questions we confront; and because there are few judicial markers to guide the conscientious lawyer.\textsuperscript{39}

Taken together, this is obviously quite a complex package to unravel. How, for example, does one reconcile the assertion that the job of the good lawyer is simply the workmanlike task of determining “what the law is,” while at the same time conceding that the constitutional boundaries are unclear, and the guiding “judicial markers” are few?\textsuperscript{40} Where, exactly, does policy end and law begin? Is there some sure way to determine when a critic is merely disagreeing with policy rather than disagreeing with the legality of a particular policy choice?

Moreover, cyclical views of history are easily manipulated to achieve whatever outcome one seeks to justify. In his well-known poetic representation of a cyclical vision, Yeats described, “[t]urning and turning in


\textsuperscript{37} This included a particular view of the lawyer/client relationship even in the government context: “A lawyer’s principal duty is to advise his client as to what the best reading of the law is—to define the space in which the client may legally act.” Mukasey, \textit{supra} note 29, at 180.

\textsuperscript{38} \textit{Id.} at 181.

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.}
the widening gyre.”41 A loosening, uncentered, anarchic cycle follows where “the falcon cannot hear the falconer,” and finally, “Things fall apart; the centre cannot hold.”42 In the legal realm, we must ask hard questions: what is the “centre” and how, exactly, should it “hold?” Yeats’ dark vision of a “second coming,” we should recall, was not one of glory but that of a “rough beast” that “slouches to be born.”43

The legal and ethical questions are neither hypothetical nor trivial. The stakes remain high. The efforts of the Obama administration to abjure the “enemy combatant” label and find a way to close Guantánamo Bay signal as much the beginning of a legal and ethical discussion as the end of an era.

This Symposium took place, and appears in print, at a particularly good moment to examine all of these questions. Although we are still at war in Iraq and Afghanistan, we are perhaps able to view the threat of domestic terrorism with more calmness and clarity than was possible for the first few years after September 11. Also, after years of litigation, we finally have some definitive guidance from the Supreme Court—in the Boumediene, Hamdan, and Hamdi cases—about the extent of the rule of law, the flexibility of due process, the strength of the norms of the Geneva Conventions, and the profundity, breadth, and power of the writ of habeas corpus.44 We also have considerable guidance from other courts, especially those in Europe, and much recent scholarly work.

Ultimately, what was at stake when John Yoo first put fingers to keyboard were many of the deepest values of our legal system. Thus, the assertion that the “task of the good lawyer” is to determine “what the law is” invokes deep normative and politico-legal questions.45 As Chief Judge of the Southern District of New York in 2004, then-Judge Mukasey wrote that, “We are now in a struggle with an extremism that expresses itself in the form of terror attacks, and in that we face what is probably the gravest threat to this country’s institutions, if not to its physical welfare, since the Civil War.”46

41 W.B. Yeats, The Second Coming, in Harold Bloom, Yeats 318 (1972).
42 Id.
43 Id.
45 Mukasey, supra note 29, at 185.
46 Mukasey, The Spirit of Liberty, supra note 36 (emphasis added). In his conclusion, then-Judge Mukasey also wrote, “[T]he hidden message in the structure of the Constitution—is that the government it establishes is entitled, at least in the first instance, to receive from its citizens the benefit of the doubt.” Id.
There is no question that many shared such sentiments. As a result, they tended to defer to the executive on a wide range of issues that could require legal analysis. Many others found such assessments puzzling and troubling, both as a matter of empirical fact and because of where they could lead us. The basic political disagreement is essentially the same as that seen by Hannah Arendt in the context of totalitarianism: “The greatest danger of recognizing totalitarianism as the curse of the century would be an obsession with it to the extent of becoming blind to the numerous small and not so small evils with which the road to hell is paved.”

Attorney General Mukasey would likely view such sentiments as naïve. Clearly, if one defines al Qaeda as a graver threat to the United States than were the forces of Nazi Germany, Imperial Japan, and the former Soviet Union, then one might well countenance waterboarding. One might even thank those who were involved, and support their right to raise a “necessity defense” if prosecuted. Is this the same as interpreting waterboarding and other such practices as legal?

It was to such questions that our panelists turned their attention. The articles published herein reflect a wide range of approaches. Major Christopher Shaw, a Judge Advocate with the U.S. Marine Corps, ana-

---

47. See Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts 43 (2007) (invoking Carl Schmitt to argue that, in times of emergency, the executive must curtail liberty to ensure security and the courts should not interfere.)

48. As David Cole and Jules Lobel have argued:

   Our long-term security turns not on “going on offense” by locking up thousands of “suspected terrorists” who turn out to have no connection to terrorism; nor on forcing suspects to bark like dogs, urinate and defecate on themselves, and endure sexual humiliation; nor on attacking countries that have not threatened to attack us. Security rests not on exceptionalism and double standards but on a commitment to fairness, justice and the rule of law. The rule of law in no way precludes a state from defending itself from terrorists but requires that it do so within constraints. And properly understood, those constraints are assets, not obstacles.


50. Andrew Tarsy, the former New England Regional Director of the Anti-Defamation League, Dean John Hutson of Franklin Pierce Law School, former Judge Advocate General of the Navy, and Professor George Brown of Boston College Law School also participated in the Symposium, though they were not able to submit articles for publication. Additionally, Professor Allan Ryan, a former Marine Corps judge advocate and professor at Boston College Law School, served as a moderator.
lyzes the clear prohibitions against torture in both domestic and international law. He argues that a lack of leadership and clear policy allowed legal violations to occur. As he writes, “Although definitions are significant, leadership, policies and ultimately a nation’s commitment to humane treatment are primary.” More broadly, Professor Lorenzo Zucca of King’s College London suggests that, “Europe has something to teach the United States.” He writes that, “ethical lawyers should seek to strike a balance between these competing interests in good faith. They should be prepared . . . to face judicial scrutiny and . . . justify their decisions. They must believe in the rule of law at any cost.”

Professor Kent Greenfield suggests that “we live in a time in which ethical rationalization deserves close scrutiny.” In this regard, he disagreed strongly with Attorney General Mukasey. As he writes, “our problem . . . is not that we don’t understand but that we understand all too well the illegal conduct that has been perpetrated in our name.” This is not because law is simple, but because it is complex. That very complexity, however, demands that, “when gaps must be filled, there is no neutral way to fill them that avoids the need for political, philosophical, or moral justification.”

William J. Dunn, an attorney with an extensive background as an intelligence analyst, offers a wide-ranging and thoughtful analysis of the role of government lawyers. Questioning how much that role ought to change in various “cycles,” Dunn writes that the, “overarching lesson [is] to moderate governmental action through counsel at all stages . . . to eliminate the unnecessary peaks of aggression and the perilous valleys of risk-averse action.” Indeed, he concludes that, “it is the tough questions and the courageous answers that define our profession.”

U.S. District Judge William G. Young, who presided over the “shoe-bomber” case in Boston, writes passionately about the declining role of the jury in American law. As he puts it, “the justice of the many cannot

54 Id. at 227.
55 Id. at 228.
57 Id. at 272.
be left to the judgment of the few.”

Although he does not conclude that the authors of the torture memos should face juries and make their best arguments there, he does decry the “massive drift away from rigorous fact-finding in open court.”

Finally, in a thoughtful and provocative article, Professor Gabriella Blum develops an occasionally complementary, but also somewhat contrary vision. She suggests that lawyers have assumed or have been given too much authority by governments. Further, she argues that, “without inquiring about the responsibility of the client receiving the legal advice, our normative and prescriptive view of government lawyering is seriously lacking.” In a sort of critical homage to Alexis de Tocqueville (albeit with a German phraseology), Professor Blum writes that in our über-legalistic culture, “if a lawyer advises her client that a policy is illegal, the client hears ‘it is evil.’ No one wants to be an evil-doer.” Upon reading this, I was reminded of Jürgen Habermas’s assertion regarding the invasion of Iraq:

There have been, since [the acceptance of the UN Charter], no more just and unjust wars, only legal or illegal ones, justified or unjustified under international law. One must bear in mind this enormous advance in the rights revolution in order to realize the radical breach that the Bush administration has wrought. . . . In the rhetoric of legitimation, there is in no ‘realistic’ redemption of ‘idealistic’ notions.

Professor Blum’s argument is not that law is irrelevant. Indeed, she notes critically how, “Bush administration lawyers . . . felt they had to justify any government action under legal terms, for fear of tying the government’s hands. By doing so, they legalized illegal actions.” Her point is not even that law should not matter or not matter much. It is out of deep respect for law that she ultimately asserts that elected government officials may sometimes decide, for reasons they believe to be good and sufficient, to violate the laws. In those rare cases, however,

---

59 Id. at 315.
61 Id. at 285.
63 Blum, supra note 60, at 285.
they are not absolved of responsibility. They should, “make the decisions and face the consequences.”

CONCLUSION

God, when he gave me strength, to show withal
How slight the gift was, hung it in my hair.

—John Milton

One of the most important purposes of law is to restrain the power and violence over which the state, as Weber argued, has a legitimate monopoly. To accomplish this, law must be both retrospective (by juries and judges) and predictive. The discipline of law is simultaneously a rhetorically constructive and an analytically de-constructive enterprise. It can be grandly eloquent and maddeningly technical as it helps to “constitute” the social order, to provide the bones and sinews around which the blood of society may flow and upon which a civilization may rest with at least a modicum of value-laden stability. Ronald Dworkin once famously described law as a sort of chain novel, written by many authors over time. Its narrative must be coherent, even as its narrators come and go. Of course, much more then mere coherence is required. The “constitution” of law is inevitably situated within a considerably less fluid system, from which it derives much of its legitimacy and against which its use and its misuse may be tested.

64 Id. at 287.
67 Metaphors abound to describe this aspect. The word “constitution” captures its essence quite simply, as John Marshall understood perfectly well when he linked that ambiguous noun to the verb “expounding.” See M’Culloch v. Maryland, 17 U.S. 316, 407 (1819).
68 See generally Ronald Dworkin, Law’s Empire (1986).
Law is also analytic: much of its function is to parse words, to elucidate and manipulate fine distinctions. This necessary, but secondary and often tedious enterprise puts obvious pressure on the grander constructive legal ideal. It is often disparaged.\textsuperscript{70} Indeed, the dangers of formalistic analysis, if unmoored from value-based discourse or if used to mask values, are a staple of modern legal realist thought. Too insular a deductive method risks what Felix Cohen famously called “transcendental nonsense.”\textsuperscript{71} It is underlying principles and policies, “practical questions of value or of positive fact,” not abstract linguistic formulations that must inform our analysis.\textsuperscript{72}

The ultimate problem is how far one can go in this direction without abandoning the very idea of law as an autonomous or even a semi-autonomous category of thought. The current torture debate, however, does not push this far if one sees a consonance between the legal and normative principles at issue. We can and we must maintain a richer theory of interpretation, which takes into account pre-interpretive legal traditions, social norms, and moral concepts. It is from these sub-strata that we can write the best contemporary versions of our constantly evolving legal novel. To be sure, this method, if too loosely undertaken, may render legal interpretation a rather shaky enterprise. When it

\textsuperscript{70} The adjective “Dickensian” is not a compliment in legal circles, as first year law students still read \textit{Bleak House} as a cautionary, ironic tale. See generally Charles Dickens, \textit{Bleak House} (Norman Page ed., Penguin Books 1971) (1853).

\textsuperscript{71} Felix S. Cohen, \textit{Transcendental Nonsense and the Functional Approach}, 35 \textit{Colum. L. Rev.} 809, 810 (1935) (noting that the question of whether a Pennsylvania corporation can be sued in New York is not properly understood as whether a corporation can “be in two places at once”; such a question is akin to enquiring “How many angels can stand on the point of a needle?”).

\textsuperscript{72} As Cohen aptly noted,

[I]n every field of law we should find the same habit of ignoring practical questions of value or of positive fact and taking refuge in “legal problems” which can always be answered by manipulating legal concepts. . . . Corporate entity, property rights, fair value, and due process are such concepts. So too are title, contract, conspiracy, malice, [and] proximate cause. . . . Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law.

\textit{Id.} at 820 (emphasis omitted from original).
comes to the role of judges, one runs the risk of being thrashed by Richard Posner as advocating rule by “enlightened despots.”

Attorney General Mukasey has maintained that “[r]easonable people can disagree, and have disagreed, about these matters.” That may be true, depending upon which matters are at issue, but he surely would not suggest that all interpretations are equally sound. Some of his public agonies seemed to derive in part from professional role tensions, though he has denied this, saying, “I wear one hat. It says attorney general of the United States. There are a number of duties under that, but as far as I’m concerned, there is no divided responsibility or divided loyalty. There is one responsibility.”

One need only read the mission statement of the DOJ, however, to see why the “one hat” model is potentially problematic. On the one hand, the agency’s role is executive and protective. But consider the statement’s very first lines: “To enforce the law and defend the interests of the United States according to the law,” and its ending, “to ensure fair and impartial administration of justice for all Americans.” Indeed, an inscription on the side of the DOJ building in Washington, D.C. states the ultimate duty still more clearly: “No free government can survive that is not based on the supremacy of the law.” This may tell us something profoundly important about how to respond to apparent criminal violations of law by U.S. agents, how to analyze legal questions regarding torture, and how to define the “task of the good lawyer.”

---

75 As the Attorney General engagingly put it, “[I]t is my job as Attorney General to do what I believe the law requires and what is best for the country, not what makes my life easier.” Id.
77 The mission statement is as follows:

To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.

78 Mukasey, supra note 29, at 185.