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FLASH: WHITEHOUSE TORTURES MUKASEY!

For the would-be Attorney General, waterboarding isn't torture, unless it is

Q: "Is waterboarding Constitutional?"

A: "I don't know what's involved in the technique. If waterboarding is torture, torture is not Constitutional."

Q: "'If waterboarding [is torture]', that's a massive hedge. I mean it either is or isn't. Do you have an opinion on waterboarding, which is the practice of putting someone in a reclining position, strapping them down, putting cloth over their faces and pouring water over the cloth to simulate the feeling of drowning. Is that Constitutional?"

A: [Long pause] "If it amounts to torture, it is not Constitutional."

Q: [Looking grim] "I'm very disappointed in that answer, I think it is purely semantics."

A: "Sorry."

By Julius (Jay) Wachtel. As we know, this Orwellian conversation between Senator Sheldon Whitehouse (D - RI) and Judge Michael Mukasey took place in the chambers of the United States Senate during the second day of hearings on the judge's nomination to be Attorney General (click [here](#) to watch the video). After spending the opening day vowing the committee with promises to run an independent ship, the Judge apparently suffered an overnight conversion, leading at least two Senators to ask whether he had been warned to get back in line. Mukasey said no, but the happy talk went away and his confirmation was placed in serious jeopardy.

Realizing that the dodge was poorly received, Mukasey wrote the committee a letter explaining that it was important to avoid prejudging the lawfulness of techniques he knew little about and might well be used by American authorities in one form or another. Having already dropped a bombshell, that in his opinion the President's authority as commander-in-chief supersedes all laws short of the Constitution, his attempt to mollify the committee with double-talk only made a lousy situation worse. Did the judge really intend to keep a firewall between the White House (the building, not the Senator) and the Department of Justice? Was he to be America's chief law enforcement officer, or the President's? Keep in mind that the job

wouldn't even be vacant but for the prior incumbent's bumbling. When Alberto Gonzalez was White House counsel he was rightfully Bush's toady, for that was his role, but when he moved over to Justice one expected a lot more. The rules changed, the man didn't, and the rest is history. Would Mukasey be a re-run?

Let's rewind. Say that Mukasey has another epiphany and shows up ready to declare every interrogation technique short of back rubs illegal. Was he right in the first place? Should he insert himself into a process that might best be left for the courts to decide? That is a resounding...maybe. The Attorney General's obligation is twofold: to enforce the law, and to supervise its agents of social control. If a practice is so well defined (like, by Senator Whitehouse) that it cannot be but torture, we need to know that Mukasey is smart enough to recognize it and brave enough to say so, no matter whose ox gets gored. Unlike the White House counsel, the Attorney General's primary loyalties are not to individuals or agencies but to the Constitution and the laws of the land. When the writer was a Federal agent he was sued twice (both times unsuccessfully) by criminal defendants for alleged civil rights violations. Although the AG came to my defense, he was not obligated to do so, and had he deemed my actions sufficiently egregious I could have been prosecuted!

Back to the present. Mukasey has a chance to redeem himself, but after all the "water" that's flowed under this bridge it's hard to picture how. Because of the dreadful consequences should they do the wrong thing, our law enforcement officers must be more than technicians -- they must be moral agents as well. Should we trust someone who hides behind legalese to lead our pre-eminent agency of justice? Having heard all his evasions, what kind of example would he be? Let the good judge go back to writing contracts, drafting wills or just sunning himself on the beach, thinking about what might have been. Or rather, what *he* might have been.