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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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October 18, 2007

Hon. Michael B. Mukasey
Patterson Belknap Webb & Tyler LLP
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New York, N.Y. 10036

Dear Judge Mukasey:

I appreciated your answers to my questions and to other Senators' questions at your hearing before the Senate Judiciary Committee. I will be following up with written questions on a number of important issues, but I wanted to highlight one issue on which it is particularly vital that you clarify your position as soon as possible.

You said in the context of warrantless surveillance that, despite Congress clearly having legislated in this area with the Foreign Intelligence Surveillance Act (FISA), the President may be able to act, and to authorize and immunize others to act, contrary to the clear boundaries of what the FISA law allows, because of the President's constitutional commander-in-chief powers.

However, you also said that, in the context of the use of torture or cruel, inhuman, or degrading treatment in the interrogation of detainees, the President could not authorize or immunize conduct outside of the law, even if he were to believe it would further his constitutional responsibility as commander-in-chief to do so.

You explained this distinction by saying that torture and cruel, inhuman, or degrading treatment are banned by the Constitution under the Fifth, Eighth, and Fourteenth Amendments, as well as by law. I find this distinction unhelpful because unreasonable search and seizure is much more clearly forbidden by the Constitution, in the Fourth Amendment, than torture or cruel, inhuman, and degrading treatment. In both situations, the President, in authorizing such conduct, would be flouting both statutory and constitutional prohibitions based on a broad assertion of executive power. I am concerned that this legal justification could lead to a continuation of the kind of warrantless surveillance in violation of statute that we have seen.

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Please clarify for me the distinction you are making and why your argument justifying presidential authority to authorize or immunize actions contrary to the FISA statute could not be similarly used to justify authorizing or immunizing action contrary to the statutory bans on torture and cruel, inhuman, or degrading treatment.

I look forward to your prompt answer.

Sincerely,



PATRICK LEAHY
Chairman

*I look forward to hearing
from you*