United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

October 23, 2007

The Honorable Michael B. Mukasey
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036

Dear Judge Mukasey:

We are deeply troubled by your refusal to state unequivocally that waterboarding is illegal during your confirmation hearing last week. We want to give you an opportunity to clarify your views on this important question.

During your hearing, Senator Whitehouse asked you about waterboarding and you replied, "I don't know what's involved in the technique. If waterboarding is torture, torture is not constitutional."

It is surprising that you are unfamiliar with waterboarding since it has been the subject of much public discussion in recent years. During the second panel of your confirmation hearing, retired Rear Admiral John Hutson, former Navy Judge Advocate General and Dean of the Franklin Pierce Law Center, responded to your testimony as follows:

> Other than, perhaps the rack and thumbscrews, water-boarding is the most iconic example of torture in history. It was devised, I believe, in the Spanish Inquisition. It has been repudiated for centuries. It's a little disconcerting to hear now that we're not quite sure where water-boarding fits in the scheme of things. I think we have to be very sure where it fits in the scheme of things.

For centuries, interrogators have used variations on a technique commonly referred to as "waterboarding" or "water torture." In some cases, bound prisoners are completely submerged in water. In other instances, water is forced into the mouths of prisoners. Another variation involves placing a cloth over the face or forcing it into the mouth of a prisoner, followed by water being poured into the nostrils of the prisoner. In yet another variation, cellophane is placed over the face and water is poured over the head of prisoners without any water entering the mouth of the prisoner. What all of these methods have in common is the intent to create a fear of death through drowning.

As Senator Durbin explained during your confirmation hearing, the Judge Advocates General, the highest-ranking military lawyers in each of the U.S. Armed Forces' four branches, told him unequivocally that waterboarding is illegal and violates Common Article 3 of the

Geneva Conventions. Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of the Marine Corps, stated that "threatening a detainee with imminent death, to include drowning, is torture under 18 U.S.C. § 2340."

As Admiral Hutson testified, waterboarding has long been recognized as a form of torture and the United States has historically repudiated this practice. Following World War II, the United States prosecuted Japanese military personnel as war criminals for waterboarding U.S. prisoners. "Drop by Drop: Forgetting the History of Water Torture in U.S. Courts," a recent study of waterboarding by law of war expert Evan Wallach, concluded: "In all cases, whether the water treatment was applied by Americans or to Americans, or simply reviewed by American courts, it has uniformly been rejected as illegal, often with severely punitive results for the perpetrators."

The U.S. State Department has long recognized waterboarding as torture and cruel, inhuman and degrading treatment and has criticized other countries for using waterboarding in its Country Reports on Human Rights Practices. For example, in the 2006 human rights report for Sri Lanka, the State Department, based on reports from sources it considers credible, concluded that "the use of torture to extract admissions and confessions was endemic" and stated that methods of torture included "near-drowning." In its annual human rights reports for Tunisia between 1996 and 2004, the State Department criticized the practice of "submersion of the head in water" as torture. The State Department's Tunisia human rights reports for 2005 and 2006 describe this practice as a form of "torture and other abuse."

During floor debate on the Military Commissions Act (MCA), Senator John Warner, then chairman of the Senate Armed Services Committee and one of the authors of the MCA, said that waterboarding is "in the category of grave breaches of Common Article 3 of the Geneva Conventions" and would be "clearly prohibited" by the MCA. Senator John McCain, the lead sponsor of the Detainee Treatment Act, has stated, "In my view, to make someone believe that you are killing him by drowning is no different than holding a pistol to his head and firing a blank. I believe that it is torture, very exquisite torture."

Your unwillingness to state that waterboarding is illegal may place Americans at risk of being subjected to this abusive technique. If the United States does not explicitly and publicly condemn waterboarding, it will be more difficult to argue that enemy forces cannot waterboard American prisoners. It also makes it more difficult for the United States to condemn repressive governments that use waterboarding on their own citizens. We are particularly troubled by recent reports that the Burmese military has used this form of torture against democracy activists. Human rights abuses such as this have rightly prompted the Administration to impose additional sanctions against the Burmese regime.

Please respond to the following question: Is the use of waterboarding, or inducing the misperception of drowning, as an interrogation technique illegal under U.S. law, including treaty obligations?

Due to the importance of this issue to your pending confirmation, we would appreciate your prompt response. Thank you for your time and consideration.

Sincerely,

Richard J. Durbin

Patrick J. Leahy

Edward M. Kennedy

Joseph R. Biden, Jr.

Herb Kohl

Dianne Feinstein

Russell D. Feingold

Charles E. Schumer

Benjamin L. Cardin

Sheldon Whitehouse