

November 2, 2007

The Honorable Patrick Leahy  
Chairman  
Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Arlen Specter  
Ranking Member  
Senate Committee on the Judiciary  
152 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Leahy and Senator Specter:

The American Civil Liberties Union strongly urges you to oppose moving the nomination of Judge Michael Mukasey for Attorney General out of the Judiciary Committee unless he states that waterboarding and other extreme interrogation tactics are torture, within the meaning of federal law, and commits to the full enforcement of federal laws against torture and abuse. This commitment is important for two reasons: 1) to ensure that the federal government stops, and does not resume, the use of torture and abuse in interrogations; and 2) to have the next attorney general committed to investigating and, if appropriate, prosecuting persons who authorized or committed torture or abuse.

Mukasey's unwillingness to answer questions on whether waterboarding and similar practices are torture undermines the rule of law and threatens the security of Americans. In response to questions from members of the Judiciary Committee, Mukasey not only refused to state whether waterboarding is torture when authorized by or committed by the federal government, but he also refused to say whether it is illegal for foreign countries to commit acts such as waterboarding, electric shocks, beatings, head slaps, and induced hypothermia on Americans.

Federal law is clear that waterboarding and all other forms of torture and abuse are illegal. The Anti-Torture Act criminalizes the use of torture; the War Crimes Act criminalizes the use of torture and abuse against detainees protected by the Geneva Conventions (which includes alleged Taliban and al-Qaeda detainees); the McCain Amendment of the Detainee Treatment Act reaffirms the prohibition in the U.S.-ratified Convention Against Torture against the use of torture and cruel, inhuman, and degrading treatment; the U.S.-ratified Convention Against Torture prohibits all torture and cruel, inhumane, and degrading treatment, and general criminal laws such as federal statutes criminalize conduct such as assaults by or against Americans in federal facilities. These laws reflect American values, all in statutes or treaties enacted or ratified under presidents ranging from Ronald Reagan to George W. Bush.

However, Mukasey refuses to answer the straightforward question of whether waterboarding is torture, and thereby illegal. In a four-page response to ten members of the Committee, Mukasey describes how he would decide the question of whether waterboarding is torture, but he states the question is "hypothetical" and that "the actual facts and circumstances are critical." The actual facts and circumstances of waterboarding are brutal, but fairly simple. Several senators described to Mukasey all of the elements of waterboarding, as practiced over

the centuries by dictatorships, rogue nations, and war criminals--and as prosecuted by the United States against war criminals. Mukasey has the law, including the Anti-Torture Act and the War Crimes Act, and all of the facts before him. After decades as a federal prosecutor and federal judge, Mukasey certainly has the capacity to answer the question of whether waterboarding is torture.

In addition to undermining American values, Mukasey's unwillingness to answer the question on whether waterboarding is torture could threaten the security of Americans overseas. In a little-noticed question-and-answer, Senator Kennedy asked Mukasey, "Do you think it would be lawful for another country to subject an American to waterboarding, induced hypothermia or heat stress, standing naked, the use of dogs, beatings, including head slaps, or electric shocks?" Mukasey responded with his stock response that he cannot answer hypotheticals, and that "the actual facts and circumstances are critical." This response was to a question on whether it was illegal for a foreign country to shock, beat, and waterboard an American citizen. The response provides no assurance to American servicemen and servicewomen and American intelligence personnel that the United States will demand protection for them against foreign torturers.

This line of questioning is not hypothetical. The use of waterboarding and other forms of torture was reportedly discussed and approved based on discussions that occurred at the highest levels of government, including participation by aides to the President and Vice President. The result was authorization of specific forms of torture and abuse, and a permissive climate that fostered even more torture and abuse. Federal government documents obtained by the ACLU through our Freedom of Information Act litigation and reports of the International Committee of the Red Cross documented torture or abuse against U.S.-held detainees, including acts such as soaking a prisoner's hand in alcohol and setting it on fire, administering electric shocks, subjecting prisoners to repeated sexual abuse and assault, including sodomy with a bottle, raping a juvenile prisoner, kicking and beating prisoners in the head and groin, putting lit cigarettes inside a prisoner's ear, force-feeding a baseball to a prisoner, chaining a prisoner hands-to-feet in a fetal position for 24 hours without food or water or access to a toilet, and breaking a prisoner's shoulders.

Mukasey's equivocal responses to these questions on waterboarding and other forms of torture and abuse reveal a more fundamental and troubling problem with his views on the scope of executive power -- not only on torture -- but on government spying as well. Under the theory of executive power Mukasey espoused, any restrictions on government spying that Congress passes may be meaningless, since Mukasey believes the president has power to engage in domestic wiretapping without a warrant and outside the law. If an Attorney General, whose mission is to enforce the law, believes the President has the power to disregard the law, our constitutional balance of powers is in peril.

A forthright answer to a question about torture is so fundamental to restoring the rule of law that the Judiciary Committee should not move Mukasey's nomination out of committee unless he states that waterboarding and other extreme interrogation tactics are torture. American values and American security both depend on his answer.

Thank you for your attention to this matter, and please do not hesitate to call us at 202-675-2308 if you have any questions regarding this issue.

Very truly yours,



Caroline Fredrickson  
Director



Christopher E. Anders  
Legislative Counsel