

MEMORANDUM FOR: Chairman and Ranking Member
Senate Committee on the Judiciary

FROM: Former U.S. Intelligence Officers

SUBJECT: Nomination of Michael Mukasey for Attorney General

Dear Senators Leahy and Specter,

Values that are extremely important to us as former intelligence officers are at stake in your committee's confirmation deliberations on Judge Michael Mukasey. With hundreds of years of service in sensitive national security activities behind us, we are deeply concerned that your committee may move his nomination to the full Senate without insisting that Mukasey declare himself on whether he believes the practice of waterboarding is legal.

We feel this more acutely than most others, for in our careers we have frequently had to navigate the delicate balance between morality and expediency, all the while doing our best to abide by the values the vast majority of Americans hold in common. We therefore believe we have a particular moral obligation to speak out. We can say it no better than four retired judge advocates general (two admirals and two generals) who wrote you over the weekend, saying: "Waterboarding is inhumane, it is torture, and it is illegal."

Judge Mukasey's refusal to comment on waterboarding, on grounds that it would be "irresponsible" to provide "an uninformed legal opinion based on hypothetical facts and circumstances," raises serious questions. There is nothing hypothetical or secret about the fact that waterboarding was used by U.S. intelligence officers as an interrogation technique before the Justice Department publicly declared torture "abhorrent" in a legal opinion in December 2004. But after Alberto Gonzales became attorney general in February 2005, Justice reportedly issued a secret memo authorizing harsh physical and psychological tactics, including waterboarding, which were approved for use in combination. A presidential executive order of July 20, 2007 authorized "enhanced interrogation techniques" that had been banned for use by the U.S. Army. Although the White House announced that the order provides "clear rules" to govern treatment of detainees, the rules are classified, so defense attorneys, judges, juries—and even nominee Mukasey—can be prevented from viewing them.

Those are some of the "facts and circumstances." They are not hypothetical; and there are simple ways for Judge Mukasey to become informed, which we propose below.

Last Thursday, President George W. Bush told reporters it was unfair to ask

Mukasey about interrogation techniques about which he had not been briefed. "He doesn't know whether we use that technique [waterboarding] or not," the president said. Judge Mukasey wrote much the same in his October 30 letter, explaining that he was unable to give an opinion on the legality of waterboarding because he doesn't know whether it is being used: "I have not been made aware of the details of any interrogation program to the extent that any such program may be classified and thus do not know what techniques may be involved in any such program." *Whether or not* the practice is currently in use by U.S. intelligence, it should in fact be easy for him to respond. All he need do is find out what waterboarding is and then decide whether he considers it legal.

The conundrum created to justify the nominee's silence on this key issue is a synthetic one. It is within your power to resolve it readily. If Mukasey continues to drag his feet, you need only to facilitate a classified briefing for him on waterboarding and the C.I.A. interrogation program. He will then be able to render an informed legal opinion. We strongly suggest that you sit in on any such briefing and that you invite the chairman and the ranking member of the Senate Select Committee on Intelligence to take part as well. Receiving the same briefing at the same time (and, ideally, having it taped) should enhance the likelihood of candor and make it possible for all to be—and to stay—on the same page on this delicate issue.

If the White House refuses to allow such a briefing, your committee must, in our opinion, put a hold on Mukasey's nomination. We are aware that the president warned last week that it will be either Mukasey as our attorney general or no one. So be it. It is time to stand up for what is right and require from the Executive the information necessary for the Senate to function responsibly and effectively. It would seem essential not to approve a nominee who has already made clear he is reluctant to ask questions of the White House. How can a person with that attitude even be proposed to be our chief law enforcement officer?

We strongly urge that you not send Mukasey's nomination to the full Senate before he makes clear his view on waterboarding. Otherwise, there is considerable risk of continued use of the officially sanctioned torture techniques that have corrupted our intelligence services, knocked our military off the high moral ground, severely damaged our country's standing in the world, and exposed U.S. military and intelligence people to similar treatment when captured or kidnapped. One would think that Judge Mukasey would want to be briefed on these secret interrogation techniques and to clarify where he stands.

The most likely explanation for Mukasey's reticence is his concern that, should his conscience require him to condemn waterboarding, this could cause extreme embarrassment and even legal jeopardy for senior officials—this time

not just for the so-called “bad apples” at the bottom of the barrel. We believe it very important that the Senate not acquiesce in his silence—and certainly not if, as seems the case, he is more concerned about protecting senior officials than he is in enforcing the law and the Constitution.

It is important to get beyond shadowboxing on this key issue. In our view, condoning Mukasey’s evasiveness would mean ignoring fundamental American values and the Senate’s constitutional prerogative of advice and consent.

At stake in your committee and this nomination are questions of legality, morality, and our country’s values. And these are our primary concerns as well. As professional intelligence officers, however, we must point to a supreme irony—namely, that waterboarding and other harsh interrogation practices are ineffective tools for eliciting reliable information. Our own experience dovetails well with that of U.S. Army intelligence chief, Maj. Gen. John Kimmons, who told a Pentagon press conference on September 6, 2006: “No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that.”

Speaking out so precisely and unequivocally took uncommon courage, because Kimmons knew that just across the Potomac President Bush would be taking quite a different line at a press conference scheduled to begin as soon as Kimmons finished his. At the White House press conference focusing on interrogation techniques, the president touted the success that the C.I.A. was having in extracting information from detainees by using an “alternative set of procedures.” He said these procedures had to be “tough,” in order to deal with particularly recalcitrant detainees who “had received training on how to resist interrogation” and had “stopped talking.”

The Undersigned

(Official duties refer to former government work.)

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