

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 23, 2008

The Honorable Michael Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Mukasey:

On October 23, 2007, we wrote to you to ask you whether the abusive interrogation technique known as waterboarding is illegal.

On October 30, you responded that waterboarding and other abusive techniques “seem over the line or, on a personal basis, repugnant to me.” You said that you could not offer an opinion on the legality of waterboarding based on “hypothetical facts and circumstances” because you had not been briefed on the government's interrogation techniques: “Legal opinions should treat real issues. I have not been briefed on techniques used in any classified interrogation program conducted by any government agency.” However, you committed that, “if confirmed I will review any coercive interrogation techniques currently used by the United States Government and the legal analysis authorizing their use to assess whether such techniques comply with the law.”

You were confirmed as Attorney General on November 8, 2007. On November 9, Senators John McCain and Lindsey Graham sent you a letter stating, “The scenarios you previously described as hypothetical are no longer so, and you now have the benefit of full access to classified programs and memoranda. We urge you to acquaint yourself immediately with these matters and take the opportunity to make clear that waterboarding is illegal and can never be employed.”

It has been over two months since then, ample time for you to study this issue and reach a conclusion. On November 27, State Department Legal Advisor John Bellinger said you were giving “high priority” to reviewing interrogation techniques, claiming, “I think there is a growing recognition ... about the need for greater clarity about what is permitted and what is prohibited.”

Your failure to say whether waterboarding is legal has placed Judge Mark Filip, the nominee for Deputy Attorney General, in a difficult position. When Judge Filip was asked at his confirmation hearing whether waterboarding was unlawful, he was unwilling to answer because you were studying the issue: “[T]he Attorney General of the United States is presently reviewing that legal question. ... I don't think I can, or anyone who could potentially [be] considered for his deputy, could get out in front of him on that question while it's under review.”

We are concerned that your silence poses a more serious threat to American servicemembers. As we noted in our October 23rd letter:

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.

This concern was highlighted recently during “The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and Is an End in Sight?” a hearing of the Senate Judiciary Committee’s Subcommittee on Terrorism, Technology and Homeland Security on December 11. Brigadier General Thomas Hartmann, Legal Advisor to the Convening Authority for the Office of Military Commissions, refused to say whether it would be legal for the Iranian government to subject an American citizen to waterboarding. He also testified that it is possible that information obtained through waterboarding could be introduced as evidence in a military commission.

In stark contrast to Brigadier General Hartmann’s refusal to say whether it would be illegal to waterboard an American, Director of National Intelligence Mike McConnell recently opined that waterboarding would be torture if used against him. According to *The New Yorker*, DNI McConnell said, “If I had water draining into my nose, oh God, I just can’t imagine how painful! Whether it’s torture by anybody else’s definition, for me it would be torture.”

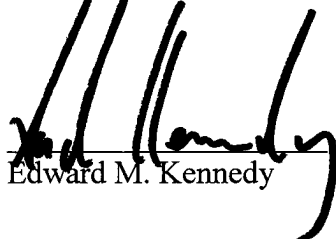
Please respond to the following questions:

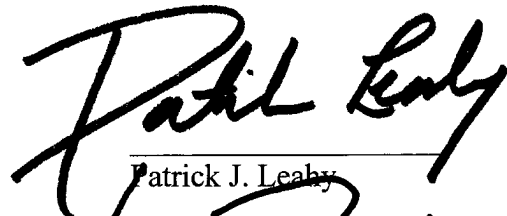
1. Is the use of waterboarding as an interrogation technique illegal under U.S. law, including treaty obligations?
2. Based on your review of other coercive interrogation techniques and the legal analysis authorizing their use, what is your assessment of whether such techniques comply with the law?

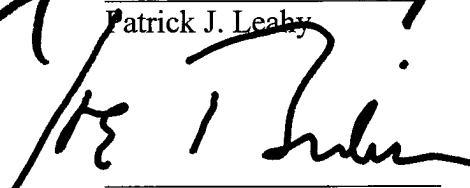
Thank you for your time and consideration.

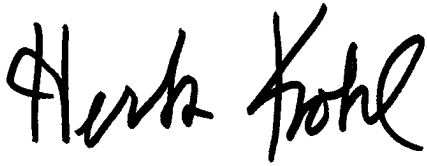
Sincerely,


Richard J. Durbin

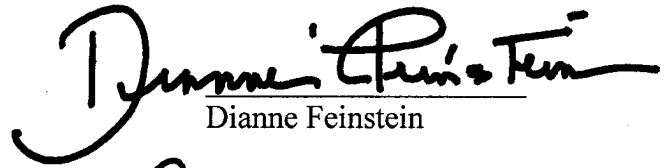

Edward M. Kennedy


Patrick J. Leahy


Joseph R. Biden, Jr.



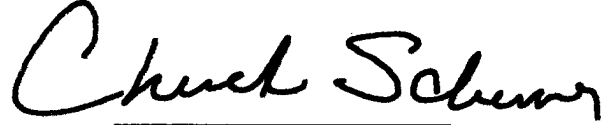
Herb Kohl



Dianne Feinstein



Russell D. Feingold



Charles E. Schumer



Benjamin L. Cardin



Sheldon Whitehouse

