MICHAEL B. MUKASEY

October 30, 2007

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

The Honorable Edward M. Kennedy
United States Senate
Washington, D.C. 20510

The Honorable Joseph R. Biden, Jr.
United States Senate
Washington, D.C. 20510

The Honorable Herb Kohl
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
United States Senate
Washington, D.C. 20510

The Honorable Russell D. Feingold
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Schumer
United States Senate
Washington, D.C. 20510

The Honorable Richard J. Durbin
United States Senate
Washington, D.C. 20510

The Honorable Benjamin L. Cardin
United States Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy, Senator Kennedy, Senator Biden, Senator Kohl, Senator Feinstein, Senator Feingold, Senator Schumer, Senator Durbin, Senator Cardin and Senator Whitehouse:

Thank you for your letter of October 23, 2007. I well understand the concerns of the Senators who signed this letter that this Country remain true to its ideals, and that includes how we treat even the most brutal terrorists in U.S. custody. I understand also the importance of the United States remaining a nation of laws and setting a high standard of respect for human rights. Indeed, I said at the hearing that torture violates the law and the Constitution, and the President may not authorize it as he is no less bound by constitutional restrictions than any other government official.

I was asked at the hearing and in your letter questions about the hypothetical use of certain coercive interrogation techniques. As described in your letter, these techniques seem over the line or, on a personal basis, repugnant to me, and would probably seem the same to many Americans. But hypotheticals are different from real life, and in any legal opinion the actual facts and circumstances are critical. As a judge, I tried to be objective in my decision-making and to put aside even strongly held personal beliefs when assessing a legal question because legal questions must be answered based solely on the actual facts, circumstances, and legal standards presented. A legal opinion based on

hypothetical facts and circumstances may be of some limited academic appeal but has scant practical effect or value.

I have said repeatedly, and reiterate here, that no one, including a President, is above the law, and that I would leave office sooner than participate in a violation of law. If confirmed, any legal opinions I offer will reflect that I appreciate the need for the United States to remain a nation of laws and to set the highest standards. I will be mindful also of our shared obligation to ensure that our Nation has the tools it needs, within the law, to protect the American people.

Legal opinions should treat real issues. I have not been briefed on techniques used in any classified interrogation program conducted by any government agency. For me, then, there is a real issue as to whether the techniques presented and discussed at the hearing and in your letter are even part of any program of questioning detainees. Although I have not been cleared into the details of any such program, it is my understanding that some Members of Congress, including those on the intelligence committees, have been so cleared and have been briefed on the specifics of a program run by the Central Intelligence Agency ("CIA"). Those Members know the answer to the question of whether the specific techniques presented to me at the hearing and in your letter are part of the CIA's program. I do not.

I do know, however, that "waterboarding" cannot be used by the United States military because its use by the military would be a clear violation of the Detainee Treatment Act ("DTA"). That is because "waterboarding" and certain other coercive interrogation techniques are expressly prohibited by the Army Field Manual on Intelligence Interrogation, and Congress specifically legislated in the DTA that no person in the custody or control of the Department of Defense ("DOD") or held in a DOD facility may be subject to any interrogation techniques not authorized and listed in the Manual.

In the absence of legislation expressly banning certain interrogation techniques in all circumstances, one must consider whether a particular technique complies with relevant legal standards. Below, I provide a summary of the type of analysis that I would undertake, were I presented as Attorney General with the question of whether coercive interrogation techniques, including "waterboarding" as described in your letter, would constitute torture, cruel, inhuman or degrading treatment, or a violation of Common Article 3 of the Geneva Conventions.

The statutory elements of torture are set forth in 18 U.S.C. § 2340. By the terms of the statute, whether a particular technique is torture would turn principally on whether it is specifically intended to cause (a) severe physical pain or suffering, or (b) prolonged mental harm resulting from certain specified threats or acts. If, after being briefed, I determine that a particular technique satisfies the elements of section 2340, I would conclude that the technique violated the law.

I note that the Department of Justice published its interpretation of 18 U.S.C. § 2340 in a December 30, 2004 memorandum to then-Deputy Attorney General James B. Comey,

which superseded the memorandum of August 1, 2002 that I testified was a "mistake." I understand that the December 30, 2004 memorandum remains the Department's prevailing interpretation of section 2340. Although the December 30, 2004 memorandum to Mr. Comey does not discuss any specific techniques, it does state that "[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."

Even if a particular technique did not constitute torture under 18 U.S.C. § 2340, I would have to consider also whether it nevertheless would be prohibited as "cruel, inhuman or degrading treatment" as set forth in the DTA and the Military Commissions Act ("MCA") -- enacted after the Department of Justice's December 30, 2004 memorandum to Mr. Comey -- which extended the Convention Against Torture's prohibition on "cruel, inhuman or degrading treatment" to individuals in United States custody regardless of location or nationality. Congress specified in those statutes, as the Senate had in consenting to the ratification of the Convention Against Torture, that the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution would control our interpretation of the phrase "cruel, inhuman or degrading treatment."

The Fifth Amendment is likely most relevant to an inquiry under the DTA and MCA into the lawfulness of an interrogation technique used against alien enemy combatants held abroad, and the Supreme Court has established the well-known "shocks the conscience" to determine whether particular government conduct is consistent with the Fifth Amendment's due process guarantees. *See County of Sacramento* v. *Lewis*, 523 U.S. 833, 850 (1998); *Rochin* v. *California*, 342 U.S. 165, 174 (1952). A legal opinion on whether any interrogation technique shocks the conscience such that it constitutes cruel, inhuman or degrading treatment requires an understanding of the relevant facts and circumstances of the technique's past or proposed use. This is the test mandated by the Supreme Court itself in *County of Sacramento* v. *Lewis* in which it wrote that "our concern with preserving the constitutional proportions of substantive due process *demands an exact analysis of circumstances* before any abuse of power is condemned as conscience shocking." 523 U.S. 833, 850 (1998) (emphasis added). As the Supreme Court has explained, a court first considers whether the conduct is "arbitrary in the constitutional sense," a test that asks whether the conduct is proportionate to the governmental interests involved. *Id.* at 847. In addition, the court must conduct an objective inquiry into whether the conduct at issue is "egregious" or "outrageous" in light of "traditional executive behavior and contemporary practices." *Id.* at 847 n.8. This inquiry requires a review of executive practice so as to determine what the United States has traditionally considered to be out of bounds, and it makes clear that there are some acts that would be prohibited regardless of the surrounding circumstances.

I would have to ensure also that any technique complies with our Nation's obligations under the Geneva Conventions, including those acts, such as murder, mutilation, rape, and cruel or inhuman treatment, that Congress has forbidden as grave breaches of Common Article 3 under the War Crimes Act. With respect to any coercive interrogation

technique, the prohibition on "cruel or inhuman treatment" would be of particular relevance. That statute, similar in structure to 18 U.S.C. § 2340, prohibits acts intended (a) to cause serious physical pain or suffering, or (b) serious and non-transitory mental harm resulting from certain specific threats or acts. Also, I would have to consider whether there would be a violation of the additional prohibitions imposed by Executive Order 13440, which includes a prohibition of willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading the detainee.

As I testified, any discussion of coercive interrogation techniques necessarily involves a discussion of and a choice among bad alternatives. I was and remain loath to discuss and opine on any of those alternatives at this stage for the following three principal reasons: First, to repeat, 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 that some may find analogous or comparable to the coercive techniques presented to me at the hearing and in your letter. Second, I would not want any *uninformed* statement of mine made during a confirmation process to present our own professional interrogators in the field, who must perform their duty under the most stressful conditions, or those charged with reviewing their conduct, with a perceived threat that any conduct of theirs, past or present, that was based on authorizations supported by the Department of Justice could place them in personal legal jeopardy. Third, for the reasons that I believe our intelligence community has explained in detail, I would not want any statement of mine to provide our enemies with a window into the limits or contours of any interrogation program we may have in place and thereby assist them in training to resist the techniques we actually may use.

I emphasize in closing this answer that nothing set forth above, or in my testimony, should be read as an approval of the interrogation techniques presented to me at the hearing or in your letter, or any comparable technique. Some of you told me at the hearing or in private meetings that you hoped and expected that, if confirmed, I would exercise my independent judgment when providing advice to the President, regardless of whether that advice was what the President wanted to hear. I told you that it would be irresponsible for me to do anything less. It would be no less irresponsible for me to seek confirmation by providing an uninformed legal opinion based on hypothetical facts and circumstances.

As I testified, 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. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports use of the technique. I view this as entirely consistent with my commitment to provide independent judgment on all issues. That is my commitment and pledge to the President, to the Congress, and to the American people. Each and all should expect no less from their Attorney General.

Sincerely,