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United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510-6050

October 31, 2007

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

Dear Judge Mukasey:

We welcome your acknowledgement in yesterday's letter that the interrogation technique known as waterboarding is "over the line" and "repugnant," and we appreciate your recognition that Congress possesses the authority to ban interrogation techniques. These are important statements, and we expect that they will inform your views as Attorney General. We also expect that, in that role, you will not permit the use of such a practice by any agency of the United States Government.

You have declined to comment specifically on the legality of waterboarding, deeming it a hypothetical scenario about which it would be imprudent to opine. Should you be confirmed, however, you will soon be required to make determinations regarding the legality of interrogation techniques that are anything but hypothetical. Should this technique come before you for review, we urge that you take that opportunity to declare waterboarding illegal.

Waterboarding, under any circumstances, represents a clear violation of U.S. law. In 2005, the President signed into law a prohibition on cruel, inhuman, and degrading treatment as those terms are understood under the standards of the U.S. Constitution. There was at that time a debate over the way in which the Administration was likely to interpret these prohibitions. We stated then our strong belief that a fair reading of the "McCain Amendment" outlaws waterboarding and other extreme techniques. It is, or should be, beyond dispute that waterboarding "shocks the conscience."

It is also incontestable that waterboarding is outlawed by the 2006 Military Commissions Act (MCA), and it was the clear intent of Congress to prohibit the practice. As the authors of the statute, we would note that the MCA enumerates grave breaches of Common Article 3 of the Geneva Conventions that constitute offenses under the War Crimes Act. Among these is an explicit prohibition on acts that inflict "serious and non-transitory mental harm," which the MCA states (but your letter omits) "need not be prolonged." Staging a mock execution by inducing the misperception of drowning is a clear violation of this standard. Indeed, during the negotiations, we were personally

assured by Administration officials that this language, which applies to all agencies of the U.S. Government, prohibited waterboarding.

We share your revulsion at the use of waterboarding and welcome your commitment to review existing legal memoranda covering interrogations and their consistency with current law. It is vital that you do so, as anyone who engages in this practice, on behalf of any U.S. government agency, puts himself at risk of criminal prosecution, including under the War Crimes Act, and opens himself to civil liability as well.

We must wage and win the war on terror, but doing so is fully compatible with fidelity to our laws and deepest values. Once you are confirmed and fully briefed on the relevant programs and legal analyses, we urge you to publicly make clear that waterboarding can never be employed.

Sincerely,

John McCain
United States Senator

John Warner
United States Senator

Lindsey Graham
United States Senator