great sacrifices in our country's name so that we might continue to be the land of the free and the home of the brave.

We are faced tonight with a vote on a bill that our troops need, but the troops are not the focus of this conference report. This political tactic does our troops and all Americans who want good government, a disservice.

I want to provide our troops with the funding and the resources they need to be successful in all their objectives. I want the Senate to consider the Fiscal Year 2008 Defense Appropriations Act on its merit. Legislating isn't a barter system, or at least it shouldn't be. The men and women of our armed services deserve better than having the funding they need to do their job being used in a horse-trading scheme so a Member of Congress can get funding for his or her own special cause. There is more than $50 million worth of projects being slipped in this so-called CR. We are moving quickly toward midnight. I guess that's a fitting time to vote on a bill laden with pork slipped in under the cover of darkness. The people of the United States deserve better.

Mrs. MCCASKILL. Mr. President, with great reluctance, I will vote today in opposition to passage of the 2008 Department of Defense appropriations conference bill. This legislation contains $459 billion in funding to provide the resources needed to run daily military operations.

I supported this legislation when it first came to the Senate floor in October. However, I can not vote in support for the final House-Senate conference report because it contained $59 million in earmarks that were added during the closed-door conference negotiations. One of those earmarks was for $3 million to fund a golf center that is in the name of the congressman who requested it. What is a golf center doing on a DOD appropriations bill?

This was a difficult decision because I strongly support most of the provisions in this bill, and I have deep respect for Chairman INOUYE and Ranking Member STEVENS and their efforts to craft a good funding bill.

However, I made a commitment during my campaign and when I took my oath of office in January to reform the secretive earmarking process. I thought we had made real progress with the passage and enactment of S.1, the ethics reform bill, that requires far more transparency and disclosure on earmarks than there has ever been. Unfortunately, I have since discovered there are still some gaps in the ethics bill that need to be filled.

One of which has to do with the difficulty of raising a 60-vote point of order on earmarks added during appropriations conference negotiations. S.1 says that we can do that. But in reality, we really can't. Most of these added funding earmarks are contained in the Joint Explanatory Statement of Managers, which, technically, isn't part of the conference report bill text. What that means is we can't raise a point of order against those earmarks to strike them out of the bill.

Let me give me you some perspective on what we are talking about. The Defense appropriations conference text was 133 pages long. The Joint Explanation of Managers—470 pages long. The JES as they call it, contains all of the earmarks, all kinds of substantive direction and is three times as long as the official conference report, and it is not subject to a point of order? This is wrong. It's not what I believe most of us thought would escape the oversight rules of S. 1 when we voted for it. At the very least, it seems disingenuous in how we sold this bill to the American public as a way to clean up our taxpayer-funded shop and how we do business around here.

I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SANDERS). Without objection, it is so ordered.

EXECUTIVE SESSION

NOMINATION OF MICHAEL B. MUKASEY TO BE ATTORNEY GENERAL

Mr. REID. Mr. President, I ask unanimous consent the Senate now proceed to executive session to consider Executive Calendar No. 374, the nomination of Michael Mukasey to be Attorney General of the United States; that there be a time limitation of 5 hours of debate equally divided between the chairman and ranking member of the Judiciary Committee, with the Democratic time divided as follows: Senator LEAHY, 45 minutes; Senator DORGAN, 15 minutes; Senator DURBIN, 20 minutes; Senator CARDIN, 10 minutes; Senator REED, 15 minutes; Senator KENNEDY, 10 minutes; Senator HARKIN, 10 minutes; Senator BOXER, 15 minutes; Senator SALAZAR, 10 minutes; that upon the conclusion or yielding back of the time, the leaders be recognized for 10 minutes each, with the majority leader going last; that the Senate then vote on confirmation of the nomination; the motion to reconsider be laid on the table; the President be immediately notified of the Senate's action, and the Senate then resume legislative session; that the Senate then, without intervening action or debate, vote adoption of the conference report on H.R. 3222.

The PRESIDING OFFICER. Is there objection?

Mr. LOTT. Mr. President, I wish to put in the RECORD that this has been cleared with the leader on our side also. I have no objection.

The PRESIDING OFFICER. Without objection, it is so ordered.

The majority leader.

Mr. REID. Mr. President, I appreciate the cooperation of everyone. This has been a difficult day. These are very sensitive issues we are dealing with, with the troops and the financing of the country, in addition to the nomination of a Cabinet officer. It is a time when you need cooperation from both sides. That is what we have had. It has not been easy. I extend my appreciation to my colleagues on the other side of the aisle and the cooperation of my Members. I would finally say that for those of you who have had questions asked by Democrats and Republicans, we are going to finish the farm bill. There is some real movement on that with amendments. I feel comfortable we will be able to get that done in the near future. I appreciate everyone's cooperation.

The PRESIDING OFFICER. The clerk will report the nomination.

The assistant legislative clerk read the nomination of Michael B. Mukasey, of New York, to be Attorney General.

The PRESIDING OFFICER. The assistant majority leader.

Mr. DURBIN. Mr. President, the Senate is now taking up the nomination of Judge Michael Mukasey to be the next Attorney General of the United States. It is a nomination which has become controversial. Judge Mukasey has served his country in many different ways. He served as a Federal judge before he retired, then went into private practice and was summoned to serve as Attorney General by this President. I had a chance to meet with him personally in my office. One cannot help but be impressed by the man's intelligence and erudition. He clearly is a person of strongly held beliefs and it takes little time to appreciate that when you meet him.

I left, after meeting him in my office, believing his nomination hearings would be interesting, and they were. On the first day, Judge Mukasey was a great witness, saying things that needed to be said about his plans to change the Department of Justice from the days of Alberto Gonzales, about his feeling of responsibility to the country not to abide by any decisions made by the President that were inconsistent with the law or the Constitution.

He went so far as to say he would resign before he would allow that to occur. I can recall speaking to my colleagues, including Senator SCHUMER, who sat next to me in the Judiciary Committee, and saying: What a breath of fresh air, how refreshing that he would be so candid and forthright. After all the years of Alberto Gonzales dodging questions, refusing to answer, here was a man who answered the questions. That was the first day.

Then came the second day of the hearing. When my turn came to ask questions, I proceeded to ask Judge Mukasey specific questions about torture. His answers to those questions led to a great deal of controversy and lead us to this moment in the Senate debate.

When we write the history of this early 21st century in America, there are going to be countless stories of courage and compassion: Firefighters and police officers racing into the burning Twin Towers minutes before they collapsed on 9/11.

The passengers on United Airlines flight 93 overcoming hijackers and plunging to certain death instead of allowing the terrorists to reach what many believe was their intended target, the U.S. Capitol, and those of us working in the building at the time. Those passengers on that flight were true American heroes. Those of us in the Senate and the House and all of us in the Capitol will be forever in their debt.

There were hundreds of thousands of brave service men and women, every single one of them volunteers, leaving families and friends to defend our country. Thousands of them have come home to America in flag-draped coffins. Stories of courage and stories of compassion.

Sadly, during the same period, there have been stories of cowardice and cruelty. A short way down Pennsylvania Avenue from this Capitol building is the U.S. Department of Justice. In that building, attorneys manipulated the law to justify practices which were unthinkable in America. They put our troops at risk and sacrificed principles for which America has always stood and for which thousands died on 9/11 and the years since. They did tremendous harm to the image of this great Nation. The late historian Arthur Schlesinger, Jr., said this about the Bush administration's torture policy:

> No position taken has done more damage to the American reputation in the world—ever.

Alberto Gonzales was an architect of the Bush administration's torture policy. As White House counsel, he recommended the President set aside the Geneva Conventions. The phrase ''Geneva Conventions'' brings to mind civility, fairness, and justice. How did Alberto Gonzales characterize the Geneva Conventions? He called them ''quaint'' and ''obsolete.'' He requested and approved the infamous Justice Department torture memo that limited the definition of torture to abuse that causes pain equivalent to organ failure or death.

Now we are asked to consider the nomination of Judge Michael Mukasey to succeed Alberto Gonzales. Judge Mukasey is obviously intelligent, with a distinguished record. But that is not enough. In light of Alberto Gonzales's shameful role in justifying torture, Judge Mukasey bears a special burden to make clear where he stands on the issue. I am sorry to say he has not met that burden.

Prior to his confirmation hearing when I met him in private, his responses troubled me. He told me ''there is a whole lot between pretty please and torture'' and that coercive techniques short of torture are sometimes effective. When I reminded Judge Mukasey that cruel, inhuman, and degrading treatment are illegal under U.S. law, he said he thought these terms were ''subjective'' and suggested the President might have authority as Commander in Chief to ignore the prohibition.

In light of these responses, which troubled me greatly, I decided to follow up with the questions I asked at his confirmation hearing. I asked him whether the torture technique known as waterboarding is illegal. He refused to answer, saying:

> I don't know what's involved in the technique. If waterboarding is torture, torture is not constitutional.

Frankly, I was surprised that Judge Mukasey was unfamiliar with waterboarding. This is not a new technique. It may be one of the oldest recorded forms of torture in the world.

Retired RADM John Hutson, former Navy Judge Advocate General, also testified at Judge Mukasey's hearing. He was asked about Judge Mukasey's position on waterboarding. This is what he said:

> Other than perhaps the rack and thumbscrews, waterboarding is the most iconic example of torture in history. . . . It has been repudiated for centuries. It's a little disconcerting to hear now that we're not quite sure where waterboarding fits in the scheme of things. I think we have to be very sure where it fits in the scheme of things.

To give Judge Mukasey a chance to clarify his views, I wrote him a letter, which all 10 Democrats on the Senate Judiciary Committee signed, and asked him a very straightforward question. Certainly, straightforward questions need to be fielded by lawyers, by judges, and the Attorney General.

The question was this: Is waterboarding illegal?

It took Judge Mukasey four pages, in a response to our committee, to say nothing. He refused to say whether waterboarding was illegal because ''hypotheticals are different from real life.'' He went on to say it would depend on ''the actual facts and circumstances.''

Waterboarding is not hypothetical. This old woodcut dates back to the Spanish Inquisition, 515 years ago. It shows a prisoner being subjected to waterboarding. This is no new idea. It is simulated drowning to create panic in the mind of the detainee and to force compliance.

The Spanish inquisitors referred to waterboarding as ''tormenta de toca,'' after the linen towel they placed over a victim's mouth and nose during the procedure. Waterboarding was part of an elaborate regime of torture that included the rack and dislocating limbs by means of a pulley.

Here we are 500 years later, and it is still being used today, sadly, in Burma by the military dictatorship. There are no facts and circumstances that need to be considered—it either is or it isn't torture.

Judge Mukasey would not say whether waterboarding was torture. Many others have, and they did not need four pages of legal obfuscation. I received a letter from four retired military officials about Judge Mukasey's position on waterboarding. This is what they said:

> This is a critically important issue—but it is not, and never has been, a complex issue. . . . Waterboarding detainees amounts to illegal torture in all circumstances. To suggest otherwise—or even to give credence to such a suggestion—represents both an affront to the law and to the core values of our nation.

In a recent statement on the Mukasey nomination, Republican Senators JOHN MCCAIN, JOHN WARNER, and LINDSEY GRAHAM wrote:

> Waterboarding, under any circumstances, represents a clear violation of U.S. law. . . . anyone who engages in this practice, on behalf of any U.S. government agency, puts himself at risk of criminal prosecution.

The Judge Advocates General, the highest ranking military lawyers in America—all four branches—testified unequivocally to the Senate Judiciary Committee that waterboarding is illegal and violates Common Article 3 of the Geneva Conventions. If these high-ranking military officials and our fellow colleagues in the Senate can answer this question so directly, why can't Judge Mukasey?

Let's take an example.

BG Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of the Marine Corps, stated that ''threatening a detainee with imminent death, to include drowning, is torture.'' No equivocation there. Nothing about ''facts and circumstances.'' He did not need to hear more. Simulated drowning is torture.

Malcolm Nance is a former master instructor and chief of training at the U.S. Navy Survival, Evasion, Resistance and Escape School. He trained Navy SEALS to resist torture, including waterboarding. Listen to what Mr. Nance, former master instructor of the SEALS, had to say:

> I know the waterboard personally and intimately. . . . I personally led, witnessed and supervised waterboarding of hundreds of people. . . . Waterboarding is a torture technique. Period. There is no way to gloss over it or sugarcoat it. . . . Waterboarding is slow motion suffocation with enough time to contemplate the inevitability of black out and expiration—usually the person goes into hysterics on the board. . . . When done right it is controlled death.

Each year, our State Department stands in judgment of the human rights record of the world. It is a rather bold thing for us to do, to say that our Nation has the moral authority to judge all the nations in the world when it comes to human rights. This is not the first President to do it. Many before have. Our own State Department has long recognized that waterboarding is torture and repeatedly criticized countries such as Sri Lanka and Tunisia for the use of the technique—a technique Judge Mukasey will not even acknowledge as torture.

For over 100 years, our Government has treated waterboarding as a crime.

Judge Evan Wallach, who used to work for majority leader HARRY REID, is a former military lawyer and expert on waterboarding. He recently wrote a study that concluded:

In all cases, whether the water treatment was applied by Americans or to Americans, or simply reviewed by American courts, it has uniformly been rejected as illegal, often with severely punitive results. . . .

In April of 1902, 105 years ago, during the U.S. occupation of the Philippines, Secretary of War Elihu Root directed that officers alleged to have used water torture be tried by court-martial. That year, U.S. Army MAJ Edwin Glenn was convicted of having ordered and directed the application of the so-called water cure. Army Judge Advocate General George Davis said of Major Glenn that he was guilty of ''a resort to torture with a view to extort a confession.'' Mr. President, 105 years ago we convicted an American soldier of engaging in torture, for using waterboarding in the Philippines.

What happened after World War II? The United States prosecuted Japanese military personnel as war criminals for waterboarding U.S. and other prisoners.

At the U.S. military commission at Yokohama, we tried three Japanese defendants for torture. The charges included ''fastening [an American Prisoner of War] on a stretcher and pouring water up his nostrils.'' During the trial, Thomas Armitage, one of the American victims, described it. This is what he said:

[T]hey would lash me to a stretcher then prop me up against a table with my head down. They would then pour about two gallons of water from a pitcher into my nose and mouth until I lost consciousness.

What did we say of the Japanese soldiers responsible for that heinous conduct? We said they were guilty of war crimes—war crimes against American soldiers and prisoners. They were convicted and sentenced to between 15 and 25 years of confinement at hard labor—for a crime that this man who would be our Attorney General cannot acknowledge as obvious, clearly illegal, and inconsistent with America's values.

In the trial of a Japanese soldier for the torture and murder of Philippine civilians, one victim testified:

I was ordered to lay on a bench and [they] tied my feet, hands and neck to that bench lying with my face upward. After I was tied to the bench [they] placed some cloth on my face and then with water from the facet they poured on me until I became unconscious.

What does it take? What does it take to get this man who wants to be the premier law enforcement official in America to acknowledge the obvious? Waterboarding is torture. Waterboarding is illegal. Waterboarding is unconstitutional and inconsistent with American values.

Some within this administration share the puzzlement that Judge Mukasey has over torture. Apparently, Vice President DICK CHENEY is one. He was asked whether it would be acceptable to him to give a detainee ''a dunk in the water.'' The Vice President's response was: ''it's a no-brainer for me.''

And the Bush administration now seems to have reined in the State Department, despite the fact that we have condemned other nations for waterboarding. Earlier this week, John Bellinger, the State Department's top legal adviser, was asked whether there could be any circumstances in which a foreign government could justify waterboarding an American citizen. Listen to this response from the Bush administration as to whether an American citizen could be waterboarded:

One would have to apply the facts to the law, the law to the facts, to determine whether any technique, whatever it happened to be, would cause severe physical pain or suffering.

Incredible. We prosecuted Japanese soldiers for doing this to Americans, and now this administration, maintaining this notion that somehow this is a hazy, undefinable concept, will not even clearly condemn the use of waterboarding to torture Americans.

Judge Mukasey's position on waterboarding is troubling, but there are other serious concerns which I explained during the Judiciary Committee debate. He would not answer direct questions about other torture techniques even though the Judge Advocates General had made it clear they were torture. Sadly, time and again, he said his response would depend on the facts and circumstances.

Mr. President, I do not know when—I do not know if I will be here to see it; I may not be alive at the time—but history will be written about this moment. The history will be written about what we have done as a nation under the administration of George W. Bush. There will be good things said, I am sure, but there will also be chapters written about, how this administration raised an issue which we thought was a settled matter, how this administration has now brought in play the question of torture, how this administration has identified this great, caring, and good Nation with that issue.

Our only hope is that men and women of courage within this administration and outside will stand up and say clearly, once and for all, torture is un-American, torture is ineffective, and torture is unacceptable when applied to detainees in our control or to Americans in the control of others. Judge Mukasey would not say that. He was unwilling to make those statements.

I think this issue transcends many other issues. Some will come before us and say the problem here is Congress just has not done its job. If Congress would sit down and really put a good definition of torture together, then maybe we could ask Judge Mukasey about it, ask whether he would enforce it.

Really? Mr. President, 105 years ago, the United States knew waterboarding was torture and prosecuted an American soldier for engaging in it. Sixty years ago, we knew waterboarding was torture and prosecuted Japanese soldiers for war crimes. And now, in this moment in history, is there really any uncertainty? The real uncertainty is what the administration has done in the name of our country in the treatment of prisoners.

When the history of this time is written, there will be stories of courage and stories of cowardice. Rest assured, the United States will not be viewed kindly if we confirm as the chief law enforcement officer of this country someone who is unwilling or unable to recognize torture when he sees it.

I yield the floor.

The ACTING PRESIDENT pro tempore. Who yields time?

The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, the allocation has been made of 5 hours equally divided on the confirmation of Judge Michael Mukasey to be Attorney General and also to cover the Department of Defense appropriations bill.

I have been informed that I will be in charge of the allocation of time. So I say to my colleagues who want to speak in favor of former Judge Mukasey or who want to speak on the Defense appropriations bill on the Republican side, come to the floor and let me know how much time you would like. The Democrats who are speaking in favor of Judge Mukasey will come out of my time as well. We ought to have some idea as to how much time will be required. Five hours will put us close to midnight.

The ways of the Senate are wondrous. It is hard to figure out—we had our last vote at 11:45 and finished shortly after noon and could have started this debating process early in the afternoon. But, as I say, in the wondrous ways of the Senate, we could not begin it until 7 o'clock, until we had reached an agreement on procedural details, which might well have been done earlier. But I have been here a while, and I learned a long time ago the Senate is a lot smarter than I am, and we follow—we play the cards we are dealt. But I don't think there is any need for us to be in session until midnight, although things could get lively and perhaps some stray television viewers will turn on C–SPAN 2; they certainly wouldn't do it during the daytime when the soaps are on. But, it may well be that the time will be yielded back. And so, I inform my colleagues to not necessarily expect to vote as late as midnight, although that may be the case.

Now, on to former Federal Judge Michael Mukasey. He is a man with an outstanding record. If you went to central casting, you couldn't find a better prospect to be Attorney General of the United States on substance or on qualifications. He graduated from Columbia University in 1963, Yale Law School in 1967, and was on the Board of Editors of the Yale Law Journal. With credentials from Yale, including the Board of Editors, and his high academic standing,

these are excellent qualifications. He was an associate in a major New York law firm for 5 years after graduating from law school. He was then an assistant United States Attorney for the Southern District of New York from 1972 to 1976 and was chief of the Official Corruption Unit for 2 years. Then, he returned to the practice of law for 11 years and became a Federal judge in 1988, serving for almost two decades, through 2006. He was Chief Judge of the Federal Court in the Southern District of New York in Manhattan from 2000 to 2006 where he presided over some very important trials involving terrorism. The courthouse for the Federal court in New York was just a few blocks from the Trade Towers, which were victimized on September 11, 2001.

Now, a great deal has been said about the issue of waterboarding. The Senator from Illinois who just spoke said the morals of our country will be judged by what has gone on with Judge Mukasey's confirmation process. We have worked through this issue, and I believe we have a satisfactory resolution of it, which accomplishes the substance of what the Senator from Illinois was decrying.

I am opposed to waterboarding. I think waterboarding is torture. When the issue was before the U.S. Senate on the Military Commission Act, we had a vote, and this body voted 53 to 46 not to classify waterboarding as torture. That is what the Senate did. In another legislative matter, the Detainee Treatment Act, waterboarding was prohibited. But, as of this moment, the Congress of the United States has not spoken on the matter.

Now Judge Mukasey has stated that if waterboarding is declared the equivalent of torture, as Attorney General he will uphold that congressional determination, even if the President seeks to reject the statute by virtue of the President's Article 2 powers as Commander in Chief and other inherent authority, which the President possesses under Article 2. Now that is exactly what the President did on the Terrorist Surveillance Program. The Foreign Intelligence Surveillance Act enacted in 1978 specifies that the exclusive way to wiretap is to go to a Federal judge with a statement of probable cause and get a warrant—judicial approval—to do the wiretapping. But, President Bush said he had authority to disregard the statute because he had constitutional authority.

As a matter of constitutional doctrine, you can't amend the Constitution with a statute. To amend the Constitution, you have to have a constitutional amendment. An amendment must pass the Congress by a two-thirds vote and be ratified by three-fourths of the States.

So the President took the position that his constitutional power superseded the statute, and he rejected it and ignored it. I have grave doubts about the propriety of what the President did. We didn't find out about it until it was disclosed in the newspapers in mid-December of 2005 when we were in the midst in this Chamber of debating the PATRIOT Act. I chaired the Judiciary Committee, and I was at this podium managing that bill when the news broke in the morning papers that day, and a number of Senators said they were prepared to vote for the PATRIOT Act until they found out what had been done secretly under the Terrorist Surveillance Program.

As the record shows, we didn't pass the bill until early in 2006. But the relevance of that procedure is that there was concern that even if Congress said waterboarding was torture and was therefore illegal, the President might seek to use his Article 2 powers to ignore that law.

The first disclosure that former Judge Mukasey would not uphold that type of Presidential action came with a disclosure by Senator SCHUMER about a meeting he had with former Judge Mukasey last Friday. It appeared in the press that Judge Mukasey would say the congressional enactment was controlling. I then had a discussion by telephone with Judge Mukasey last Monday morning to be explicit and to confirm what I had read in the papers. Not wanting to rely on that, Judge Mukasey told me he that it was his legal judgment that Congress had the constitutional authority to legislate, to say waterboarding was torture and was, therefore, illegal. And if such legislation was enacted, then it was Judge Mukasey's legal judgment that the President could not supersede the statute and could not rely on Article 2 power to ignore that finding. That was confirmed in writing.

I ask unanimous consent that a copy of that letter dated last Monday, November 5, be printed in the RECORD.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 1.)

Mr. SPECTER. I said in the letter, as the record will show, if Judge Mukasey had any difference with my statement, he should let me know promptly. I know it was received by White House personnel, and we communicated, staff to staff, about it, and that is a binding commitment. That commitment, in conjunction with Judge Mukasey's response to my questioning—I asked him if the President of the United States ignored his advice as Attorney General if and when confirmed on a matter of serious import, would Judge Mukasey resign as Attorney General, just as Attorney General Elliot Richardson had resigned on the Saturday Night Massacre when efforts were made to stop the investigation of President Nixon at that time, and Judge Mukasey said he would resign. So, I think we have a very solid record.

Now, I do believe there were reasons Judge Mukasey did not express a judgment on waterboarding as being torture, although candidly it would have been my preference if he had done so and if he had agreed with my vote on the subject. But, Judge Mukasey said in written responses that he believed he could not make that pronouncement without placing people at risk to be sued or perhaps even criminally prosecuted. A few weeks ago, former Secretary of Defense Rumsfeld was in Paris at a time when people sought legal process against him. It was unclear whether it was a criminal procedure or a civil procedure, but we do know that many nations are exercising extraterritorial jurisdiction when they may consider conduct to be a violation of the law against humanity.

We know, for example, that Israeli Prime Minister Sharon was indicted, I believe it was in Belgium. They couldn't serve the warrant, but had he gone to Belgium. He would have been subject to that process. We know the case of Pinochet from Chile where extraterritorial jurisdiction was sought as to him. So this is a matter of some considerable import.

Professor Goldsmith wrote, speaking from his experience as Assistant Attorney General in the Office of Legal Counsel, that members of the administration had expressed concerns that they might be subject to civil liability or even criminal liability if it was later determined that some of their conduct was illegal. So, Judge Mukasey faced a situation where an expression of an opinion by him would put people at risk.

Professor Goldsmith, in a book which was recently published, documented the concern that members of the administration had expressed. Judge Mukasey also sought to explain his unwillingness to give a legal opinion on whether waterboarding was torture because he hadn't been read into the program. I thought that was inadequate and insufficient. While it is true he was not read into the program, there is no doubt it would have been easy for him to have been read into the program. The investigation which had been conducted prior to the President submitting his name to the Senate as a nominee for Attorney General was very thorough, and there is no doubt that he would have been entrusted with whatever classified information was involved in being informed on the issue of waterboarding. So I thought that was an excuse and not weighty—or not a valid excuse.

Parenthetically, I think it is worth noting that there are members of the Judiciary Committee who were called upon to pass on Judge Mukasey's qualifications who had not been read into the program on waterboarding; that is, to know specifically what it was, whether it was used, what it was all about, was it entirely hypothetical, or what the facts were. We have some members of the Judiciary Committee—four—who are on the Intelligence Committee. The chairman and I as ranking member were read into the program. I tried to get the administration to read

the members of the Judiciary Committee into the program, but the administration wouldn't do it. Now, they read the Intelligence Committee into the program, and I think the Intelligence Committee should have been read into the program, but the operative committee to pass on Judge Mukasey was not the Intelligence Committee. It was the Judiciary Committee. We voted on Judge Mukasey with members of the Judiciary Committee not knowing the specifics on waterboarding to have a sufficient basis, in my view, to cast an intelligent vote. But the administration precluded that. This evening, there will be about 80 Senators—if they stay up until midnight, or whenever it is that we vote—who will be voting on Judge Mukasey and waterboarding is going to be a central issue of the debate tonight—without knowing the details of what waterboarding is.

The brutal fact is that the administration has not given Congress the information Congress should have received so that we can perform our oversight function. The Intelligence Act requires that members of the Intelligence Committee be notified of matters such as the secret terrorist surveillance program, and it may be that a few Members of Congress—the Speaker of the House, the senior Republican in the House, the majority leader of the Senate, and the minority leader of the Senate—were informed about the terrorist surveillance program. It may be that, finally, the chairman and ranking members on the Intelligence Committee in both Houses were informed. But the full committee, under the statute, was supposed to be informed. The administration didn't follow the statute as they should have. It was only when the confirmation of General Hayden came before the Senate that the administration finally notified the Intelligence Committee.

I voted against General Hayden to be Director of the CIA as a protest vote. I said he was well qualified for the job, and I voted against him as a protest because the administration had not followed the law. They should have informed me, as chairman of the Judiciary Committee in the 109th Congress, and Senator LEAHY, as ranking member. That is a statement of what might be considered as a collateral matter. It is relevant in this discussion because Judge Mukasey was not read into the program. I think he should have been. I don't know that he would have said anything more. But now the ball is squarely in our court—the congressional court. Legislation is pending that would make waterboarding torture and, therefore, illegal.

This is the kind of question which I think is a quintessential example of what the Congress of the United States ought to decide. In a representative democracy, the Congress ought to make the determination of what is the appropriate public policy, and the Congress ought to assess the risk of terrorism—what is the risk to the United States?—and then consider the conduct of waterboarding. What does it do? How frequently has it been used, if at all? Where is there an intent to use it? The Congress ought to make this evaluation and make the decision. We are the proper people to decide that issue. If the Congress enacts legislation that is signed into law, then Judge Mukasey has stated unequivocally that he would enforce it.

Then there is another issue we all dance around, and that is the issue of the so-called ticking-bomb case. That is the situation described where a terrorist may come into possession of a powerful weapon—perhaps even a nuclear weapon—and, regrettably, that is not beyond the realm of possibility. There might be a situation where someone would know information that could stop the ticking bomb and injury to an enormous number of people could be prevented. What is to be done in that situation?

The generalized statements that have been made by so-called leaders in our society are that we ought not to define that situation. They say, if we were to say that torture, waterboarding, or some other extreme form of interrogation were legal under even the most limited circumstances, that we would give legitimacy to waterboarding, to torture. And then with an exception, you find people that say—as the expression goes, the hole is so big, you could drive a truck through it. But, if this Senate and the House take up our duty to decide whether waterboarding is torture, we ought to make a decision as to whether it could be used in any circumstance. Perhaps we should decide it should be used in no circumstance.

There has also been discussion about legislation to define the extraordinary circumstances when torture would be permitted—with a warrant application to a judge. We ask for judicial approval on wiretapping or warrants of arrest or on a variety of issues.

Then there are some who the surmise that if the President was faced with a situation of a ticking bomb, it would be up to the President to act under those exigent circumstances, and he could be relied upon. But that is not so easy either because it may well be—and I think, in fact, is—that agents of the CIA would not undertake, under a Presidential order, a violation of U.S. law because no one is above the law. Even if the President were to authorize it, the President doesn't do the waterboarding or interrogation. Those people would be unwilling to undertake something that was a violation of law.

There was a famous case, after World War I, where a ship was sunk by a submarine. The survivors in the lifeboat were at sea, and the submarine surfaced. The commander ordered the gunner to shoot the people in the lifeboat. The gunner resisted for a while, and then he followed his orders. He shot and killed the people in the lifeboat. The gunner was prosecuted, and he defended that he was following orders. The court said that you cannot follow illegal orders. Anybody should know better than to shoot people in a lifeboat.

So we have a major issue to consider as it relates to the confirmation of Judge Mukasey, and I think the ball is now in our court. He will enforce legislation that equates waterboarding with torture.

There are a couple of other points worthy of comment. I was not satisfied with Judge Mukasey's response to my questions on signing statements. We have seen that the President of the United States now does not follow the constitutional options when legislation is presented to him having been passed by both bodies, both Houses, where the Constitution says the President has the choice of signing it or vetoing it. We now find that he signs it and issues the signing statement, cherry-picking, deciding which of the provisions he will enforce and which he will not enforce.

One of the measures passed by Congress by a 90-to-9 vote of the Senate was prohibiting interrogation that met certain standards. The President had a famed rapprochement with Senator MCCAIN on the point. They came to terms. We passed the McCain language. Then the President issued a signing statement which, in effect, said he retained his Article II powers not to follow it.

The PATRIOT Act, which came out of the committee during my tenure as chairman, gave the FBI substantial additional powers. In consideration of that, we reserved additional oversight. And then, notwithstanding that negotiation approved by the President's agents at the Department of Justice, the President issued a signing statement cherry-picking and leaving him free to disregard the oversight provision.

I think Judge Mukasey should have been unequivocal in condemning that practice and should have said he would advise the President to either sign legislation or veto it but not to cherry-pick. He had a very artful answer where he says he will try to avoid this kind of tension and conflict between the executive branch and the Congress. While I don't like that, I don't think it is a sufficient reason to vote against him.

Judge Mukasey was forthright on his views as to habeas corpus. He acknowledged that habeas corpus is a constitutional right, unlike his predecessor, who really rejected the plain English of the Constitution, which states that habeas corpus is a constitutional right.

Considering all of these factors, it is my judgment, after meeting informally with former Federal Judge Mukasey and participating in the extensive hearings and reviewing answers to many written questions, that Judge Mukasey is well qualified to be Attorney General. I think it unfortunate that there will be many negative votes

against him. I think those negative votes will be in the context of this waterboarding issue, where there are very substantial emotional and political considerations involved, and Senators exercise rights to vote as they choose. But I do believe that even those who vote against Judge Mukasey will acknowledge his qualifications. He is well qualified by way of academic and professional background, and he has a very sterling record as a judge; that he is honest, forthright, and talented. He is a lawyer's lawyer or a judge's judge. When you talk to him or question him at a hearing, you get back very sophisticated, erudite answers, analytically displaying a vast knowledge of the Constitution and the cases which have been interpreted. What weighs heavily in my mind on Judge Mukasey is the urgent need of the Department for new leadership.

I thank the chairman for having a special markup on Tuesday. It was extra work for the committee, but Senator LEAHY called the Judiciary Committee together for an extra markup. He has exercised the leadership to bring this matter to a vote tonight.

I thank the distinguished majority leader also for scheduling the vote, because the Department of Justice needs Judge Mukasey at work tomorrow morning. They need to have him sworn in sometime between the vote of confirmation tonight and 8 a.m. tomorrow, when people ought to report to work at the Department of Justice. The Department of Justice has been categorized as dysfunctional, in disarray. It is in urgent need of an Attorney General. When that is done, I think we will see some nominations for Deputy, which is vacant. An Associate Attorney General is only an acting deputy, and a number of assistants are only acting.

All things considered, I think it is in the national interest that we confirm former Federal Judge Mukasey. I predict he will do a sterling job as Attorney General.

How much time remains, Mr. President?

The ACTING PRESIDENT pro tempore. The Senator has 2 hours remaining under his control.

Mr. SPECTER. I thank the chair and yield the floor.

EXHIBIT 1

U.S. SENATE,
Washington, DC, November 5, 2007.

Hon. MICHAEL B. MUKASEY,
Avenue of the Americas,
New York, NY.

DEAR JUDGE MUKASEY: I think it is important to have our telephone conversation of this morning on the record so I'm writing to confirm the following:

(1) In your opinion, Congress has the constitutional authority to legislate that waterboarding is torture and is therefore illegal; and

(2) If such legislation is enacted, it is your opinion that the President would not have the authority under Article II of the Constitution to overrule that legislation.

If I have inaccurately stated our conversation, I would appreciate your prompt advice.

As we discussed, the New York Times on Saturday quoted Senator Schumer on your commitment to the same effect. If I do not hear from you to the contrary, I intend to release this letter to the news media because this information would be important on the Senate's consideration of your confirmation.

Sincerely,

ARLEN SPECTER.

The ACTING PRESIDENT pro tempore. The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, how much time has been reserved for the Senator from Vermont?

The ACTING PRESIDENT pro tempore. The Senator has 45 minutes.

Mr. LEAHY. How much time is reserved overall for those in opposition to this nomination?

The ACTING PRESIDENT pro tempore. An hour and 45 minutes. Twenty has been used, so 1 hour 25 minutes remains.

Mr. LEAHY. I thank the Chair.

Mr. President, this debate is as much a discussion of principles that are vital to American ideals and to the American soul as it is a debate about who is going to act as the Attorney General for the next 14 months.

During the Judiciary Committee's consideration of this nomination earlier this week, Senators KENNEDY, KOHL, FEINGOLD, DURBIN, CARDIN, WHITEHOUSE, and I made clear the fallacy that would disregard settled law and discredit America's role in the struggle for liberty and human dignity, something we should all support.

On the way to rationalizing support for a particular nominee, just as with rationalizing support for a particular piece of legislation, it may be tempting this once—just this once, we might tell ourselves—tacitly to abet the arguments of those who want to define torture down to make it something less. Whatever the temptation—whatever the temptation, this once—we cannot rationalize away our core American ideals, the rule of law, and the principle that in America, not even the President is above the law.

The President and Vice President should not be allowed to violate our obligations under the Convention Against Torture and the Geneva Conventions, should not be allowed to disregard U.S. statutes, such as our Detainee Treatment Act and War Crimes Act. They should not be allowed to overturn more than 200 years of our Nation's reverence for human rights and moral leadership around the world.

The administration has compounded its lawlessness by cloaking its policies and miscalculations under a veil of secrecy. They left the Congress, they left the courts, and, most importantly, they left the American people in the dark about what they were doing. The President says we do not torture, but then he had his lawyers redefine ''torture,'' and he had them do that in secret memos, in fundamental conflict with American values and law.

Again, yesterday, I wrote to the White House counsel reiterating my earlier request for this administration's secret, purported justifications for having Americans engage in waterboarding and other treatment that would violate our Nation's obligations and values.

I ask unanimous consent to have printed in the RECORD a copy of my most recent letter to Counsel Fielding on this point.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, November 7, 2007.

Mr. FRED FIELDING, Esq.,
Office of the Counsel to the President,
The White House, Washington, DC.

DEAR MR. FIELDING: I have not received a reply to the letter I sent to you almost two weeks ago seeking a fuller accounting of this Administration's legal justifications and policies with regard to torture and interrogation. Another copy of my unanswered October 25, 2007, letter is enclosed.

Over the past few days I have read in the press that there may, in fact, be three legal memoranda from the Justice Department's Office of Legal Counsel in 2005, not just two, that have been withheld from us. Apparently, the Administration has conceded the existence of three such memoranda in court filings this week. Without even an accounting from you and the Administration, it is impossible for me to know.

As I have previously noted, the Committee does not yet have a complete picture of the Administration's historic position on the legal basis and standards for detention, transfer, and interrogation in connection with counter-terrorism efforts. It is important that you share with the Senate Judiciary Committee all legal opinions on these issues from the Office of Legal Counsel and elsewhere in the Department of Justice and the Administration. I noted in my previous letter that you have not, despite our repeated requests, provided us with the 2005 memoranda that apparently authorize the use of combinations of cruel and extreme practices. We are fast approaching the one-year anniversary of my November 15, 2006, request for ''any and all Department of Justice directives, memoranda, and/or guidance . . . regarding CIA detention and/or interrogation methods.''

I regret that you did not take the opportunity created with the announced resignation of Alberto Gonzales to work with us to put these matters to rest. The first step would have been disclosure of the legal memoranda still being kept secret from the Senate Judiciary Committee. That has yet to occur. As you have recently witnessed, without these materials and a shared understanding of what the Administration has been doing, is doing, its justifications, its legal analysis, and its purported basis for overriding our laws and treaty obligations, many Members of the Committee remain very concerned.

Much of the controversy and discussion surrounding the Committee's consideration of the President's nomination of Michael Mukasey to serve as Attorney General arose from these matters. The Administration's lack of cooperation greatly contributed to the controversy and ultimately to the opposition to that nomination.

Sincerely,

PATRICK LEAHY,
Chairman.

Mr. LEAHY. Mr. President, I agree with the generals, the admirals, and the judge advocates general that waterboarding is torture and is illegal. The generals, the admirals, the judge

advocates general say waterboarding is torture and illegal.

I ask unanimous consent to have printed in the RECORD a copy of a letter I received from MG John Fugh, RADM Don Guter, RADM John Hutson, and BG David Brahms, dated November 2.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

NOVEMBER 2, 2007.

Hon. PATRICK J. LEAHY,
Chairman, U.S. Senate,
Washington DC.

DEAR CHAIRMAN LEAHY: In the course of the Senate Judiciary Committee's consideration of President Bush's nominee for the post of Attorney General, there has been much discussion, but little clarity, about the legality of ''waterboarding'' under United States and international law. We write because this issue above all demands clarity: Waterboarding is inhumane, it is torture, and it is illegal.

In 2006 the Senate Judiciary Committee held hearings on the authority to prosecute terrorists under the war crimes provisions of Title 18 of the U.S. Code. In connection with those hearings the sitting Judge Advocates General of the military services were asked to submit written responses to a series of questions regarding ''the use of a wet towel and dripping water to induce the misperception of drowning (i.e., waterboarding). . . .'' Major General Scott Black, U.S. Army Judge Advocate General, Major General Jack Rives, U.S. Air Force Judge Advocate General, Rear Admiral Bruce MacDonald, U.S. Navy Judge Advocate General, and Brigadier Gen. Kevin Sandkuhler, Staff Judge Advocate to the Commandant of the U.S. Marine Corps, unanimously and unambiguously agreed that such conduct is inhumane and illegal and would constitute a violation of international law, to include Common Article 3 of the 1949 Geneva Conventions.

We agree with our active duty colleagues. This is a critically important issue—but it is not, and never has been, a complex issue, and even to suggest otherwise does a terrible disservice to this Nation. All U.S. Government agencies and personnel, and not just America's military forces, must abide by both the spirit and letter of the controlling provisions of international law. Cruelty and torture—no less than wanton killing—is neither justified nor legal in any circumstance. It is essential to be clear, specific and unambiguous about this fact—as in fact we have been throughout America's history, at least until the last few years. Abu Ghraib and other notorious examples of detainee abuse have been the product, at least in part, of a self-serving and destructive disregard for the well-established legal principles applicable to this issue. This must end.

The Rule of Law is fundamental to our existence as a civilized nation. The Rule of Law is not a goal which we merely aspire to achieve; it is the floor below which we must not sink. For the Rule of Law to function effectively, however, it must provide actual rules that can be followed.

In this instance, the relevant rule—the law—has long been clear: Waterboarding detainees amounts to illegal torture in all circumstances. To suggest otherwise—or even to give credence to such a suggestion—represents both an affront to the law and to the core values of our Nation.

We respectfully urge you to consider these principles in connection with the nomination of Judge Mukasey.

Sincerely,

Rear Admiral Donald J. Guter, United States Navy (Ret.), Judge Advocate General of the Navy, 2000–02; Rear Admiral John D. Hutson, United States Navy (Ret.), Judge Advocate General of the Navy, 1997–2000; Major General John L. Fugh, United States Army (Ret.), Judge Advocate General of the Army, 1991–93; Brigadier General David M. Brahms, United States Marine Corps (Ret.), Staff Judge Advocate to the Commandant, 1985–88.

Mr. LEAHY. Mr. President, these distinguished military officers, flag officers, people who are charged with knowing what is our law, what is our Constitution, what are our treaty commitments, and what are the rules our military must follow, write with absolute clarity, and I quote the significant sentence from their letter:

Waterboarding is inhumane, it is torture, and it is illegal.

They also quote the sitting judge advocates general of the military services from our committee's hearing last year in which they unanimously and unambiguously agreed that waterboarding is inhumane, it is illegal, it is a violation of law.

Think for a moment, if another nation picked up an American and waterboarded that American and we heard about it; no Senator, no American would have to know the circumstances and the purported justifications for it. We would condemn it. All 100 of us would be on the floor condemning it, and 435 members of the other body would be condemning it. Whoever was President of the United States would condemn it. But you know what, that was before this debate began, and now, tragically, this administration has so twisted America's role and our laws and values that apparently our own State Department is now ordered they cannot say that waterboarding of an American is illegal.

Mr. President, that is how far we have sunk. I ask unanimous consent to have printed in the RECORD a copy of a letter I sent to Secretary Rice protesting this order.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, November 6, 2007.

Hon. CONDOLEEZZA RICE,
Secretary of State,
Washington, DC.

DEAR SECRETARY RICE: There are reports that one of your principal aides and legal advisers, a Mr. John Bellinger, is taking the legal position that he cannot say whether it is permissible to waterboard Americans and that it depends on the facts and circumstances. I could not disagree more strongly. There are no conceivable facts or circumstances that would justify waterboarding an American anywhere in the world for any reason. Our treaty obligations and domestic law make waterboarding illegal. Please respond without delay and set this matter straight.

Sincerely,

PATRICK LEAHY,
Chairman.

Mr. LEAHY. Mr. President, senior State Department legal officers are told that waterboarding, which has been recognized as torture, not for the last 10 years or 50 years or 100 years, but has been recognized as torture for the last 500 years, is a ''technique'' they cannot rule out as something a foreign intelligence service might be justified in using against Americans. This is ''Alice in Wonderland.''

Never mind that President Teddy Roosevelt, no shrinking violet he, prosecuted American soldiers for this more than 100 years ago. Never mind that we prosecuted Japanese soldiers for waterboarding Americans during World War II. Never mind what repressive regimes are doing to this day around the world. It is appalling.

When it comes to our core values—the things that make our country great, that define America's place in the world—it does not depend on the circumstances; it depends on our core values. America, the great and good nation that has been a beacon to the rest of the world on human rights, does not torture, it should not stand for torture, and it should stand against torture.

I ask unanimous consent to have printed in the RECORD a copy of a letter I received from the National Religious Campaign Against Torture, dated November 1.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

NATIONAL RELIGIOUS CAMPAIGN
AGAINST TORTURE,
Washington, DC, November 1, 2007.

Hon. PATRICK LEAHY,
Chairman, U.S. Senate, Committee on the Judiciary, 433 Russell Senate Office Building, U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY: The National Religious Campaign Against Torture (NRCAT), a campaign of over 130 religious organizations working together to abolish U.S.-sponsored torture and cruel, inhuman or degrading treatment of anyone, without exception, is deeply concerned about the responses Judge Michael Mukasey gave both at his nomination hearing and in his most recent written response on the subject of torture. We believe his answers leave open the door to the use of techniques by the U.S. government that would be cruel, inhuman and degrading and that could amount to torture. This is true not only for waterboarding, which is clearly illegal and a form of torture, but also for a number of other techniques we understand the CIA has used and may continue to use.

Our country already knows what happens when we have an Attorney General who countenances torture and cruel, inhuman or degrading treatment. We lose our moral compass; decent Americans are called upon on our behalf to commit acts that damage their souls; our soldiers who may be captured are placed in greater jeopardy; we are shamed in the eyes of the world.

It is time to turn a new page; the confirmation of a new Attorney General is such an opportunity. It would be tragic to allow an individual who has not clearly rejected the illegal and immoral practices of torture and cruel, inhuman degrading treatment to become the leading law enforcement officer of our nation.

NRCAT members, who include representatives from the Catholic, evangelical Christian, mainline Protestant, Orthodox Christian, Unitarian Universalist, Jewish, Quaker,

Muslim, and Sikh communities, believe that torture violates the basic dignity of the human person that all religions, in their highest ideals, hold dear. It degrades everyone involved—policy-makers, perpetrators and victims—and it contradicts our nation's most cherished values. We believe that any policies that permit torture and inhuman treatment are shocking and morally intolerable.

We urge you to approve a nominee as Attorney General who is unequivocal in his or her stance against the use of torture and cruel, inhuman or degrading treatment.

Sincerely,

LINDA GUSTITUS,
President.
REV. RICHARD KILLMER,
Executive Director.

Mr. LEAHY. Mr. President, what do we set as an example? We lose our way on this question of torture. When America arranged to have a Canadian citizen, changing a plane in the United States on the way to Canada, sent to Syria to be tortured, what did we tell the rest of the world? I will tell you what we told the rest of the world: Here we have the outrageous conduct of President Musharraf's Government in Pakistan. He is closing down the courts, he is closing down the opposition, he is closing down the press. We have to meekly say: Please don't do that; we do send you billions of dollars in aid; please don't destroy democracy.

A Cabinet Minister in his Government was interviewed yesterday on a Canadian show. When he was asked if he was ashamed of the images the world was seeing of Pakistanis being clubbed by police in the streets, part of his reply was this: Are other countries—referring to the United States—ashamed of taking persons from another country to a third country and torturing them? Are they ashamed?

I would like to think as Americans we hold the high moral ground, but we can be lectured because we have not, by the likes of a member of the Cabinet of a despotic regime in Pakistan, and there is no answer to it. There is no answer to it because what he objects to us doing is sending a citizen of another country who was on our land to Syria to be tortured, and we have no answer to that because this administration and this Government did it.

I am proud to be an American. I am so happy my maternal grandparents immigrated to this country from Italy and gave me a chance to be an American, as did my great-grandparents from Ireland. I am proud of it. I am proud to see my children growing up as Americans, now my grandchildren, as I know the distinguished Presiding Officer whose family has been in this country much longer than mine is proud of his American heritage. But torture should not be what America stands for. Indeed, the better example is set by the Army Field Manual, which instructs our forces to consider how we would react if what a soldier is about to do to someone was done to an American soldier. How would our soldiers react if they found somebody waterboarding an American soldier? They would do everything to rescue them because it would be wrong and it would be illegal. It is not just illegal and wrong if somebody else does it, it is illegal and it is wrong if we do it.

Sadly, when I cited this very standard in a written question to Judge Mukasey and asked if it would be an abuse if another country waterboarded an American, he sidestepped the question, and he failed to condemn even waterboarding of Americans. When we found our State Department to begin to do the same, I saw a pattern.

In their recent letter to the nominee, Senators WARNER, MCCAIN, and GRAHAM do not take that approach. They recognize, as I do and I hope all Senators do, that waterboarding, under any circumstances, represents a clear violation of U.S. law. That is what Senators WARNER, MCCAIN, and GRAHAM said. As chairman of the Senate Judiciary Committee, I agree with them.

When the administration and others state that we cannot state whether America waterboards people because it would tip off our enemies, they have it precisely wrong. That is about as effective as Saddam Hussein hinting that he had weapons of mass destruction, even though he did not, as he tried to impress his enemies.

In refusing to say we do not waterboard prisoners, what do we do? We end up giving license to others. When the United States cannot state unequivocally that waterboarding is torture and illegal and will not be tolerated, what does that mean for other Governments? What comfort does that provide the world's most repressive regimes? How does it allow the United States, that hitherto has been a beacon for human rights, to criticize or lecture these repressive regimes that torture that way?

Some have sought to find comfort in Judge Mukasey's personal assurance that he would enforce a future, some kind of new law against waterboarding if Congress were to pass one. Even some in the press have used that talking point from the White House. Any such prohibition would have to be enacted over the veto of this President, a President who has not ruled out the use of waterboarding.

But the real damage in this argument is not its futility. The real harm is that it presupposes we don't already have laws and treaty obligations against waterboarding. As we know, when we enter a treaty, it becomes the law of the land. We have laws already against it. We don't need a new law. No Senator should, with any kind of clear conscience, abet this administration's legalistic obfuscations by those, such as Alberto Gonzales, who take these positions, or John Yoo and David Addington, by agreeing somehow that the laws we already have on the books do not already make waterboarding illegal. We have been properly prosecuting water torture for more than 100 years.

Vote for the nominee or vote against the nominee, but don't hide behind some kind of a cloak and say maybe we should have a law in the future. We have that law. This is as if, when somebody murders somebody with a baseball bat, they were to say: We had a law against murder, but we never mentioned baseball bats. Murder is murder; torture is torture. Our laws make both illegal, and our laws—but especially our values—do not permit this to be an open question or even one that depends on who is doing the waterboarding. We cannot say it is wrong when other countries do it but, of course, it is right when we do it because our heart is pure. That is a prescription for disaster. That is what heightens the risk to American citizens and soldiers around the world, and it gives repressive regimes comfort, and that is something I will not do.

I will not accept this fallacious argument. I will not accept this pretense that it is OK because we have not yet passed a law, when that has always been the law in the United States. It was in Theodore Roosevelt's day, it was when we prosecuted Japanese soldiers after World War II for waterboarding, and it is today.

It would be like saying we haven't a specific law for some of the things done in Abu Ghraib. Of course, we had not. We knew such actions violated every principle of our law. Are we going to say, however, it was all right because we didn't have spelled out in the law every single thought that could be raised about torture so we could specifically cite to that?

Mr. President, hasn't there been enough harm done to the United States by the images of Abu Ghraib? Hasn't there been enough harm done to the United States by this Government intentionally taking a Canadian citizen and sending that citizen to Syria to be tortured? Hasn't there been enough harm done to this country that we don't need to have Senators stand on the floor of the Senate and say: Well, maybe sometime in the future we should have a law against waterboarding, when our top military and everybody else all agree this is already against the law.

Now, I wish I could support Judge Mukasey's nomination because I like him. I like his legal abilities. I like his background as a prosecutor. He is a tough, no-nonsense prosecutor. But we are dealing with an administration that has been acting outside the law, an administration that has now created a confirmation contortion. Mr. President, I am not a moral contortionist, and I am not going to aid and abet the confirmation contortions of this administration. When many of us voted to confirm General Petraeus, the administration turned around and, for political advantage, tried to claim when we voted to confirm the general, we also voted for the President's war policies. Well, I did not vote for a war in Iraq. I voted against it. And I do not vote to allow torture. And just as I do not support this President's Iraq policy, I do not support his torture policy

or his views of unaccountability or unlimited Executive power.

No one is more eager to restore strong leadership and independence to the Department of Justice than I. For almost 3 years, it has been leaderless. For almost 3 years, it has engaged in every single effort not to follow the law, but to find ways around the law. That has created a terrible problem of morale among the very wonderful men and women, the talented men and women who work there.

We all know what we need most right now is an Attorney General who believes and understands there must be limitations on Executive power. Whether the Executive is a Republican or a Democratic President, there have to be limitations. America needs to be certain of the bedrock principles of our laws and our values and that no President, no American, can be authorized to violate them. In America, no one is above the law. The President of the United States is not above the law. He is not allowed to place anybody else above the law. That is what has maintained this democracy for over 200 years.

When we began considering this nomination, I observed that the Department of Justice has experienced an unprecedented crisis of leadership. It is a crisis that has come more and more into view as Senator SPECTER and I have led a bipartisan group of concerned Senators serving on our Judiciary Committee to consider a U.S. attorney firing scandal, a confrontation over the legality of the administration's warrantless wiretapping program, and the politicization of hiring at the Department of Justice. What we have seen is not just poor leadership, but the complete breakdown of the principles that have always embodied the Department of Justice and the position of Attorney General.

For me, the issue has never been personal to Alberto Gonzales. The Judiciary Committee's investigations into the Department's many scandals were not designed to force the resignation of Alberto Gonzales, but rather to restore the integrity and the mission of the Department of Justice. My goal was not to force his resignation but to restore the Department of Justice. That the administration had him remain more than 6 months after the U.S. attorney firing scandal was known continued the harm and forestalled the restoration of order.

It was not just the fact that he lost my confidence that forced him to leave. It was not the Senate passing a resolution of no confidence. Rather it was our bipartisan efforts in which Republicans and Democrats who care about Federal law enforcement and the Department of Justice joined together to press for accountability.

The issue during the Senate confirmation of Alberto Gonzales remains today. The Department of Justice has always set out to enforce the law and to ensure that no one, not even the President, is above the law. As we consider the nomination of Michael Mukasey, we must determine what kind of Attorney General he would be and whether he will stand for the rule of law against the demands of this White House.

I began my consideration of this nomination as I did with the last Attorney General nomination, hoping to be able to support the nominee. After the hearing for the last nominee in 2005, I decided that I could not vote for the confirmation of Alberto Gonzales. I did so noting, as Justice James Iredell had in 1792, that the person who serves as Attorney General ''is not called Attorney General of the President, but Attorney General of the United States.'' This is a different kind of Cabinet position, distinct from all the others, and it requires greater independence. The departing Attorney General never understood this. Instead, he saw his role as a facilitator for this White House's overreaching policies and partisan politics.

The crisis of leadership that led to the resignation of the entire senior leadership of the Department and their staffs, as well as Karl Rove and his two top aides at the White House, has taken a heavy toll on the tradition of independence that had long guided the Department of Justice and protected it from political influence. As a former prosecutor I know that the dismay runs deep, from the career attorneys at Justice and in our U.S. attorney offices, straight down to the cops on the beat.

The Senate should only confirm a nominee who will bring a commitment to the rule of law and American liberties and values back to the Justice Department. As I have reviewed Judge Mukasey's nomination, I have found much to like. He has impressive credentials, vast experience as a lawyer and a judge, and a refreshingly straightforward manner. I liked him when I met him, and I am convinced that he is a man of integrity and would not be governed merely by personal or political loyalty.

At his hearing, he answered firmly that he would not tolerate political meddling in investigations or litigation and would end hiring based on politics, and he was clear in asserting that he would resign if the President insisted on going forward with a course of action he had found to be illegal. These were encouraging signs.

But I am concerned that he shares with this administration a view of virtually unbridled executive power and authority. In these uncertain times, it may be tempting simply to defer the Commander in Chief, but I believe that in difficult times, it is more important than ever to insist on the rule of law and the principles that have made our country unique in the world for more than 200 years. Even Judge Mukasey's strong promise to resign if the President insists on an illegal course of action loses its power if he believes the President to be largely unconstrained by law. If nothing the President can do would be illegal, there would never be an occasion for him to make such a principled stand.

That is why I was so disappointed by Judge Mukasey's answers suggesting that he sees little occasion to check the President's power. I was disturbed by his insistence that, with regard to warrantless wiretapping and the Foreign Intelligence Surveillance Act, the President has inherent authority outside of the statute and could authorize and immunize conduct contrary to the law. I fail to see a valid distinction justifying his assertion that the President could have the power of an executive override in the surveillance context, but not in the torture context, and I worry about where his reasoning could lead us.

I was disappointed in his abandoning his initial answer to parrot the White House's conclusion that a U.S. attorney could not bring a congressional contempt citation to a grand jury. That is the mechanism in the law that allows an independent court the opportunity to referee any claim of executive privilege that the executive and legislative branches could not resolve amongst themselves. He, instead, insisted that the solution in such a situation was an ''accommodation'' of the kind that this administration has been consistently unwilling to make. Once again, his position leads me to worry that he would allow this President's unprecedented assertions of power to go completely unchecked.

I was saddened to hear Judge Mukasey say that he apparently would not support habeas corpus rights for detainees, rejecting a core legal right and a basic American value which Senator SPECTER and I have fought so hard to restore. I was disappointed to see him echo in response to my questions the same administration policy on extraordinary rendition that has led to several disgraceful episodes for this Nation and fail to commit even to review the case of Maher Arar, a prominent and disturbing episode of rendition.

Which brings me back to the issue that came to dominate the consideration of this nomination, the issue of torture. The United States does not torture. The United States does not inflict cruel, inhuman, and degrading treatment. This is part of the moral fiber of our country and our historical place as a world leader on human rights, and it has long been fixed in our laws, our Constitution, and our values.

That is why I was so saddened when Judge Mukasey, given repeated opportunities, refused to say that the ancient and extreme technique of waterboarding, a brutal practice in which a person is subjected to simulated drowning, is illegal. There may be interrogation techniques that require close examination and extensive briefings. Waterboarding is not among them. Judge Mukasey does not need a

classified briefing to learn about waterboarding. He could go to the library to read about waterboarding that was done as far back as the Spanish Inquisition, or about American prosecutions of Japanese war criminals for waterboarding after World War II. Evan Wallach, a judge at the U.S. Court of International Trade, a professor who teaches the law of war, and a former JAG officer, wrote an insightful column in last Sunday's Washington Post that I ask unanimous consent be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

WATERBOARDING USED TO BE A CRIME

(By Evan Wallach)

As a JAG in the Nevada National Guard, I used to lecture the soldiers of the 72nd Military Police Company every year about their legal obligations when they guarded prisoners. I'd always conclude by saying, ''I know you won't remember everything I told you today, but just remember what your mom told you: Do unto others as you would have others do unto you.'' That's a pretty good standard for life and for the law, and even though I left the unit in 1995, I like to think that some of my teaching had carried over when the 72nd refused to participate in misconduct at Iraq's Abu Ghraib prison.

Sometimes, though, the questions we face about detainees and interrogation get more specific. One such set of questions relates to ''waterboarding.''

That term is used to describe several interrogation techniques. The victim may be immersed in water, have water forced into the nose and mouth, or have water poured onto material placed over the face so that the liquid is inhaled or swallowed. The media usually characterize the practice as ''simulated drowning.'' That's incorrect. To be effective, waterboarding is usually real drowning that simulates death. That is, the victim experiences the sensations of drowning: struggle, panic, breath-holding, swallowing, vomiting, taking water into the lungs and, eventually, the same feeling of not being able to breathe that one experiences after being punched in the gut. The main difference is that the drowning process is halted. According to those who have studied waterboarding's effects, it can cause severe psychological trauma, such as panic attacks, for years.

The United States knows quite a bit about waterboarding. The U.S. government—whether acting alone before domestic courts, commissions and courts-martial or as part of the world community—has not only condemned the use of water torture but has severely punished those who applied it.

After World War II, we convicted several Japanese soldiers for waterboarding American and Allied prisoners of war. At the trial of his captors, then-Lt. Chase J. Nielsen, one of the 1942 Army Air Forces officers who flew in the Doolittle Raid and was captured by the Japanese, testified: ''I was given several types of torture. . . . I was given what they call the water cure.'' He was asked what he felt when the Japanese soldiers poured the water. ''Well, I felt more or less like I was drowning,'' he replied, ''just gasping between life and death.''

Nielsen's experience was not unique. Nor was the prosecution of his captors. After Japan surrendered, the United States organized and participated in the International Military Tribunal for the Far East, generally called the Tokyo War Crimes Trials. Leading members of Japan's military and government elite were charged, among their many other crimes, with torturing Allied military personnel and civilians. The principal proof upon which their torture convictions were based was conduct that we would now call waterboarding.

In this case from the tribunal's records, the victim was a prisoner in the Japanese-occupied Dutch East Indies:

A towel was fixed under the chin and down over the face. Then many buckets of water were poured into the towel so that the water gradually reached the mouth and rising further eventually also the nostrils, which resulted in his becoming unconscious and collapsing like a person drowned. This procedure was sometimes repeated 5–6 times in succession.

The United States (like Britain, Australia and other Allies) pursued lower-ranking Japanese war criminals in trials before their own tribunals. As a general rule, the testimony was similar to Nielsen's. Consider this account from a Filipino waterboarding victim:

Q: Was it painful?

A: Not so painful, but one becomes unconscious. Like drowning in the water.

Q: Like you were drowning?

A: Drowning —you could hardly breathe.

Here's the testimony of two Americans imprisoned by the Japanese: They would lash me to a stretcher then prop me up against a table with my head down. They would then pour about two gallons of water from a pitcher into my nose and mouth until I lost consciousness. And from the second prisoner: They laid me out on a stretcher and strapped me on. The stretcher was then stood on end with my head almost touching the floor and my feet in the air. . . . They then began pouring water over my face and at times it was almost impossible for me to breathe without sucking in water.

As a result of such accounts, a number of Japanese prison-camp officers and guards were convicted of torture that clearly violated the laws of war. They were not the only defendants convicted in such cases. As far back as the U.S. occupation of the Philippines after the 1898 Spanish-American War, U.S. soldiers were court-martialed for using the ''water cure'' to question Filipino guerrillas.

More recently, waterboarding cases have appeared in U.S. district courts. One was a civil action brought by several Filipinos seeking damages against the estate of former Philippine president Ferdinand Marcos. The plaintiffs claimed they had been subjected to torture, including water torture. The court awarded $766 million in damages, noting in its findings that ''the plaintiffs experienced human rights violations including, but not limited to . . . the water cure, where a cloth was placed over the detainee's mouth and nose, and water producing a drowning sensation.''

In 1983, federal prosecutors charged a Texas sheriff and three of his deputies with violating prisoners' civil rights by forcing confessions. The complaint alleged that the officers conspired to ''subject prisoners to a suffocating water torture ordeal in order to coerce confessions. This generally included the placement of a towel over the nose and mouth of the prisoner and the pouring of water in the towel until the prisoner began to move, jerk, or otherwise indicate that he was suffocating and/or drowning.''

The four defendants were convicted, and the sheriff was sentenced to 10 years in prison.

We know that U.S. military tribunals and U.S. judges have examined certain types of water-based interrogation and found that they constituted torture. That's a lesson worth learning. The study of law is, after all, largely the study of history. The law of war is no different. This history should be of value to those who seek to understand what the law is—as well as what it ought to be.

Mr. LEAHY. More than 100 years ago, in 1901 and 1902, U.S. military commissions charged American officers with waterboarding detainees in the Philippines, and President Theodore Roosevelt wrote:

Great as the provocation has been in dealing with foes who habitually resort to treachery, murder and torture against our men, nothing can justify the use of torture or inhuman conduct of any kind on the part of the American Army.

This country's abhorrence for cruel treatment of detainees goes back further still to General George Washington who wrote of captured troops during the Revolutionary War:

Treat them with humanity, and let them have no reason to complain of our copying the brutal example of the British Army in their treatment of our unfortunate brethren.

Those are American standards and American values that should not be compromised.

As RADM John Hutson, former Judge Advocate General of the Navy, testified to the Judiciary Committee:

Other than perhaps the rack and thumbscrews, water-boarding is the most iconic example of torture in history. It has been repudiated for centuries. It's a little disconcerting to hear now that we're not quite sure where water-boarding fits in the scheme of things. I think we have to be very sure where it fits in the scheme of things.

Judge Mukasey acknowledged that, in evaluating interrogation techniques, we look to standards such as whether the conduct ''shocks the conscience,'' whether it is ''outrageous,'' or whether it is ''for the purpose of humiliating and degrading the detainee.'' He was unwilling, though, to say that waterboarding meets these standards. To me, it is not a hard call that waterboarding shocks the conscience, that it is outrageous, that it humiliates and degrades detainees. I do not believe that the question whether waterboarding is illegal is subject to a balancing test. It is. Indeed, it is that kind of ''balancing test'' that has allowed this President to claim the discretion to commit so many abuses that have brought such disgrace on this great country.

Senator MCCAIN, who knows too much about the issue of torture, said recently:

Anyone who knows what waterboarding is could not be unsure. It is a horrible torture technique used by Pol Pot and being used on Buddhist monks as we speak. People who have worn the uniform and had the experience know that this is a terrible and odious practice and should never be condoned in the U.S. We are a better nation than that.

I agree.

Nothing is more fundamental to our constitutional democracy than our basic notion that no one is above the law. This administration has undercut that precept time after time. They are now trying to do it again, with an issue as fundamental as whether the United States of America will join the ranks

of those governments that approve of torture. That is why I will vote no on the President's nomination.

Mr. President, I reserve the remainder of my time.

The ACTING PRESIDENT pro tempore. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, before yielding 20 minutes to the distinguished Senator from California, I praise Senator FEINSTEIN for her work on the confirmation of Judge Mukasey. As is customary for Senator FEINSTEIN, she is present at all the hearings, at all the Judiciary Committee business, and comes to the meetings extraordinarily well prepared. I think she has a natural advantage, however, because she is not a lawyer.

It is a very difficult matter in this body to state the facts and to cross party lines, and to do so requires a number of factors. It requires a lot of confidence and judgment, and it requires a lot of courage to stand up as one of very few.

Her vote and Senator SCHUMER's vote were indispensable to move the nomination to the Senate floor. So she has 20 minutes.

Mrs. FEINSTEIN. I thank the ranking member of the Judiciary Committee.

Mr. President, shortly the Senate will vote on whether to confirm Michael Mukasey as the next Attorney General or whether to leave the Department of Justice without a real leader for the next 14 months.

I believe that is the issue. I will vote to confirm Judge Mukasey.

For me, the Department of Justice has always been the beacon of law enforcement and justice around the world. I have always truly believed we had a state-of-the-art system of justice that functioned independently of whoever happened to hold the White House or whoever was in the Congress. This beacon has been dimmed in the last 7 years, and I am one who finds the Department in disarray today.

I think the real issue before us today is: Can this nominee be a strong and independent leader of the Justice Department in the remaining time of this administration? Can he depoliticize the Department? Can he restore its morale? Will he be independent from the White House?

If your answer is yes, then I believe we should vote for him. If it is no, then you don't mind an Acting Attorney General for the next 14 months.

Ten of the most important positions in the Department today have no permanent person serving but are either acting or interim. Mr. President, 21 out of 93 U.S. Attorney positions are vacant, and only two nominees are pending before the Senate for confirmation.

Cases have been brought based on partisan considerations instead of the facts and the law. U.S. Attorneys who did not initiate partisan prosecutions were summarily fired. The Civil Rights Division has been weakened and politicized.

Judge Mukasey has shown he will be a strong and independent Attorney General.

He couldn't be any more different from Alberto Gonzales. Alberto Gonzales owed his political career, and his legal career to a great extent, to President Bush. Judge Mukasey does not. He has followed an independent path. And he has been, for 18 years, a Federal district court judge—yes, following the rule of law, not the rule of man. He has stood on his own, he has litigated on his own, he has judged on his own.

Judge Mukasey, in my view, is going to be a very different Attorney General. And it is hard for me to understand why everyone in this body doesn't come to the same conclusion just by judging his background against the background of the prior Attorney General. That is very hard for me to understand. Their backgrounds—their legal backgrounds, their service backgrounds—are so entirely different.

If you read the 178 pages of answers to questions that were submitted by Senators, some as many as 30, 35 questions, you see the independence of Judge Mukasey. In response to question 20 by Senator KENNEDY, Judge Mukasey said this:

> There can be no political litmus test for the hiring of career civil service employees. This is, and must be, a bedrock principle.

He added that he would have ''zero tolerance'' in this area.

Isn't that what we want?

On the issue of politically motivated prosecutions, which, as I have said, I believe there have been by this department, he said, in the transcript, dated 10/17/07, page 19:

> Partisan politics plays no part in either the bringing of charges or the timing of charges.

And in response to question 20(a) by Senator DURBIN he also said he would recommend the firing of any U.S. Attorney who brought or planned to bring a case for partisan gain.

Isn't that what we want?

With regard to election crime prosecutions, he wrote this:

> The closer to an election, the higher the standard that must be met for charges to be brought.

That was in response to question no. 18 from Senator KENNEDY.

In addition, Judge Mukasey made it clear he will work to fix the many problems that have arisen in the Department's Civil Rights Division. He wrote this to us:

> The Civil Rights Division occupies a crucial place in the Department precisely because it continues to carry out the work of the civil rights movement by enforcing the Nation's civil rights laws. I strongly support the mission of the Civil Rights Division and will ensure that it has the tools and resources it needs to fulfill its mandate.

This was in answer to a question submitted by Senator LEAHY.

I think these answers alone show it is not going to be business as usual in the Department of Justice.

Isn't that what we want?

Now, the President has said publicly he will not send another nominee to the Senate. So what does that mean? It means if we don't confirm this nominee, we will effectively have an Acting Attorney General for the remaining 14 months of this President's tenure.

And what does that mean? It could likely mean that Peter Keisler, who has been an architect of Bush administration policies at DOJ for more than 5 years, will remain as Acting Attorney General for the rest of this administration.

Is that what we want?

It means most likely there will be recess appointments this winter for the 10 major leadership positions in the Department.

And what does that mean? Simply stated: The administration could put in place the most egregious and political leadership, and we—the Senate—could do nothing about it. We would have reduced transparency and reduced congressional oversight.

Now this is the realpolitik. This is the likelihood, should Judge Mukasey fail confirmation.

I believe it is the fundamental and driving factor for confirmation of this nominee. Not to confirm him will leave this vital department open to a continuation of egregious past actions, and we have railed against those past actions for years now. We have a chance to make a change.

We don't select the nominee, the President selects the nominee.

Does he have failed character? No. Does he lack in experience? No. Does he have the temperament to be Attorney General? He has proven it with 18 years as a Federal judge.

Does he know one of the most important areas of the law—national security law? He has tried some of the major terrorist cases that have been tried in Article III courts in the United States of America, and defendants have gone to prison.

Now, I have seen people pound their breasts here on torture. And none of us want torture.

There is a difference between U.S. law and treaty law. We have passed certain U.S. laws. We have passed a Military Commissions Act. That is a law of the United States of America. We have passed the Detainee Treatment Act. That is a law of the United States of America. The Detainee Treatment Act prohibits waterboarding for any military personnel anywhere in the world.

So, to the opponents of this nomination: We have passed a law. They say it is not necessary to pass a law, but in fact we have passed a law prohibiting waterboarding. And Judge Mukasey has said the Detainee Treatment Act is binding on the President and binding on this country.

The one exception is, there is no U.S. law that deals with the CIA. That is the exception. There are prestigious human rights groups that say it

doesn't matter; the Geneva Conventions and the Conventions Against Torture prevail. The President is saying I have Article II authority, and AUMF authority, and my view of Presidential power.

So what will solve it? A constitutional confrontation? The Supreme Court? What solves it?

My belief is, it is so easy: Instead of pounding our chests, simply do what we did in the Detainee Treatment Act, but do it for the CIA and prohibit waterboarding. End of debate.

Some people want to keep the issue alive rather than solve the problem. I am not one of those people. I believe we should end the ambiguity, and simply prohibit waterboarding across the board.

I do not believe Judge Mukasey should be denied confirmation for failing to provide an absolute answer on this one subject.

Nobody should think anything else is happening tonight. He would be denied confirmation because he said, I would like an opportunity to look at these laws, to look at these treaties, to read the legal opinions that have been written, and then have time to make up my mind.

Maybe we will want people to snap to and issue immediate judgments. This man has been a judge for 18 years. Maybe he likes to consider the facts before he makes a decision. I don't think that should be disqualifying.

We can bring him before the Judiciary Committee in late January and simply say: Judge Mukasey, now-Attorney General Mukasey, you have had an opportunity to look at the law. What is your opinion?

At the same time, I can say to you quite honestly, I believe waterboarding is illegal. I don't think it should be countenanced by the United States of America. I am not a lawyer, and I have not been for 18 years—or even 1 year—a Federal judge.

I believe waterboarding is prohibited under the Convention Against Torture and the Geneva Conventions. But it is not prohibited by name. It is prohibited in terms of its effects. There is a certain grayness for some—for some.

The opponents of this nomination have not given us any reason to think an acting or interim Attorney General would give us a better answer about waterboarding.

As a matter of fact, I would hazard a guess they would not. I would hazard a guess that if this nominee goes down, the exact same policies that have characterized the last 7 years will continue for the next 14 months. Am I being too abrupt to suggest we are missing something, that we should not get overwhelmed by the pounding of the chest against torture—that this is our chance for change?

If Judge Mukasey were not a respected judge, if he didn't have the legal background, if he didn't have the streak of independence—and read 178 pages of questions and answers and you will see that streak of independence—I would tend to agree with some of what has been said here. But I do not, because I seriously believe this is the only chance this Senate is going to be offered to put new leadership in the Department of Justice.

If, in fact, you believe it is in disarray, then there is only one action to take. If you believe it has been politicized, there is only one action to take.

The former Attorney General has not been independent, and he said he wore two hats—one serving the White House and one serving the people. If you believe there is only one hat an Attorney General can wear, and that is serving the people, then you have no choice other than Judge Mukasey. That is because otherwise, there will be an Acting Attorney General, not subject to confirmation, not subject to questioning, not subject to any kind of oversight—but, again, an arm of the White House.

Most of the major newspapers in my State have editorialized in favor of Judge Mukasey. This is what the San Diego Union-Tribune had to say about him:

> Torture is antithetical to American values. President Bush ought to issue an Executive order explicitly outlawing waterboarding. That said, Mukasey is not to blame for the Bush administration's interrogation policies. In his confirmation hearings, he has demonstrated a firm commitment to defend the Constitution. He merits confirmation by the Senate.

They got it.

The Detroit Free Press had this to say:

> As Attorney General, Mukasey can be expected to fight hard for what's legal rather than what's expedient.

Don't we want that?

> At least that's a step toward restoring the rule of law in the last 14 months of the Bush administration. The full Senate should confirm Mukasey, lest the president's next pick be someone with a more malleable sense of right and wrong.

Then, a paper from my State, The Sacramento Bee, got it right:

> As a replacement for Alberto Gonzales, Michael Mukasey, the nominee for U.S. attorney general, would bring a restorative independence of mind to the job. . . . Mukasey appears likely to operate in the open and with a higher respect for the system of the U.S. Government than for personal ties.

A critical question.

> We would expect him to urge the president to work with Congress. The Senate should confirm Mukasey to begin the cleanup at Justice.

This is the only chance we have. It is not as if we can turn him down and the administration is going to send us another nominee. They have already said they will not.

I do not believe that voting down this nominee will do even a bit of good in preventing torture. No one has explained why more of the same at the Justice Department would be better than putting Judge Mukasey in charge.

I do believe he will be a truly nonpolitical, nonpartisan Attorney General; that he will make his views very clear; and that, once he has the opportunity to do the evaluation he believes he needs on waterboarding, he will be willing to come before the Judiciary Committee and express his views comprehensively and definitively.

In conclusion, this nominee had no part in the administration's policies or legal opinions with respect to torture. We should not blame him for them. How can this man be the standard-bearer for torture? He is not. Why is he being treated as such?

We should give this nominee an opportunity to look at these treaties, look at the laws, read the opinions, and we should do what we are here to do—legislate and prohibit waterboarding across the board.

I thank the ranking member.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from New Jersey is recognized.

Mr. MENENDEZ. Mr. President, I ask unanimous consent I control the time allocated to Senator REED of Rhode Island, who has indicated he will not be using that time.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. MENENDEZ. Mr. President, I further ask unanimous consent that the next Democratic speakers be the following: Senators CARDIN, BOXER, KENNEDY, SALAZAR and SANDERS but not necessarily in that order.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, would the sequence permit alternating between those four against Judge Mukasey?

Mr. MENENDEZ. It would.

The ACTING PRESIDENT pro tempore. The order would so provide.

Mr. SPECTER. So provided, for alternation?

The ACTING PRESIDENT pro tempore. For alternation.

Mr. SPECTER. I thank the Chair, thank the Senator from New Jersey, and pardon the interruption.

The ACTING PRESIDENT pro tempore. The Senator from New Jersey is recognized.

Mr. MENENDEZ. Mr. President, how much time do I have?

The ACTING PRESIDENT pro tempore. Fifteen minutes.

Mr. MENENDEZ. Mr. President, I rise today to express my opposition to the nomination of Judge Michael Mukasey to be the next Attorney General for the United States. This has not been an easy decision for me to make.

I met Judge Mukasey before the judiciary hearings and liked him immensely on a personal level. We discussed the unprecedented and extremely harmful politicization that that has occurred within the Justice Department since the beginning of the

Bush administration. I was encouraged by the steps he said he would take to reverse it. We talked about the problems of leaking secret grand jury information, and I was impressed by his commitment to investigate any allegations of grand jury leaks and to terminate any responsible prosecutors.

In fact, after my meeting, I thought that I could comfortably vote to confirm Judge Mukasey as our next Attorney General. But, then came the judiciary hearings.

On the second day of the hearings, Judge Mukasey was specifically asked whether waterboarding was illegal. Now, before I get to Judge Mukasey's answer, let me describe what waterboarding is. And, let me make clear that my description contains no classified information—nothing that Judge Mukasey would need special security clearance to know.

The term waterboarding can be used to describe several different interrogation techniques. In one, the victim is immersed in water. In another, water is forced into the victim's nose and mouth. In the third, water is poured onto material—like cellophane—that is placed over the victim's face so that the victim inhales and swallows the water.

Regardless of which technique is used, the victim experiences the sensations of drowning: they struggle, they panic, they hold their breath. They inhale water into their lungs—they vomit and sometimes black out. This is not simulated drowning. It is simulated death. The drowning is real.

Despite this public knowledge of what constitutes waterboarding, Judge Mukasey refused to say whether waterboarding was illegal. According to the judge ''hypotheticals are different from real life.'' Therefore whether waterboarding was illegal would depend on ''the actual facts and circumstances''—things he did not know I have a hard time understanding what facts and circumstances could make the procedures I just described legal. I have a hard time understanding what facts and circumstances could make them somehow not cruel and inhumane. The only thing I don't have a hard time understanding is why Judge Mukasey's evasive and non-committal comments sound so familiar.

We have heard them before and all too often. Time and time again, other members of the Bush administration have played word games to justify their use of illegal or inappropriate interrogation techniques.

Judge Mukasey tried to backpedal by saying that he found waterboarding personally repugnant. Well, as many of us know, whether someone finds a law personally repugnant often has no impact on whether that person will enforce the law. Whether they find an action personally repugnant often has no impact on whether they will prosecute that action.

Judge Mukasey also said he would uphold any law that Congress passes in the future outlawing waterboarding. I am not sure how reassuring this statement is, since waterboarding is already illegal in the United States. Why should Congress have to pass a law prohibiting something that is already illegal?

Judge Mukasey should be well aware that waterboarding is illegal. On October 31, Senators MCCAIN, GRAHAM, and WARNER—all experts in the area of interrogation and military justice—wrote a letter to Judge Mukasey stating, without a shadow of a doubt that ''waterboarding, under any circumstances, represents a clear violation of U.S. law.'' And my colleagues should know this. They authored the 2005 prohibition on cruel, inhuman, and degrading treatment that the President signed into law. During the debate, they made it very clear that the so-called ''McCain amendment'' prohibits waterboarding or other extreme techniques that ''shock the conscience.''

I ask unanimous consent that a letter concerning waterboarding from Senators MCCAIN, WARNER and GRAHAM and letters of opposition and concern from the American-Arab Anti-Discrimination Committee and the American Psychological Association be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See Exhibit 1.)

Mr. MENENDEZ. Knowing what we know about waterboarding, there is no way anyone can argue that it does not shock the conscience.

The McCain amendment is not the only provision of U.S. law prohibiting waterboarding. The 2006 Military Commissions Act clearly prohibits the practice. It enumerates the grave breaches of common article III of the Geneva Conventions that constitute offenses under the War Crimes Act. And, it explicitly prohibits acts that inflict ''serious and nontransitory mental harm.'' As my colleagues stated so clearly in their letter ''Staging a mock execution by inducing the misperception of drowning is a clear violation of this standard.''

In fact, the U.S. has successfully prosecuted individuals who have engaged in waterboarding. After World War II, U.S. Military Commissions accused and successfully convicted Japanese soldiers for torturing American prisoners through the use of waterboarding. How can we stand here over 60 years later and confirm an individual to be our country's highest ranking law enforcement official if he will not enforce laws we have already prosecuted?

There is no reason to believe that waterboarding is anything but illegal. There is no compelling argument that it could ever be consistent with U.S. law. There is no ambiguity here. No shades of gray. It is clear to me that water boarding is illegal. It is clear to my colleagues Senators MCCAIN, GRAHAM, and WARNER that waterboarding violates U.S. law. The only person that it is not clear to is Judge Mukasey.

I have spent some time trying to understand why Judge Mukasey refused to confirm something that is so clear under our laws. The only thing I can come up with is that his statement is consistent with the current Bush administration policy. It protects administration officials who have admitted waterboarding occurred on their watch, and it tacitly permits President Bush to continue utilizing waterboarding as an interrogation technique.

It strikes me as more than a little coincidental that on his first day of testimony before the Judiciary Committee, Judge Mukasey was not afraid to depart with administration policy and assert his independence. Yet on the second day of testimony, he all of a sudden began to play the role of loyal footsoldier.

One has to wonder whether this change of heart occurred under pressure from the administration. If nothing else, it certainly makes me wonder whether Judge Mukasey will be as independent of a thinker and an actor as he led us all to believe he would be.

I hope that I am wrong about Judge Mukasey. This is a critical point in history for the Justice Department. Since the beginning of the Bush administration, we have seen the influence of political appointees expand exponentially. We have seen good, qualified, dedicated prosecutors fired and replaced by Bush loyalists. We have seen the number of civil rights prosecutions drop, and we have seen clearly discriminatory voter I.D. laws approved by partisan political appointees over the objections of experienced career employees.

The Justice Department clearly needs new leadership. It needs to be cleaned up. It needs someone who will not only stop the continuing politicalization but reverse the effects of what has already happened.

If confirmed, I hope that Judge Mukasey will be that kind of leader. I hope that he will exhibit the independence and honesty that he said he would when I met with him. I hope he is as committed to upholding the laws of the United States as Attorney General as he appeared to be as a United States Judge. I hope that his statements on waterboarding are an exception to, not an indication of, the role he will play as Attorney General.

But, I cannot vote on hope alone. I have to vote on facts. And, given the facts available, I simply cannot support Judge Mukasey's nomination.

EXHIBIT 1

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC, October 31, 2007.

Hon. MICHAEL B. MUKASEY,
Patterson Belknap Webb & Tyler LLP,
New York, NY.

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 nontransitory 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.
LINDSEY GRAHAM,
United States Senator.
JOHN WARNER,
United States Senator.

AMERICAN-ARAB
ANTI-DISCRIMINATION COMMITTEE,
Washington, DC, November 1, 2007.

Hon. PATRICK LEAHY,
Chairman, Senate Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN LEAHY: On November 5, as the Senate Committee on the Judiciary convenes a nomination hearing for Attorney General Nominee Judge Michael Mukasey, the American-Arab Anti-Discrimination Committee (ADC), the nations premier organization dedicated ensuring the civil rights of Arab Americans, would like to express its opposition to Judge Mukasey's confirmation.

Judge Mukasey has disappointed our national expectations and failed our patriotic legacy as champions of democracy, human rights, and due process. He refused to name the practice of waterboarding as torture, has cast doubts as to whether non-citizens in U.S. custody should enjoy the protection of the U.S. Constitution, and has advocated for the creation of separate national security courts, casting doubt on our time-proven judiciary system.

It should be noted that all four currently serving Judge Advocates General for our armed forces are on record in qualifying waterboarding as torture and constituting a war crime. The Attorney General is the nation's chief law enforcement officer and is tasked with the application of the rule of law. The Attorney General must be able to maintain the delicate balance between national security and individual liberties and rights. Judge Mukasey's hesitancy on these vital matters, his doubts as to whether the U.S. Constitution, our supreme law of the land, applies to non-citizens, foreshadow a possible unwillingness on his part to enforce the role of law, including that of our Constitution and international legal standards; standards that our nation has championed for decades.

It is time for President Bush to nominate an attorney general who stands up for the values that have defined our nation; Judge Mukasey is not such a nominee. As our nation's largest non-profit organization dedicated since 1980 to defending the civil rights of Americans of Arab descent, we ask that you stand up as a patriot and a leader in defense of our national values and oppose Judge Mukasey's confirmation as the next attorney general.

Thank you for your consideration of this matter. Should you or your staff have any questions concerning this matter or ADC's work with the U.S. Department of Justice please do not hesitate to contact ADC Legislative Director Christine Gleichert at Christine@adc.org or (202) 244–2990.

Very truly yours,

KAREEM W. SHORA, JD, LLM,
National Executive Director.

AMERICAN PSYCHOLOGICAL
ASSOCIATION,
Washington, DC, November 1, 2007.

Hon. PATRICK J. LEAHY,
Chairman, Senate Judiciary Committee, Washington, DC.

Hon. ARLEN SPECTER
Ranking Member, Senate Judiciary Committee, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SPECTER: We are writing on behalf of the American Psychological Association (APA), the world's largest scientific and professional organization of psychologists, to commend and support your ongoing efforts related to the confirmation hearing and follow-up correspondence to Attorney General nominee Michael B. Mukasey. We highly value your commitment to ensure that the next U.S. Attomey General is dedicated to safeguarding the physical and psychological welfare and human rights of individuals incarcerated by the U.S. government in foreign detention centers. We are all too aware of reports of a 2002 memorandum by then Assistant U.S. Attorney General Jay Bybee that granted power to the President to issue orders in violation of the Geneva Conventions and international laws that prohibit torture and cruel, inhuman, or degrading treatment. (Fortunately, this memorandum has since been disavowed by President Bush and overridden by his Executive Order in July of this year.)

In a separate letter to President Bush, we urged him to regard the ongoing Senate confirmation process involving his Attorney General nominee as a timely opportunity to expand his recent Executive Order to clarify that ''enhanced'' interrogation techniques, such as forced nudity, waterboarding, and mock executions, which are defined as torture or cruel, inhuman, or degrading treatment by the Geneva Conventions and the United Nations Convention Against Torture, shall not be used or condoned by the U.S. government. We also urged the government to disallow any testimony resulting from the use of these techniques.

APA unequivocally condemns the use of torture and cruel inhuman, or degrading treatment or punishment under any and all conditions, including the detention and interrogation of both lawful and unlawful ''enemy combatants,'' as defined by the U.S. Military Commissions Act of 2006 (see attached August 2007 resolution). Accordingly, we also urge the Congress and the Bush administration to establish policies and procedures to ensure the judicial review of these detentions, which in some instances have gone on for years without any determination of their legality.

Psychologists consulting to the military and intelligence communities, like their colleagues in domestic forensic settings, use their expertise to promote the use of ethical, effective, and rapport-building interrogations, while safeguarding the welfare of interrogators and detainees. It is always unethical for a psychologist to plan, design, or assist, either directly or indirectly, in interrogation techniques delineated in APA's 2007 resolution and any other techniques defined as torture or cruel, inhuman, or degrading treatment or punihment under the Geneva Conventions, the United Nations Convention Against Torture, and APA's 2006 Resolution Against Torture.

There are no exceptional circumstances whatsoever to these prohibitions, whether induced by a state of war, threat of war, or any other public emergency, or in the face of laws, regulations, or orders. APA will support psychologists who refuse to work in settings in which the human rights of detainees are not protected. Moreover, psychologists with knowledge of the use of any prohibited interrogation technique have an ethical responsibility to inform their superiors and the relevant office of inspectors general, as appropriate, and to cooperate fully with all government oversight activities to ensure that no individual is subjected to this type of treatment.

We look forward to working with the Senate Judiciary Committee to develop policies on interrogation that provide for ethical and effective means to elicit information to prevent acts of violence. Our own work in this area is ongoing, and we plan to make available a casebook and commentary (upon completion) to provide guidance on the interpretation of our resolution. If you have any questions or are in need of additional information, please contact APA's Director of Ethics, Stephen Behnke, J.D., Ph.D., at (202) 336–6006 or at sbehnke@apa.org, or our Senior Policy Advisor, Ellen Garrison, Ph.D., at (202) 336–6066 or egarrison@apa.org.

Sincerely,

SHARON STEPHENS BREHM, PH.D,
President.
NORMAN B. ANDERSON, PH.D.,
Chief Executive Officer.

Attachment

REAFFIRMATION OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION POSITION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT AND ITS APPLICATION TO INDIVIDUALS DEFINED IN THE UNITED STATES CODE AS ''ENEMY COMBATANTS''

Whereas the mission of the American Psychological Association is to advance psychology as a science and profession and as a means of promoting health, education and human welfare through the establishment and maintenance of the highest standards of professional ethics and conduct of the members of the Association;

Whereas the American Psychological Association is an accredited non-governmental organization at the United Nations and so is committed to promote and protect human rights in accordance with the United Nations Charter and the Universal Declaration of Human Rights;

Whereas the American Psychological Association passed the 2006 Resolution Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, a comprehensive and foundational position applicable to all individuals, in all settings and in all contexts without exception;

Whereas in 2006, the American Psychological Association defined torture in accordance with Article 1 of the United Nations Declaration and Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,

[T]he term ''torture'' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted upon a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official [e.g., governmental, religious, political, organizational] capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions [in accordance with both domestic and international law];

Whereas in 2006, the American Psychological Association defined the term ''cruel, inhuman, or degrading treatment or punishment'' to mean treatment or punishment by a psychologist that, in accordance with the McCain Amendment, is of a kind that would be ''prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.'' Specifica1ly, United States Reservation I.1 of the Reservations, Declarations and Understandings to the United Nations Convention Against Torture stating, ''the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.'' [ii]

Be it resolved that the American Psychological Association reaffirms unequivocally the 2006 Resolution Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in its entirety in both substance and content (see Appendix A);

Be it resolved that the American Psychological Association affirms that there are no exceptional circumstances whatsoever, whether induced by a state of war or threat of war, internal political instability or any other public emergency, that may be invoked as a justification for torture or cruel, inhuman, or degrading treatment or punishment, including the invocation of laws, regulations, or orders;

Be it resolved that the American Psychological Association unequivocally condemns torture and cruel, inhuman, or degrading treatment or punishment, under any and all conditions, including detention and interrogations of both lawful and unlawful enemy combatants as defined by the U.S. Military Commissions Act of 2006;

Be it resolved that the unequivocal condemnation includes an absolute prohibition against psychologists' knowingly planning, designing, and assisting in the use of torture and any form of cruel, inhuman or degrading treatment or punishment;

Be it resolved that this unequivocal condemnation includes all techniques defined as torture or cruel, inhuman or degrading treatment under the 2006 Resolution Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the United Nations Convention Against Torture, and the Geneva Convention. This unequivocal condemnation includes, but is by no means limited to, an absolute prohibition for psychologists against direct or indirect participation in interrogations or in any other detainee-related operations in mock executions, water-boarding or any other form of simulated drowning or suffocation, sexual humiliation, rape, cultural or religious humiliation, exploitation of phobias or psychopathology, induced hypothermia, the use of psychotropic drugs or mind-altering substances used for the purpose of eliciting information; as well as the following used for the purposes of eliciting information in an interrogation process: hooding, forced nakedness, stress positions, the use of dogs to threaten or intimidate, physical assault including slapping or shaking, exposure to extreme heat or cold, threats of harm or death; and isolation, sensory deprivation and overstimulation and/or sleep deprivation used in a manner that represents significant pain or suffering or in a manner that a reasonable person would judge to cause lasting harm; or the threatened use of any of the above techniques to the individual or to menbers of the individual's family;

Be it resolved that the American Psychological Association calls on the United States government—including Congress, the Department of Defense, and the Central Intelligence Agency—to prohibit the use of these methods in all interrogations and that the American Psychological Association shall inform relevant parties with the United States government that psychologists are prohibited from participating in such methods;

Be it resolved that the American Psychological Association, in recognizing that torture and other cruel, inhuman or degrading treatment and punishment can result not only from the behavior of individuals, but also from the conditions of confinement, expresses grave concern over settings in which detainees are deprived of adequate protection of their human rights, affirms the prerogative of psychologists to refuse to work in such settings, and will explore ways to support psychologists who refuse to work in such settings or who refuse to obey orders that constitute torture;

Be it resolved that the American Psychological Association asserts that any APA member with knowledge that a psychologist, whether an APA member or non-member, has engaged in torture or cruel, inhuman, or degrading treatment or punishment, including the specific behaviors listed above, has an ethical responsibility to abide by Ethical Standard 1.05, Reporting Ethical Violations, in the Ethical Principles of Psychologists and Code of Conduct (2002) and directs the Ethics Committee to take appropriate action based upon such information, and encourages psychologists who are not APA members also to adhere to Ethical Standard 1.05;

Be it resolved that the American Psychological Association commends those psychologists who have taken clear and unequivocal stands against torture and cruel, inhuman or degrading treatment or punishment, especially in the line of duty, and including stands against the specific behaviors (in lines 81 through 100) or conditions listed above; and that the American Psychological Association affirms the prerogative of psychologists under the Ethical Principles of Psychologists and Code of Conduct (2002) to disobey law, regulations or orders when they conflict with ethics;

Be it resolved that the American Psychological Association asserts that all psychologists with information relevant to the use of any method of interrogation constituting torture or cruel, inhuman, or degrading treatment or punishment have an ethical responsibility to inform their superiors of such knowledge, to inform the relevant office of inspectors general when appropriate, and to cooperate fully with all oversight activities, including hearings by the United States Congress and all branches of the United States government, to examine the perpetration of torture and cruel, inhuman, or degrading treatment or punishment against individuals in United States custody, for the purpose of ensuring that no individual in the custody of the United States is subjected to torture or cruel, inhuman, or degrading treatment or punishment;

Be it resolved that the APA Ethics Committee shall proceed forthwith in writing a casebook and commentary that shall set forth guidelines for psychologists that are consistent with international human rights instruments, as well as guidelines developed for health professionals, including but not limited to: Common Article 3 of the Geneva Conventions; The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; The United Nations Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; and The World Medical Association Declaration of Tokyo: Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment;

BE IT RESOLVED that the American Psychological Association, in order to protect against torture and cruel, inhuman, or degrading treatment or punishment, and in order to mitigate against the likelihood that unreliable and/or inaccurate information is entered into legal proceedings, calls upon United States legal systems to reject testimony that results from torture or cruel, inhuman, or degrading treatment or punishment.

ENDNOTES

[i] Defined as both unlawful enemy combatants and lawful enemy combatants as set forth in the U.S. Military Commissions Act of 2006 (Chapter 47A; Subchapter I: §948a. Definitions)

''(1) Unlawful enemy combatant.—

(A) The term 'unlawful enemy combatant' means—

''(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States

or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

''(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

''(B) Co-belligerent.—In this paragraph, the term 'cobelligerent', with respect to the United States, means any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy.

''(2) Lawful enemy combatant.—The term 'lawful enemy combatant' means a person who is—

''(A) a member of the regular forces of a State party engaged in hostilities against the United States;

''(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

''(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

''Article V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Resolution Adopted by the Council of Representatives of the American Psychological Association on August 19, 2007.

The ACTING PRESIDENT pro tempore. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I yield 10 minutes to the distinguished Senator from Alabama, Mr. SESSIONS.

Mr. SESSIONS. Mr. President, I believed we were moving toward a very harmonious vote on Judge Mukasey's confirmation. I have been disappointed that has not occurred.

Opponents have latched on to complaints about torture and a specific classified procedure that Judge Mukasey has never seen or studied in detail. Since he refused to express a legal opinion on that one specific technique, they have asserted that he supports torture, and many have decided to vote against him. I think that is unfair to the judge.

I will recall that Judge Mukasey was called to the attention of the President through Senator SCHUMER who has spoken highly of him and who voted for him in the committee, as did Senator FEINSTEIN, two Democratic colleagues. Senator SCHUMER apparently has known him and his reputation in New York for some time. The President attempted to reach out and to pick a nominee who appeared to be above politics, apart from politics, a person who had a history of competence and integrity.

Being a Federal judge is about as removed from the normal give and take of politics and compromise and wheeling and dealing as you can get. And he served in that position for many years but also had experience as an assistant U.S. attorney involved in leading a public corruption section in New York which was pretty sizable and important and dealt with a lot of important cases.

He was on the Law Review at Yale and has all of the kind of academics credentials and practical experience you would look for and is the kind of U.S. Attorney General I, and I think people of both parties can feel comfortable with. I really do believe that.

I was hopeful we would see a nominee such as Larry Thompson, a longtime friend of mine. He served as former Deputy Attorney General of the United States, a former U.S. attorney; Ted Olson, who served as Solicitor General; or former Attorney General Bill Barr. These are a few individuals who would be considered normal Republican appointees for this position and whose views are well known to be in accord with those of the President on most issues. But, instead, the President reached out and appointed someone who appeared to have strong bipartisan support.

I am sorry we have had some of these complaints because I think they distort the record and what the judge actually said in his testimony and are inaccurate in a number of different ways.

The issue of torture has been discussed in great detail. But in many ways it has not been handled with accuracy, and the issues have not been squarely addressed. They have been sort of sloughed over, and he has been accused of things, and others, including the President and former Attorney Generals and the military and other people have been accused of things in an inaccurate fashion.

I think I would like to make a few comments about how I see the legal situation that we find ourselves in and how things have developed. Prior to the Supreme Court's ruling in 2006 in Hamdan, a legitimate position, clearly, for the United States was that our personnel, when they were dealing with unlawful combatants, were bound by the torture statute, title 18, U.S. Code, Section 2340. That is the controlling statutory authority. It defined torture. It was passed overwhelmingly by Congress in 1994.

It was passed by a vote of 92 to 8. Every current member of the Senate Judiciary Committee who was here in the Senate in 1994 voted for it. Senator BIDEN, Senator FEINGOLD, Senator FEINSTEIN, Senator GRASSLEY, Senator HATCH, Senator KENNEDY, Senator KOHL, Senator LEAHY, and Senator SPECTER all voted for this act.

I asked Mr. Jack Goldsmith, former head of the Office of Legal Counsel in the Department of Justice under President Bush who resigned because he was not happy with some of the things that were being done, about the legal landscape regarding torture prior to the Hamdan decision—and he wrote a book about it.

I asked Mr. Goldsmith about the landscape prior to Hamdan—which found that the Common Article III of the Geneva Convention applied to enemy unlawful combatants detained at Guantanamo Bay. But that decision did not occur until the summer of 2006, so prior to that, pretty clearly, the authority that controlled the U.S. military in dealing with unlawful combatants, which we, I think, had every right to conclude were not covered by the Geneva Conventions, was the torture statute Congress passed in 1994. That is the statute that our military was compelled to comply with.

And so the statute on torture is pretty clear. The people who drafted it wanted to make sure that whether in the United States or out of the United States that persons in our custody ought not to be tortured.

That certainly is an honorable and appropriate goal, and they did that. They passed this statute in which they defined torture:

As used in this chapter (1) ''torture'' means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) ''severe mental pain or suffering'' means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering.

And it goes on.

Playing music or segregating a prisoner or giving one prisoner less food or less quality food than you give another one, placing them in stressful conditions clearly does not qualify under this torture statute as inflicting severe physical or mental pain.

Our military had lawyers. As Mr. Goldsmith, who was a critic, really, of this administration's behavior, said in his testimony and in his book, they were awash with lawyers. They had lawyers all over the place. Everything was read by lawyers. He said the CIA had 100 lawyers. I don't know how many in the Department of Defense and others he made reference to were there trying to figure out how to conduct interrogations at a time when our

country had been attacked, 3,000 people had been killed, and we were trying to figure out if there were other cells in our country and other groups prepared to kill more Americans.

I remember when Senator John Ashcroft was nominated for Attorney General, and they were jumping on him about all of this and what should be done and what they had heard that somebody might have done. An exasperated then-Senator, Attorney General nominee Ashcroft responded to one question in frustration by saying: Well, the problem I have with you, Senator, is, it is not my definition of torture that counts, it is the one you enacted into law.

So that is what we enacted into law. If people are not happy with it—I think it is a legitimate statute, but if they are not happy with it, so be it. That is the one we passed into law. Our lawyers were telling our intelligence people and others who were apprehending terrorists who were committed to destroying America that they had to comply with this statute.

The ACTING PRESIDENT pro tempore. The time of the Senator has expired.

Mr. SESSIONS. I ask unanimous consent for 1 additional minute.

The ACTING PRESIDENT pro tempore. Does the Senator from Pennsylvania yield an additional minute to the Senator from Alabama?

Mr. SPECTER. What is the request pending?

Mr. SESSIONS. One additional minute.

Mr. SPECTER. Granted.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. SESSIONS. There is another matter of some importance. A number of Senators have demanded that Judge Mukasey make express statements of law regarding the separation of powers, and they have asked him these questions as a condition of his confirmation. Several Senators alluded to private conversations in which they say Judge Mukasey stated that a President cannot act outside the parameters set by the legislative branch, I guess on most any matter. Particularly, I guess it dealt with FISA. I believe this contradicts the fundamental separation of powers set forth in the Constitution by our Founding Fathers. The oath the President takes is to faithfully execute the Office of the President and to preserve, protect, and defend the Constitution of the United States. That is written in the Constitution.

While the original FISA statute was being debated in 1978, then Carter administration Attorney General Judge Griffin Bell testified:

> The current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that this does not take away the power of the President under the Constitution.

I associate myself with the remarks of Griffin Bell and recognize that nothing we can do in this Congress can impede on the powers vested in the Executive by the Constitution. Congress cannot curtail the constitutional powers of the Executive by statutory law.

The ACTING PRESIDENT pro tempore. The time of the Senator has expired.

Mr. SPECTER. How much more time would the Senator like?

Mr. SESSIONS. One additional minute.

Mr. SPECTER. Granted.

Mr. SESSIONS. The purported conversations that Senators indicate they have had apparently took place in private settings and not in a confirmation hearing held by the Judiciary Committee where these statements could be made a part of the record or cross-examined or where the words could be recorded with any accuracy. These types of promises, though touted as justification for a vote, perhaps, are not legislative history and have not been made a part of the record of this nomination. They cannot be a part of a legislative history of any kind.

Furthermore, I would suggest that if Judge Mukasey did, in fact, say that in a categorical manner, which I really doubt, he would be in error. Any President has certain constitutional powers that cannot be taken away by statute.

I yield the floor.

Mr. SPECTER. Mr. President, how much time remains on each side?

The ACTING PRESIDENT pro tempore. The Senator from Pennsylvania has 1 hour 26 minutes; the Senator from Vermont has 1 hour 36 minutes.

The Senator from Maryland is recognized for 10 minutes.

Mr. CARDIN. Mr. President, I have the opportunity to serve on the Judiciary Committee, so I participated in the confirmation hearings on Judge Mukasey. I had a chance to personally meet with him. I had the chance to propound written questions and received written answers from him. Throughout this process, all of us have been looking for a person to be the next Attorney General who would be an Attorney General for the American people and not just the President of the United States.

I cannot accept Judge Mukasey's answer on waterboarding. As my colleagues have said, waterboarding is an interrogation technique that simulates death by drowning. The original question that was asked Judge Mukasey on the second day of the confirmation hearings asked specifically about waterboarding. He didn't really answer the question. I must tell you, I gave him the benefit of the doubt on that question. He indicated that he may not have been familiar with what waterboarding is. I found that difficult to believe, but okay. He would have a chance to reflect upon it, be able to look at the historical information on waterboarding, and we asked him a written question followup as to whether he would comment on the interrogation technique of waterboarding.

The question was asked. As waterboarding is generally known, it has been used for centuries. Judge Mukasey would not give us a direct answer as to whether waterboarding was torture and prohibited under U.S. law. Then we find out that Judge Mukasey says: Look, if Congress passes a statute that specifically outlaws waterboarding, I would enforce that statute. That is not necessary because waterboarding is already illegal. But that causes me some additional problems.

Let me talk a little bit about the various issues because to me it is more than just waterboarding. We are talking about torture and the U.S. position on torture and the U.S. leadership in advancing human rights as the leader of the free world. I believe that reputation has been damaged.

The United States historically has provided clarity and leadership on advancing human rights issues. There should be no doubt that waterboarding is torture and waterboarding is illegal. My colleagues have cited the torture statutes that have been passed by the Congress that make it clear that this kind of conduct would fall under the general definition of torture and is illegal in the United States.

It is internationally condemned under the Geneva Conventions article 3. Our Constitution prohibits torture, and waterboarding would fall under that. We prosecuted Japanese officials after World War II as war criminals because they waterboarded American soldiers.

We recently passed the McCain amendment that said that cruel, inhumane, and degrading treatment or punishment of persons under the detention, custody, or control of the United States would not be permitted. So there should be no doubt that waterboarding is torture and illegal.

Admiral Hutson, who testified before the committee on a panel of outside witnesses, told us a little bit more about the historical aspects of waterboarding. He is a former Judge Advocate General, former senior uniformed legal advisor to the Secretary of the Navy and the Chief of Naval Operations. He stated that waterboarding ''is the most iconic example of torture.'' It was devised during the Spanish Inquisition, and its use has been repudiated for centuries. This is not a new technique. It is well known. I don't believe we need to pass another statute. It is clear already.

I have heard my colleagues say: All we have to do is pass a statute. Does that mean we are going to have to pass a statute that outlaws all types of specific uses of torture such as mock execution or forced nudity or attack dogs or the use of rack or thumb screws? Are we going to have to outlaw those specific techniques because it is not clear under our statute of torture that is illegal today? I hope not. I hope it is clear that these techniques are torture, as is waterboarding, and it is illegal.

Admiral Hutson put it best when he said the Attorney General, as our chief

law enforcement officer, has to be absolutely unequivocal as to what is torture and what is not. On torture, I want the President of the United States and the Attorney General to be very clear to the international community that the United States will not tolerate torture being used by the United States, waterboarding being used by the United States or used against any American. We have to be clear about that.

I want our Government to use all resources at its disposal if a foreign agent attempts to torture an American, including waterboarding of an American. It has been said, but can you imagine the resolution that would be brought before this body if an American soldier was waterboarded by a foreign enemy, what we would be doing here, each one of us?

I have my concern because I want our country to be clear on this issue. I have the President of the United States, in a signing statement on the McCain amendment, saying: Well, maybe torture doesn't apply to me. Now I have an Attorney General nominee who tells us that he can't tell us with precision that waterboarding is illegal?

We do have international responsibilities. We are the leader of the free world. I am proud to represent this body in the Helsinki Commission as the chair, to speak up internationally on human rights issues. I find myself defending America. I am having a hard time on this issue as to where we stand on the issue of torture.

Judge Mukasey is not responsible—let me make it clear because some of my colleagues have intimated this—for the Bush administration's policies on torture or on techniques to interrogate. He is not responsible. He had nothing to do with it. But I do believe we need to make sure he will stand up to the Bush administration to challenge these tactics if they, in fact, are illegal. Judge Mukasey is a good person. He is an honorable man. But on the critical issue of whether he will stand up to the President and give independent advice as to what is torture and what is not, I have my doubts.

I will be voting against his confirmation.

I yield back the remainder of my time.

The ACTING PRESIDENT pro tempore. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, we have about 3 hours remaining of time, and I note Senators on the floor speaking in opposition to Judge Mukasey. So I would ask my colleagues who want to speak in favor to come to the floor so we can make some evaluation as to how much time we need, and perhaps some can be yielded back. We are not required to vote on Friday morning necessarily.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from California is recognized for 15 minutes.

Mrs. BOXER. Mr. President, thank you very much.

Mr. President, I rise to express my opposition to the nomination of Judge Michael Mukasey to be our next Attorney General. I thank Chairman LEAHY and his committee, including Senator SPECTER and members I see here, Senator KENNEDY, for working hard to examine the nominee's record and, frankly, for asking the tough questions, which I think gave us a real look into the mind and the heart of this man.

I have respect for Judge Mukasey's background, his dedication to public service, his reputation as a distinguished jurist, and as a good man. But when evaluating our Nation's chief law enforcement official, we must weigh far more than background and likability. Particularly now—particularly now—when we are following the disastrous tenure of Alberto Gonzales, particularly now, when we have lost so much more leadership in the world because of what is happening in Iraq, and, unfortunately, what has happened in Abu Ghraib, we need to look past likability and qualifications.

We must firmly believe our next Attorney General must always put his loyalty to the Constitution above his loyalty to the President. We have a President and a Vice President who have dangerously abused their Executive power and who have undermined the public trust. This is not a partisan opinion.

Listen to what John Dean, White House Counsel to President Richard Nixon, wrote:

> Not since Nixon left the White House have we had such greed over presidential power, and never before have we had such political paranoia. . . . History never exactly repeats itself, but it does some rather good imitations.

When an administration spies on its own citizens without a warrant, strips habeas corpus rights from those held by America, and fires its own U.S. attorneys for political reasons, that is a shocking abuse of Executive power.

When an administration thinks it can just ignore an entire coequal branch of Government, even using signing statements to reinterpret or disregard more than 750 laws that Congress has passed, that is a shocking abuse of Executive power.

When an administration silences its own officials, rewriting testimony, redacting testimony, shelving reports, refusing to let experts publicly speak the truth, that is a shocking abuse of Executive power.

I have seen this so many times with this administration. The latest time was with global warming experts whose truths the White House find ''inconvenient.'' And what did they do? They redacted testimony of the CDC Director, the Center for Disease Control Director, when we asked her to come before the Environment Committee of the Senate and tell us what would the health effects of unfettered global warming be. What would happen? The White House muzzled her by slashing her testimony. They gave all kinds of excuses as to why it was done. None of them were real.

Then, when I wrote to the President, and I said: Mr. President, we need to hear what Dr. Gerberding has to say about the impacts of global warming on the health of our people; Mr. Fielding, White House Counsel, wrote back: Oh, gee, we are not going to send you her original testimony you have asked for. Oh, no, that would be an abuse of executive privilege. Let me restate that: That would be an abuse of the separation of powers. And he asserted executive privilege. Imagine asserting executive privilege for something like the health effects of global warming. It is unbelievable.

So now we need an Attorney General who is going to be the people's lawyer, not the President's lawyer, not the one who is going to tell us: Oh, yeah, we just cannot do anything about it, Congress.

We need an Attorney General who is going to check this unprecedented abuse of power, not rubberstamp it.

Unfortunately, because of the deep and thorough questioning of the Judiciary Committee, and my reading of that, I cannot support Judge Mukasey.

Judge Mukasey ruled that President Bush had the authority to detain American citizens as enemy combatants without criminal charges or habeas corpus rights; likewise, during his confirmation hearing, Judge Mukasey failed to demonstrate that he would independently evaluate this President's broad assertion of executive privilege.

When asked if he would permit the U.S. attorney to execute congressional contempt citations when the White House refuses to provide documents to Congress, Judge Mukasey did not say yes. He should have said yes.

The statute is clear. The statute is clear that when Congress issues a contempt citation, the U.S. attorney is required to bring the matter to a grand jury.

What Judge Mukasey said was, he would have to look at it. He would have to see if it really was reasonable. The fact is, that is not what the statute says. There is no ''reasonable'' test. When the Congress issues a contempt citation, the U.S. attorney is required to bring the matter to a grand jury. If the President says ''executive privilege,'' it does not matter. But the judge said he would look at it and see if the President was being reasonable.

So we have to send a clear and unequivocal message to the Justice Department staff. We have to send a clear message to the American people and to the world that the United States honors and respects and will never turn away from our Constitution.

It is so amazing to me. We have a crisis in Pakistan where a dictator—unfortunately, is what I am saying General Musharraf is behaving like—has suspended the Constitution—and everyone here, all of us, feel terrible about this, including the President of the United States, who, as I understand it,

talked to him on the phone and told him to restore the Constitution—and here we cannot get papers from this White House.

I am not comparing that in any way, shape, or form to the kind of suspension of the Constitution we see abroad. But I am saying in this country—in this country—everyone assumes the Constitution will be followed. That is why we need an Attorney General now, in 2007, who is going to be so strong on the point.

Yes, he should have said if Congress issues a contempt citation, of course, we will do what we have to do under the law. So it is not enough to hope the nominee will exercise independent judgment and stand up to this President and Vice President. We must know from the record before us that this nominee will uphold the Constitution and our laws and do it clearly and unequivocally.

Now, that is a high standard. I admit that. But that is what the people of this great Nation deserve, nothing less. Unfortunately, Judge Mukasey's response to questions about torture do not meet the standard.

During his confirmation hearing, the nominee was asked whether waterboarding is illegal. Now, I know a lot of people have discussed this, and perhaps we are all being repetitious. But I think we need to say how we feel.

This is a moment for this Senate. This has been a long day for all of us. I know for me it has been a big day. I helped to lead, along with Senator INHOFE, an override of a very important bill. I had a hearing on global warming. I had a briefing on global warming. I have been at it, just as we all have.

But I came out to the floor because I think this is an important moment where Members have to be heard. We must know from the record before us that the nominee will uphold the Constitution and our laws. And, yes, it is a high standard that the people deserve.

So when the nominee was asked whether waterboarding is illegal, he responded if waterboarding is torture, then, in fact, it is unconstitutional. So I have to ask this rhetorical question: If waterboarding is torture? If? We are talking about a brutal interrogation technique that simulates drowning.

Not surprisingly, members of the Judiciary Committee were not satisfied with this answer. And I praise them. They probed, they questioned, they asked again: Is waterboarding illegal?

This time, the judge responded with a four-page letter that, once again, failed to answer. He called the question ''hypothetical.'' He said his legal opinion would depend on ''the actual facts and circumstances.'' Depend on ''the actual facts and circumstances'' if waterboarding is torture? Is this the message we want to send to the world, that our evaluation of a brutal tactic depends on ''facts and circumstances''?

In fact, Judge Mukasey's answer was a bit too similar to a statement by Alberto Gonzales that the legality of torture techniques ''would depend on circumstances.''

This is not a clear answer. This is not unequivocal. And it is not what we need in an Attorney General now, in 2007, when the world is turning away from America as a moral leader.

Teddy Roosevelt did not have to consider the ''facts and circumstances'' in 1902 when he court-martialed and removed an American general in the Philippines for allowing his troops to engage in waterboarding. That was 1902, the last century, the turn of the last century, and we have someone equivocating on this point? President Roosevelt said then nothing can justify the use of torture or inhuman conduct by our military.

Senators MCCAIN, WARNER, and GRAHAM did not have to consider ''the facts and circumstances'' when they wrote to Judge Mukasey:

> Waterboarding, under any circumstances, represents a clear violation of U.S. law.

Waterboarding today is not a hypothetical. It is used in Burma against supporters of democracy. Waterboarding is an unconstitutional form of cruel and inhumane treatment. It is illegal under U.S. laws—from the Torture Act, which prohibits acts ''specifically intended to inflict severe physical or mental pain or suffering,'' to the Detainee Treatment Act, which prohibits ''cruel, inhuman or degrading treatment.''

It is illegal under international laws, such as the Geneva Conventions, which are not quaint. Those conventions prohibit cruel, humiliating, and degrading treatment.

Following World War II, the United States convicted several Japanese soldiers for waterboarding American and allied POWs. Let me repeat: Following World War II, the United States convicted several Japanese soldiers for waterboarding American and allied POWs. What kind of statement are we hearing from Judge Mukasey? Our law and our history are crystal clear, so why can't Judge Mukasey state in unequivocal terms that waterboarding is torture and that is illegal?

Mr. President, I ask unanimous consent for 1 additional minute and I will sum up.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mrs. BOXER. Mr. President, our country is at a critical point in our history. This President and Vice President have shown reckless disregard for the rule of law and the institutions sworn to uphold it.

Now, more than ever before, we need an Attorney General who can exercise independent judgment and who will exercise independent judgment. We need an Attorney General who shows every day, by word and by deed, that the United States is still the world's standard bearer for the rule of law. We need an Attorney General who will truly turn the page and write a new chapter for the Justice Department and for our country.

It is very rare that I vote no on these kinds of nominations. I do it now and then. But I have to say, regretfully, tonight I have concluded Judge Mukasey does not meet the critical standard and at this time I feel very strongly that he should not be confirmed.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Massachusetts is recognized for 10 minutes.

Mr. KENNEDY. Mr. President, the Department of Justice is in a state of crisis. Under Attorney General Gonzales, it too often served as a rubberstamp for the White House and as a pawn for political gain, rather than as the Nation's guardian of the rule of law. It ignored the law and authorized torture and warrantless surveillance. It let politics drive decisions about who should be prosecuted. It fired U.S. attorneys who would not go along. It hired and punished career attorneys on the basis of their personal politics, and it abandoned enforcement of our civil rights laws.

After such an unacceptable period of tarnished leadership of the Department, we need a clear, decisive, and straightforward Attorney General who is not afraid to stand up for the Constitution and the rule of law—especially when that means disagreeing with the President of the United States.

I had hoped Judge Mukasey would be that person. He is, clearly, an able lawyer, and his commitment to public service as an assistant U.S. attorney and Federal judge is admirable. As a Federal judge for almost 19 years, he was, by all accounts, fair and conscientious in the courtroom. But after listening to Judge Mukasey's testimony and considering his responses to written questions from the members of the Judiciary Committee, I have concluded he is not the right person to lead the Justice Department at this crucial period of our history.

The next Attorney General must restore confidence in the rule of law. He must show the American people and the world America has returned to its fundamental belief in the rule of law as the bedrock protector of our national values. Only an Attorney General who is not afraid to speak truth to power can be such a leader. Regrettably, Michael Mukasey has shown he is not that leader.

Similar to many of my colleagues and many American citizens, I am deeply troubled by Judge Mukasey's evasive answers about torture. He has repeatedly refused to acknowledge that waterboarding—the controlled drowning of a prisoner—is torture. Instead, he has said only that torture is unconstitutional without being willing to say whether waterboarding is torture.

As the record makes clear, courts and tribunals have consistently found waterboarding to be an unacceptable act of torture. As Malcolm Nance, a former master instructor and chief of training at the U.S. Navy Survival,

Evasion, Resistance and Escape School, said of waterboarding:

For the uninitiated, it is horrifying to watch and if it goes wrong, it can lead straight to terminal hypoxia. When done right it is controlled death.

During the questions for Judge Mukasey in the Judiciary Committee, he was asked these questions:

Is the use of a wet towel and dripping water to induce the misperception of drowning (i.e, waterboarding) legal?

Listen to what the Judge Advocates said:

''No,'' said RADM Bruce McDonald, U.S. Navy Judge Advocate General.

''No,'' said BG Kevin Sandkuhler, U.S. Marines, Judge Advocate General.

''No. An interrogation technique that is specifically intended to cause severe mental suffering involving a threat of imminent death by asphyxiation is torture,'' said MG Jack Rives, U.S. Air Force Judge Advocate General.

''Inducing the misperception of drowning as an interrogation technique is not legal,'' said MG Scott Black, U.S. Army Judge Advocate General.

Waterboarding is an ancient and barbaric technique. In the fifteenth and sixteenth centuries, interrogators of the Spanish inquisition used it. It was used against slaves in this country. In World War II, it was used against our soldiers by Japan. In the 1970s, it was used against political opponents of the Khmer Rouge and the military dictatorships of Chile and Argentina. As I speak, it is being used against prodemocracy activists by the military dictators of Burma. This is the company the Bush administration embraces when it refuses to renounce waterboarding.

But Judge Mukasey is unwilling to say waterboarding violates the law. He calls it repugnant, and it obviously is. But he refuses to condemn it as unlawful. Why? The answer seems painfully obvious. Former intelligence officers and supervisors have admitted—and the Vice President has confirmed—that the CIA has waterboarded detainees. Had Judge Mukasey renounced waterboarding as unlawful, he would have had to assert his independence and speak the truth about this administration's lawlessness. He was unwilling to do so.

We were told Judge Mukasey had agreed to enforce a new law prohibiting waterboarding if Congress passed it. There are two problems with this statement. First, enforcing laws passed by Congress that are constitutional is the job of the Attorney General. It is a prerequisite to occupying the office, not a concession to be offered to win confirmation.

But, second, waterboarding is already illegal. It is illegal under the Geneva Conventions, which prohibit ''outrages upon personal dignity,'' including cruel, humiliating, and degrading treatment. It is illegal under the Torture Act, which prohibits acts ''specifically intended to inflict severe physical or mental pain or suffering.'' It is illegal under the Detainee Treatment Act, which prohibits ''cruel, inhumane, or degrading treatment,'' and it violates the Constitution. The Nation's top military lawyers and legal experts across the political spectrum have condemned waterboarding as illegal. After World War II, the United States prosecuted Japanese officers for using waterboarding. What more does this nominee need to enforce existing laws?

The Attorney General must have the legal and moral judgment to know when an activity rises to the level of a violation of our Constitution, treaties or statutes. But this nominee wants to pass the buck to Congress. He has failed to demonstrate that he will be the clear, decisive, and straightforward leader the Department of Justice so desperately needs.

This administration has recklessly brushed aside the rule of law for 7 years. We need an Attorney General who will stand up to this destructive conduct and say: No more. We cannot afford to take our chances on the judgment of an Attorney General who either does not know torture when he sees it or is willing to look the other way to suit the President.

I urge the Senate to vote no on this nomination.

Mr. SPECTER. Mr. President, before yielding 15 minutes to the Senator from New York, I would like to note to my colleagues we have Senator GRAHAM listed with a request for a short period of time, and the only request pending for those in support of Judge Mukasey, so unless other Senators come to the floor, at least on our side, we may be nearing the end of debate. I think it is appropriate to put all Senators on notice that we could be voting perhaps shortly after 10 or the 10:30 range.

I yield 15 minutes, as I said, to Senator SCHUMER.

The ACTING PRESIDENT pro tempore. The Senator from New York is recognized for 15 minutes.

Mr. SCHUMER. Thank you very much, Mr. President. I wish to thank Senator SPECTER for yielding time and I wish to thank all my colleagues for this debate.

I intend to vote to confirm Michael B. Mukasey to be the 81st Attorney General of the United States. I do so for one overarching reason: the Department of Justice, one of the crown jewels among our Government institutions—once the crown jewel—is now adrift and rudderless. It desperately needs a strong and independent leader at the helm to set it back on course. A number of people's lives who are affected day to day in quiet but material ways by what this Justice Department does are at risk. We don't hear from them. Their issues, whether it is the ability to vote or the right to be safe or the ability to be protected from economic crime, we don't hear about that. But it matters.

Under previous leadership—or lack thereof—the Justice Department has become adrift. The Justice Department has become rudderless. The Justice Department has become politicized. The Justice Department has become an agency where morale is as low as it has ever been. So we desperately need a strong and independent leader at its helm to set it back on course, and that is not a trivial statement or a statement to be forgotten or passed over. I believe Judge Mukasey is that person.

As almost everyone in America knows, the Justice Department has been run into the ground by the Bush administration, especially under Alberto Gonzales. As I said when I introduced Judge Mukasey, he will be inheriting an agency experiencing its greatest crisis since Watergate and, if confirmed, his tasks will be no less momentous and no less difficult than that facing Edward Levi when he took the reins of John Mitchell's Justice Department after Watergate. A department in such crisis should not be left to an unconfirmed and unaccountable caretaker.

We need to look no further than our own investigation in the Senate Judiciary Committee to see that we need a real leader at the top of the Justice Department. What we learned in that investigation over the last 9 months leads inexorably to the conclusion we cannot afford a caretaker Attorney General for the next 14 months.

Let me review—because they seem almost forgotten in this Chamber tonight—some of the most disturbing revelations. We learned that outstanding U.S. attorneys were dismissed without cause or, worse, because they may have been too tough on Republicans or too soft on Democrats. We learned that career Civil Rights Division lawyers have been driven out in droves; that when these lawyers said that civil rights were being violated or the Voting Rights Act was being violated, they were overruled by political decisions made from the top.

In my judgment, there was no way that any fair Justice Department would have allowed the voter ID process that is now in place in Georgia and take back the ability to vote that was fought for so long and hard.

We learned that individuals appear to have been prosecuted for political reasons. In the other House, the Judiciary Committee did an extensive investigation, and in the process of doing one, it appears more and more likely that a Democratic Governor in Alabama is sitting in jail because of a political prosecution. How can we have that in America? How can we allow that? How can we countenance it?

We learned that White House liaison Monica Goodling unlawfully rejected young lawyers for career jobs because they were not conservative ideologues.

We learned that there were improper political litmus tests in hiring decisions in the Civil Rights Division, in the prestigious Honors Program, and even in the Summer Law Intern Program. So politics permeated the Justice Department—the Department,

above all, that should be immune from politics and had been until this administration.

We learned that Bradley Schlozman, in violation of the Department's own policy, brought indictments on the eve of an election in Missouri, seemingly to influence the result. We learned that politics seems to have trumped professionalism in decisionmaking about voting rights cases, tobacco litigation, and other matters. The list goes on and on.

Justice is sacred in this country. It is the Justice Department that must produce justice.

In sum, we learned that politics has been allowed to infect all manner of decisionmaking at the Department of Justice.

Now we are on the brink of a reversal. There is virtually universal agreement, even from those who oppose Judge Mukasey, that he would do a good job in turning the Department around in these areas.

One of my colleagues who is voting against the nominee nonetheless lauded Judge Mukasey as ''a brilliant lawyer, a distinguished jurist and, by all accounts, a good man.''

Another colleague on the Judiciary Committee, who is also voting nay, had this to say:

> Over the remaining 15 months of the Bush Presidency, the Department must recover its credibility and its reputation. . . . Judge Mukasey appears to have the intelligence, the experience, and the stature to undertake this very important task.

Such comments of confidence echo the comments of those who have appeared before the judge in court. As a jurist, Judge Mukasey has a well-deserved reputation for efficiency, fairness, and integrity. Indeed, even those who didn't always receive the benefit of a favorable ruling from the judge have been quick to describe the judge's basic fairness and decency.

Upon his retirement from the bench, one of Jose Padilla's lawyers said, ''I admire him greatly'' and described herself as ''another weeping fan.'' That is a lawyer for Mr. Padilla.

Another Padilla lawyer has said, ''I don't always agree with where he comes out, but I am happy, always happy to draw him as a judge. You are going to get your day in court.'' He went on to say that ''his sense of fairness and due process—it's more than intellectual. It's really down to the genetic level. It's in his DNA.''

There are many such testimonials for Judge Mukasey. Because he is so dead wrong on torture, which I think he is, does not take away all of these other things. And if we are to reject him, make no mistake about it, we will not have somebody in his place who can live up to that standard. Should we reject Judge Mukasey, President Bush has already said he would install an acting caretaker Attorney General who could serve for the rest of his term without the advice and consent of the Senate. It would be another Alberto Gonzales or maybe even worse. It would be the Cheney-Addington wing running the Justice Department on the issues of security. Judge Mukasey is hardly perfect. He would not be the person I would have nominated, but he is clearly head and shoulders better than what we would get. That is not something to be dismissed. That is not something to be forgotten. It is hardly mentioned on this floor.

The main function of the Justice Department would be taken back and railroaded far from where it should be, and it would be gone for another long 14 months. It would mean accepting and exacerbating the declining morale at the highest levels of the Department. It would mean delaying vital reforms relating to depoliticizing prosecutions. It would mean tolerating continued vacancies in many of the top positions at the Justice Department. Perhaps most important, it would mean surrendering the Department to the extreme ideology of Vice President CHENEY and his Chief of Staff, David Addington. All the work we have done—the hearings, the letters, the requests to get the Attorney General to resign—would be undone in a quick moment. That is serious, colleagues.

I have complete respect for people who disagree. It is a values choice. But let's not forget that a caretaker Attorney General will not be close to Judge Mukasey on the issues that brought the downfall of Attorney General Gonzales. Let us also not forget that Judge Mukasey has had a long and distinguished career. Because his views on torture are different from so many of ours, including my own, does not evaporate all of these other important considerations.

Let me be clear on the torture question, which understandably motivates so many of my colleagues. I deeply oppose this administration's opaque, mysterious, and inexplicable policy on the use of torture. This is not a policy that was constructed by Judge Mukasey.

In particular, I believe that the cruel and inhumane technique of waterboarding is not only repugnant but also illegal under current laws and conventions, period. I also support Congress's efforts to pass additional measures that would explicitly ban this and other forms of torture. I voted for Senator KENNEDY's antitorture amendment in 2006, and I am a cosponsor of a similar bill in this Congress. If it was important to do it in 2006, it is also important to do it in 2007.

When Judge Mukasey came before the Senate Judiciary Committee last month, he refused to state that waterboarding was illegal. That was unsatisfactory, that was wrong, and that will be a blemish on his distinguished career for as long as he lives. But he has personally made it clear that if Congress passed further legislation in this area, the President would have no legal authority to ignore it—not even under some theory of inherent authority granted by article II of the Constitution. That is a very important point.

My colleagues say we will never pass an amendment on torture and waterboarding. That may be; it may not. But the fact that Judge Mukasey has rejected the overreaching theory of the unitary executive certainly in this area, and in others, says something about what kind of Attorney General he will be on torture, on wiretapping, and on all of the other issues where basically this Department and this administration thought Congress should have no say at all.

Furthermore, maybe it will be the courts that will rule torture is illegal. Judge Mukasey will abide by those court decisions that make waterboarding illegal. Judge Mukasey will allow those court decisions to stand. I don't think we doubt that.

The expansive article II argument, of course, is one that this administration—in the form of President Cheney and David Addington—has explicitly endorsed. In an infamous torture memo, the following passage was reportedly insisted upon by David Addington:

> Prohibitions on torture must be construed as inapplicable to interrogations undertaken pursuant to his commander-in-chief authority. . . . Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.

That is a horrible statement. Unlike either of his predecessors, Judge Mukasey specifically rejects this view.

I asked him:

> If Congress were to legislate against certain forms of coercive interrogation, such as waterboarding, in all circumstances, not just relating to those in the Department of Defense custody, would it be acting within its constitutional authority?

He answered ''yes.'' No qualifier. And contrary to the views of the Vice President and his Chief of Staff, he specifically stated that the President would not have legal authority to ignore it, even under his inherent authority under article II. For a Bush nominee, this is no small commitment. It is a dramatic difference from both Attorney General Ashcroft and Attorney General Gonzales. It is a quantum leap over the views of Alberto Gonzales and signals that we may yet get an independent review—and perhaps reversal—of some of the worst of the administration's legal policies.

I also believe this because I asked him what he thought of a book written by Jack Goldsmith called ''The Terror Presidency.'' Mr. Goldsmith, as many will recall, was the former head of the Office of Legal Policy, the principal person who sounded the alarm over badly reasoned and overreaching legal opinions within the Government. He was the courageous official who started the process that led to the infamous showdown in the hospital room of John Ashcroft over the President's warrantless wiretapping program.

In his book, Mr. Goldsmith is a relentless critic of the unilateral my-

way-or-the-highway approach of Vice President CHENEY and David Addington. When I asked Judge Mukasey what he thought of the book, he said he thought it was superb, and he endorsed many of its arguments. He also told me privately that the administration's unilateral approach to legal policy was likely responsible for its low approval ratings in the polls. So we have a nominee who is head and shoulders above his predecessors in a number of ways, including in his commitment to work with Congress.

One more thing on the issue of torture, my colleagues. Let's assume Congress cannot pass a law, and let's assume even that the courts do not rule the way we think they should. Still, Judge Mukasey will be head and shoulders different, very possibly, than a caretaker. Mukasey would be more likely than a caretaker to find on his own that waterboarding and other coercive techniques are illegal. He didn't say they are illegal. A caretaker would. He said he would have to study them. He should not have to. There is still a chance that somebody regarded as thoughtful and independent, and a lawyer above all, may—and I cannot say he will, and I wish I could—find on his own that waterboarding and other coercive techniques are illegal. Certainly, there is more of a chance with Judge Mukasey than with a caretaker. So even if you are voting on the issue of torture alone—which I am not—to vote down Judge Mukasey and install an independent caretaker will not solve the problem of torture and, in all likelihood, will leave us worse off, not better.

Judge Mukasey's answers to our questions demonstrated more openness to ending the practices we abhor than either of those who were the previous Attorney General nominees.

In many respects, Judge Mukasey reminds me of Jim Comey, a former Deputy Attorney General in the Bush administration who has been widely praised for his independence. Would we turn down Jim Comey knowing his courage? No. Today, would we turn down Goldsmith? No. Both of them have very conservative views.

Might I have an additional 5 minutes to finish my remarks, I ask my colleague from Pennsylvania.

Mr. SPECTER. The Senator may.

The PRESIDING OFFICER (Mr. MENENDEZ). The Senator is recognized.

Mr. SCHUMER. Mr. President, again, if the issue is torture alone, we clearly will be as bad off as we are today with a caretaker. We may—not will, maybe not even likely—have a chance, a decent chance of being better with Mukasey than with the alternative. And as with Comey and Goldsmith, no, Mukasey will not have our views particularly on issues of security. No one this President nominates will. That is why we are working so hard to get a new President with different views. But on issues of the rule of law and independence and integrity, Judge Mukasey will clearly be much better than others.

I wish to say this to my colleagues, a vast majority of my colleagues who oppose this nomination: I respect their views. I understand the anger and the anguish about what this administration has done to that beautiful lady who stands in the harbor of the city in which I live. I share that anguish. I share it. Unfortunately, we are in a world where this administration will continue for another 14 months.

Let me ask my colleagues to think about this: Let's say we reject Judge Mukasey tonight and the caretaker is installed, and 6 months from now the exact same policies we abhor continue. Will this have been a great victory?

I understand the importance of standing up to the President. Few would accuse me of not doing that. And I understand the importance of symbolic victory. But this is a tough choice because there is a lot at stake on the other side. There is at stake the integrity of a department which is in shambles, which is politicized, and which has routinely rejected the rule of law which is the fundamental wellspring of this Nation and this democracy. And we have a chance, at least a good part of the way, to restore it. The Department of Justice is the front-line agency safeguarding our civil rights, fighting public corruption, curbing violent crime, enforcing environmental laws, and much more.

I deplore the administration's opaque policy on torture, as I mentioned before, but I also care about attempts to affect elections through suspiciously timed criminal prosecutions. I care about criminal cases brought for political reasons. I care about allegations that our leading law enforcement agency is stocked with inexperienced cronies rather than experienced professionals. I care about a downward spiral in civil rights cases brought in recent years. I care about a loss of morale among a 100,000-person strong institution and every week, at one airport or another in this country, how insistent U.S. attorneys came to me and said: Do something. Judge Mukasey, in all likelihood, will do something. A caretaker will not. I don't want to turn those pleas aside, even though I have strong disagreement with Mr. Mukasey on many substantive issues, torture among them. I care about a continuing uptick in violent crime due to a department's failure to keep its eye on the ball and not have the most qualified people in important positions. I care about the Department, and I care about justice. And it is not a small matter to take someone who is measurably better than what his replacement would be and reject it.

Again, this is value choice. There are good arguments on each side. People's values will have them come down on different sides. But anyone who thinks this is an easy choice, anyone who thinks that should Judge Mukasey be rejected things will improve from the desperate, deplorable state in which they are now is wrong.

No one questions that Judge Mukasey would do much to turn around the Justice Department and move to remove the stench of politics from this vital institution. I believe we should give him that chance. There is too much at stake not to.

Mr. BINGAMAN. Mr. President, I rise today to speak about the nomination of Michael Mukasey to be the next United States Attorney General.

First, let me say that by all accounts Judge Mukasey is a good man with a long distinguished record. In his testimony before the Senate Judiciary Committee, he made clear that he understands the need to restore the public's trust and confidence in the Department of Justice. I also believe he demonstrated a willingness to take the necessary steps to de-politicize the Department, and to provide the leadership required to repair its credibility.

However, I am also deeply troubled by the positions Judge Mukasey has taken regarding several important issues. Much has been said about Judge Mukasey's unwillingness to clearly state that certain interrogation techniques, such as waterboarding, are unlawful and amount to torture. I share this concern, but I would also like to highlight another area that I find particularly disturbing; that is the idea that the President doesn't have to comply with a constitutional law passed by Congress.

Over the last 6 years, the Bush administration has put forth a view of Executive power that is incredibly expansive, and in my opinion, an unjustified and dangerous threat to our fundamental rights and our commitment to the rule of law.

The President has asserted the right to unilaterally imprison whomever he wants without judicial review, whether or not they are a United States citizen, if he determines that they are a so-called ''enemy combatant.'' The administration has taken the position that the President can authorize the use of techniques that amount to torture, and then immunize any person acting pursuant to his orders from criminal liability. The President also authorized warrantless surveillance in direct contravention to the Foreign Intelligence Surveillance Act.

In all of these instances, the President justified his actions on the basis that he was acting within his authority as commander-in-chief to defend the country, and that neither Congress nor the courts can infringe on this power. While many of these assertions have ultimately been rejected by Federal courts, Congress, or overturned internally when they became public, the President continues to assert that there are few restraints on his power when it comes to national security matters.

During his confirmation hearing, Judge Mukasey stated that he would step down if he determined that the

President's actions were unlawful and the President refused to heed his advice to change course. Although this does signal a welcomed degree of independence, I remain concerned about what Judge Mukasey will find to be ''lawful.''

Let me read an exchange that took place during a hearing in the Senate Judiciary Committee which illustrates this point.

Senator Leahy: . . . where Congress has clearly legislated in an area, as we've done in the area of surveillance with the FISA law, something we've amended repeatedly at the request of various administrations . . . if it's been legislated and stated very clearly what must be done, if you operate outside of that, whether it's with a presidential authorization or anything else, wouldn't that be illegal?

Judge Mukasey: That would have to depend on whether what goes outside the statute nonetheless lies within the authority of the president to defend the country.

Senator Leahy: Can the President put someone above the law by authorizing illegal conduct?

Judge Mukasey: If by illegal you mean contrary to a statute but within the authority of the President to defend the country, the President is not putting somebody above the law, the President is putting somebody within the law.

While this view may be consistent with the current administration's position regarding Executive authority, this stance is not consistent with how the powers of the president have traditionally been interpreted. The notion that the President may disregard a valid law by citing his inherent power to defend the country is disconcerting.

And frankly, it is all too reminiscent of President Nixon's assertion that actions taken in the name of national security, whether or not they are in accordance with relevant statues, are by definition legal if they are carried out on behalf of the President. This assertion was widely rejected, as it should have been.

As our Nation's highest law enforcement officer, it is essential that the Attorney General faithfully execute laws passed by Congress. It is one thing for the Attorney General to state that he or she will not enforce a certain measure because it is unconstitutional; however, it is a very different matter if the Executive Branch asserts that it is not bound by a law that is clearly constitutional.

It is for this reason that I cannot support the nomination of Judge Mukasey to be the next Attorney General.

Mr. ALLARD. Mr. President, I rise today in support of President Bush's nomination of Judge Michael B. Mukasey to serve as Attorney General of the United States. I am pleased that leadership is bringing Judge Mukasey's nomination to the Senate floor. It has been more than 45 days since his nomination, making him the longest pending nominee for Attorney General in more than 20 years.

Judge Mukasey expressed to me earlier today his desire to fill the leadership void at the Justice Department and assured me that he is prepared to address the challenges we face as a nation. I greatly appreciate his attention to the important issues pertaining to Colorado and his strong commitment to the rule of law.

Judge Mukasey demonstrated a fine record of management as the presiding judge over one of the busiest judicial districts in the Nation and I am confident that he is qualified to be our next Attorney General and aware of the challenges we face at the Justice Department.

I am truly impressed with this Nominee's background. I would point out that Judge Mukasey is not a Washington insider. Judge Mukasey recently worked as a partner at the New York law firm of Patterson, Belknap, Webb and Taylor. Judge Mukasey has spent his career in New York since President Ronald Reagan nominated Mukasey to serve on the U.S. District Court for the Southern District of New York in 1987. He spent almost 19 years as a Federal judge, including serving as chief judge until his retirement from the bench in 2006.

Judge Mukasey has shown a strong commitment to the rule of law and has a demonstrated record of managing one of the busiest judicial districts in the Nation. Both attributes qualify him to lead the Department of Justice in fulfilling its mission of enforcing all of the Nation's laws fairly and vigorously.

Judge Mukasey's record as a Federal district judge shows a strong and independent commitment to the rule of law. As chief judge of the Southern District of New York, he managed one of the busiest dockets in the Nation. His work following the attacks of September 11 ensured that individuals could access the courthouse even in the immediate aftermath of a national emergency.

Attorney General Mukasey would not hesitate to say no to anyone, including the President. No man is above the law, and Judge Mukasey has stated that he would resign rather than participate in a violation of the law.

I would also point out that Judge Michael Mukasey has a very strong background on national security issues, most notably as a federal district court judge. He has ruled in national security cases involving at least 15 different defendants. Moreover, he has issued at least two dozen national security related opinions.

I strongly urge my colleagues to cast a vote in favor of Judge Michael B. Mukasey's confirmation as the 81st Attorney General of the United States.

Mr. LEVIN. Mr. President, tonight the Senate will vote on the nomination of Judge Michael Mukasey to be Attorney General. His nomination comes at a critical time. At this moment in history, America is faced with serious challenges both at home and abroad. We are at war in Iraq and Afghanistan and are engaged in a long-term struggle against al-Qaida and other extremists. Military might alone will not be enough for us to win these fights. Strengthening America's security requires us to harness the power of our ideals and values and lead a global effort to confront these threats. When we project moral hypocrisy or suggest that our commitment to our fundamental values depends on the circumstances, we lose the support of the world in our common efforts against common enemies, thereby compromising our own security.

The pictures of American soldiers mistreating prisoners at Abu Ghraib and the stories of detainee abuse at Guantanamo Bay compromised our moral authority and our ability to lead the global struggle against al-Qaida. America must demonstrate an unambiguous commitment to basic human rights. And this is not some intellectual musing. It is hard headed pragmatism.

Earlier this year, I visited some of our veterans at a Michigan VA hospital. I asked one Korean war veteran who was lying in his bed: What can we do to help you? And do you know what he said? ''Win back the respect of people around the world for America.'' That veteran understands that the erosion of support for America makes us less secure and weakens us in a way that military force cannot remedy.

I have devoted significant time looking into the issue of detainee abuse and considering what is appropriate when it comes to the treatment of detainees in U.S. custody. Building back the respect for America that the Michigan veteran and all of us seek requires a definitive commitment to treating all people—even our enemies—in a manner consistent with both our laws and basic human rights.

Last month I asked Judge Michael Mukasey, President's Bush's nominee to be Attorney General of the United States, what I thought was a straightforward question for the record:

Would you consider it inhumane to secure a detainee onto a flat surface and slowly pour water directly onto the detainee's face or onto a towel covering the detainee's face in a manner that induced a perception by the detainee that he was drowning?

That question to Judge Mukasey should have prompted a simple answer of ''yes.'' But the Judge said that, while the tactic is ''repugnant'' to him, he could not say it was inhumane without evaluating the ''facts and circumstances.'' Judge Mukasey's ambiguous response is more than deeply troubling, it sends a message—from the man nominated to head the Department of Justice—that abuses of detainees in U.S. custody may not have been categorically wrong, but that such acts might have been justified by the circumstances.

In 2002, the Department of Defense requested authority to use a number of aggressive interrogation techniques—including mock drowning—on detainees held at Guantanamo Bay. FBI agents vigorously objected to the aggressive techniques. One stated in a

legal analysis that aggressive techniques, including mock drowning, were ''not permitted by the U.S. Constitution.''

Another FBI agent also expressed alarm to his Justice Department colleagues over a DOD interrogation plan for a detainee held at Guantanamo Bay, saying ''You won't believe it!'' An e-mail described abuses that a FBI agent had witnessed, including detainees being chained in fetal positions on the floor for 18 to 24 hours at a time, having urinated and defecated on themselves and being subjected to extreme cold.

If Judge Mukasey were to be confirmed to lead the Department of Justice, he would take charge of the FBI. How would Judge Mukasey respond to those FBI agents? Would he have said that the validity of those objections depended on the ''circumstances''?

Over the past 5 years, the Department of Justice has repeatedly issued aggressive legal opinions that seek to exploit any possible legal ambiguity to justify the administration's policies. In 2002, for example, the Department of Justice issued a now disavowed memo finding that physical pain had to be ''equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death'' to constitute torture. The Executive order that the President issued in July of this year interprets Common Article 3 of the Geneva Conventions to bar only those outrageous acts that are done ''for the purpose of humiliating or degrading the individual.'' The Geneva Conventions make no such distinction. These results-driven interpretations of law have contributed to the negative image of the United States in the world, leaving many to question why we attempt to impose standards on other countries that we do not require of ourselves. These interpretations endanger our troops when captured because their captors will cite these interpretations to justify abuses of our troops.

It does a disservice to our Nation for a person who has been nominated to lead the Department of Justice to hide behind purposeful ambiguities, particularly at a time when our Nation's prestige has been so tarnished by abuses against detainees in our custody. The legality of mock drowning—waterboarding—does not depend on the circumstances. It is illegal.

Waterboarding clearly runs afoul of three Federal statutes—the 1994 antitorture statute, the Military Commissions Act, and the Detainee Treatment Act—and it is inconsistent with our obligations under Common Article 3 of the Geneva Conventions.

In his answers to questions from the Judiciary Committee, Judge Mukasey refused to state whether waterboarding constitutes torture under U.S. law. Under the Federal antitorture statute adopted in 1994, 18 U.S.C. § 2340, an act is torture if it is specifically intended to cause ''severe physical or mental pain or suffering.'' The statute defines ''severe mental pain and suffering'' as mental harm caused by, among other things, ''threat of imminent death.'' Pouring water over a detainee's face to create the sensation of drowning is intended to threaten imminent death.

In questions for the record of an August 2006 Senate Judiciary Committee hearing, Senator DURBIN asked each of the Judge Advocates General, JAGs, of the Marine Corps, Air Force, Army, and Navy whether, in their personal view: ''the use of a wet towel and dripping water to induce the misperception of a drowning (i.e., waterboarding) (was) legal?'' The answer from each of the JAGs was an unequivocal ''No.'' The Marine Corps JAG responded to Senator DURBIN ''Threatening a detainee with imminent death, to include drowning, is torture under 18 U.S.C. § 2340''—the anti-torture statute. Similarly, the Air Force JAG stated: ''An interrogation technique that is specifically intended to cause severe mental suffering involving a threat of imminent death by asphyxiation is torture under 18 U.S.C § 2340.'' And the Army JAG responded: ''inducing the misperception of drowning as an interrogation technique is not legal.''

Whether the practice of mock drowning is legal is a question that our Nation's top military lawyers had no problem answering. But the nominee for Attorney General says that it depends on ''circumstances,'' it could be ''yes,'' it could be ''no.''

The U.S. Navy's Survival, Evasion, Resistance, and Escape—SERE—School trains our troops, whose dangerous assignments leave them susceptible to being captured, to resist and survive abusive tactics that might be used by the enemy. Waterboarding is one of the tactics that troops are exposed to at Navy SERE school. Listen to how a former master instructor and chief of training at the Navy's SERE school described waterboarding in an October 31, 2007, article in the New York Daily News:

> Waterboarding is slow-motion suffocation with enough time to contemplate the inevitability of blackout and expiration. Usually the person goes into hysterics on the board. For the uninitiated, it is horrifying to watch. If it goes wrong, it can lead straight to terminal hypoxia—meaning, the loss of all oxygen to the cells.''

As he put it, ''waterboarding is a torture technique—without a doubt. There is no way to sugarcoat it.''

A U.S. Federal court has concluded that mock drowning constitutes torture. The Ninth Circuit Court of Appeals examined an interrogation technique used by the Philippine military under Ferdinand Marcos whereby ''all of [the victim's] limbs were shackled to a cot and a towel was placed over his nose and mouth; his interrogators then poured water down his nostrils so that he felt as though he was drowning.'' The court referred to this practice as ''water torture'' and found against those responsible for this and other illegal acts.

By contrast, Judge Mukasey not only refuses to state that waterboarding is torture, he also refuses to say whether it constitutes ''cruel or inhuman treatment,'' which is illegal under the Military Commissions Act of 2006.

Congress enacted the Military Commissions Act in the wake of Abu Ghraib scandal. The statute bans interrogations tactics that constitute ''cruel or inhuman treatment,'' which it defines as any act generally intended to cause ''serious mental or physical pain and suffering.''

Medical experts who have treated and observed the survivors of water torture have described the physical and psychological severity of the practice and its long-term effect. Dr. Allan Keller, associate professor of medicine at New York University, NYU, School of Medicine and director of the Bellevue/NYU Program for Survivors of Torture, recently testified before the Senate Intelligence Committee that a person subjected to the waterboard, ''gags and chokes, [and] the terror of imminent death is pervasive, with all of the physiologic and psychological responses expected, including an intense stress response, manifested by tachycardia, rapid heart beat and gasping for breath. There is a real risk of death from actually drowning or suffering a heart attack or damage to the lungs from inhalation of water.'' Dr. Keller put it plainly, the ''clinical experience and data from the medical literature are clear and unequivocal. These techniques can cause significant and long lasting psychological and often physical pain and harm.''

It is clear that waterboarding involves ''serious'' physical or mental pain or suffering and therefore constitutes illegal ''cruel or inhuman treatment'' under the Military Commissions Act. Yet in response to questions from Senator KENNEDY and Senator BIDEN, Judge Mukasey would not say whether waterboarding is ''cruel or inhuman'' under this legal standard.

When asked whether the practice of mock drowning on detainees was ''cruel, inhuman, or degrading,'' which is a violation Detainee Treatment Act, Judge Mukasey would not respond to the question, simply giving his stock answer that his analysis depends on the ''circumstances.''

Congress passed the Detainee Treatment Act in 2005 to make clear that inhumane treatment is illegal. The Detainee Treatment Act prohibits subjecting any detainee in U.S. Government custody or control, wherever held, to ''cruel, inhuman, or degrading treatment or punishment.'' Those terms were defined to restrict any conduct that would constitute cruel, unusual, and inhumane treatment or punishment prohibited by the U.S. Constitution, which includes conduct that ''shocks the conscience.''

There can be no question that mock drowning ''shocks the conscience'' and

rises to the level of ''cruel, inhuman, or degrading treatment or punishment'' under the Detainee Treatment Act.

I asked Judge Mukasey whether the practice of mock drowning on detainees was ''inhumane,'' which would be a violation of Common Article 3 of the Geneva Conventions. Judge Mukasey would not respond to that question, again giving his stock answer that his analysis depends on the ''circumstances.'' Regardless of what the President's recent Executive order would suggest, the humane standard of Common Article 3 has never varied depending on the type of information in someone's possession or the purpose behind the acts.

The Army Field Manual on Intelligence, which sets standards for military interrogations consistent with the Geneva Conventions and with U.S. law that prohibits ''torture or cruel, inhuman, or degrading treatment or punishment'' explicitly bans certain coercive techniques including ''waterboarding.''

Throughout history America has condemned waterboarding by seeking prosecution of enemies who have used the technique on American servicemembers. Following the Second World War, U.S. military commissions and international tribunals prosecuted individuals who had used waterboarding, or similar forms of water torture on civilians and Allied forces. The U.S. military commissions in the Pacific theater explicitly held that the ''water cure'' was torture in prosecuting cases related to the mistreatment of captured U.S. bomber crews. The U.S. Military Commission at Yokohama, Japan also tried four Japanese defendants for torture, including water torture, of American and Allied forces. Each of the defendants was convicted and sentenced to 20 years hard labor.

Would Judge Mukasey find it acceptable if U.S. soldiers were subjected to mock drowning by our enemies? Would he say that its acceptability depends on the ''circumstances''? Would Judge Mukasey say that he needed to know the motives of our enemies before saying that our soldiers who endured waterboarding had been tortured or subject to inhumane treatment? Would he distinguish between someone who waterboarded our troops to elicit information as contrasted to someone who used the technique on our troops for sadistic purposes?

Judge Mukasey needs to be clear that waterboarding is illegal for the sake of protecting our men and women in uniform from abuse should they ever be captured. Judge Mukasey has not been clear and if he is confirmed to head our Justice Department, it will be America signaling moral ambiguity about what is unambiguously torture and inhumane.

In fact, the United States has prosecuted its own servicemembers who have used waterboarding and similar water tortures during interrogations. During the American intervention in the Philippines, in 1902, a military court rejected MAJ Edwin Glenn's defense of ''military necessity'' and convicted him for using water torture on a captured insurgent. During the Vietnam war, a soldier participated in water torture which was captured in photos and published in the Washington Post on January 21, 1968. According to the Washington Post, the soldier was court martialed for his involvement in the practice.

U.S. veterans who served as interrogators in the Second World War recently discussed how proud they were that they were able to obtain vital information by using skill, not torture, and by treating a dangerous enemy with ''respect and justice.'' In an article in the Washington Post last month, one veteran proudly exclaimed:

> During the many interrogations, I never laid hands on anyone. We extracted information in a battle of the wits. I'm proud to say I never compromised my humanity.

I had hoped Judge Mukasey would stand with that veteran and stand up for American values. But despite the clear law and history, Judge Mukasey engaged in legalisms and obfuscation, playing into the negative image that others project about the U.S.—that we apply double standards.

This kind of obfuscation tarnishes America's image, which has a negative impact on our ability to organize and maintain alliances to achieve national goals. As Steven Kull, the director of the Program on International Policy Attitudes, stated:

> The thing that comes up repeatedly is not just anger about Iraq. The common theme is hypocrisy. The reaction tends to be—You were a champion of a certain set of rules. Now you are breaking your own rules.

Purposeful ambiguity about the legality of waterboarding and the other coercive interrogation techniques he was asked about is at the center of Judge Mukasey's confirmation, just as it is at the center of how we are viewed in the world. That ambiguity is untenable and unacceptable in the person who, if confirmed, will symbolize America's concept of justice before the world. For these reasons, I oppose Judge Mukasey's nomination to be Attorney General.

Mr. FEINGOLD. Mr. President, I will vote against the nomination of Judge Mukasey to be the next Attorney General. This was a difficult decision, as Judge Mukasey has many fine qualities. I was particularly impressed by his determination to depoliticize the Department of Justice. After the debacle of the last Attorney General, this is obviously a very high priority. If nothing else, over the remaining 15 months of the Bush Presidency, the Department must recover its credibility and its reputation. Never again should it be led by someone who is willing to wield its awesome power for political purposes or fill its most important positions with individuals chosen for their politics rather than their legal skills. Judge Mukasey appears to have the intelligence, the experience, and the stature to undertake this very important task.

There are other areas where I was favorably impressed by Judge Mukasey. His straightforward promise to stop the disparate treatment of gay employees at the Department of Justice was welcome and refreshing. He indicated his intention to be a much more hands-on manager of the process for seeking the federal death penalty, and when I asked him in writing if a request by a U.S. attorney to discuss a death penalty decision with Attorney General personally was a valid reason to fire that U.S. attorney, he answered simply, ''No.'' If Judge Mukasey is confirmed, I look forward to working with him to try to ensure that Federal death penalty is fairly administered.

I was also impressed that on several occasions Judge Mukasey was willing to admit in his written answers that some thing he had said or written in the past were incorrect. This administration needs more people who will admit they were wrong when that is the case. That kind of humility and honesty is often the first step toward correcting mistakes and reaching consensus.

In many respects then, Judge Mukasey is a big improvement on the previous Attorney General. At this point in our history, however, the country needs more. Simply put, after all that has taken place over the last seven years, we need an Attorney General who will tell the President that he cannot ignore the laws passed by Congress. And on that fundamental qualification for this office, Judge Mukasey falls short.

The President's warrantless wiretapping program, instituted after 9/11 and carried out in secret until it was revealed in a New York Times article in December 2005, presented the Department of Justice with a historic test of its integrity and its commitment to the rule of law. Under the previous leadership, the Department failed that test. We need an Attorney General who, when faced with a similar crisis, will look the President in the eye and tell him ''No.''

When I first met with Judge Mukasey, I questioned him about the two justifications for authorizing warrantless wiretaps that the Department has put forward publicly. With respect to the argument that the authorization for use of military force, or AUMF, somehow authorized warrantless wiretaps, he said, ''I don't see that argument.'' With respect to the argument that the program was legal under the President's article II powers, he said he was ''agnostic.''

I and a number of my colleagues on the Judiciary Committee returned to this question in the hearings and in written questions for the record. Unfortunately, this time the results were not reassuring. He responded to my question for the record about the largely discredited AUMF justification by

saying that ''I still have not come to a conclusion. . . . I believe there are good arguments on both sides of that issue.'' That is a statement that ought to give pause to anyone in this body.

His answers to questions concerning the article II justification indicate that he is no longer agnostic on that question, but instead he has become a believer that executive power trumps the laws written by Congress.

Both at the hearing and in writing, Judge Mukasey stated several times that the President must obey all valid and constitutional statutes, even if he is acting to defend or protect the country. He also said that ''FISA is a constitutional law'' and that ''[a]s a general matter, therefore, the President is not free to disregard or violate FISA.''

But he also stated that ''difficult separation of powers questions'' would arise, and would have to be resolved through the three-part test articulated in the Supreme Court Youngstown case, if a statute—and FISA in particular—were to constrain the President's constitutional authority. If FISA is constitutional—and Judge Mukasey says it is—then why are these separation of powers questions so ''difficult''? Clearly, Judge Mukasey believes that a law can be constitutional on its face, but can become unconstitutional if its application constrains the constitutional authority of the President. There is no difference between this view of executive power and the theory that executive power trumps congressional power. There is no other way to interpret Judge Mukasey's statement to Senator LEAHY: ''If by illegal you mean contrary to a statute, but within the authority of the president to defend the country, the president is not putting somebody above the law; the president is putting somebody within the law.''

This view is simply contrary to Justice Jackson's three-part test in Youngstown. Youngstown makes clear that where the President's constitutional authority and a statute passed by Congress come into conflict, the President's powers are reduced by whatever powers Congress holds over the subject—not vice versa. Jackson states that when the President acts against the will of Congress, ''he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling Congress from acting upon the subject.'' Congress is thus free to constrain the President's constitutional powers to any degree it likes, as long as Congress is acting within its own powers in doing so; likewise, the President's actions may be upheld only if they are ''within his domain and beyond control of Congress.''

The argument that constitutional statutes can become unconstitutional ignores this second part of the inquiry—whether the limitation on the President's authority is in an area where Congress cannot legislate. It is clear that wiretapping is not within the exclusive domain of the President, as Judge Mukasey admits that FISA is a constitutional law. Moreover, the executive authority that Judge Mukasey invoked most often—the authority to protect and defend the country—is not exclusive to the President. It is an authority that Congress shares, which Judge Mukasey admitted in answers to written questions.

I have discussed this issue in some detail because extreme theories of executive power have become one of the primary, and most unfortunate, legacies of the Bush administration. Congress needs to be very clear in rejecting them, and in making respect for the rule of law a nonnegotiable qualification for the office of Attorney General of the United States.

Let me say a word about the issue of torture, which has dominated the debate on the nomination of Judge Mukasey in the past week. Last week, the White House press secretary again implied that Members of Congress who have been briefed on the CIA's interrogation program have approved it or consented to it. That is not the case. I have vigorously opposed the program, and continue to do so. The program is of highly questionable legality, it is inconsistent with our values as a nation, and it does not make our Nation any safer. In fact, I believe that it may have the effect of exposing Americans—including military and other U.S. personnel—to greater risk.

I have detailed the reasons for my strong objections to the CIA's program in classified correspondence, sent shortly after I was first briefed on it. More recently, I have stated my opposition publicly, although I am prohibited by classification rules from providing further details about my concerns in a public setting.

In any event, neither detailed legal and factual analysis, nor knowledge of the operational details of the CIA's program, is necessary to reach a judgment on whether waterboarding is torture. Waterboarding has been used by some of the most evil regimes in history. It has been considered torture in this country for over a century. If Judge Mukasey won't say the simple truth—that this barbaric practice is torture—how can we count on him to stand up to the White House on other issues?

America needs an Attorney General who stands squarely on the side of the rule of law. This is not an arid, theoretical debate. The rule of law is the very foundation of freedom and a crucial bulwark against tyranny. Congress cannot stand silent in the face of this challenge by the executive to the crucial underpinnings of our system of government.

The Nation's top law enforcement officer must be able to stand up to a chief executive who thinks he is above the law. The rule of law is too important to our country's history and to its future to compromise on that bedrock principle.

Mr. COBURN. Mr. President, I rise today to support the nomination of Judge Michael Mukasey to be Attorney General of the United States. Judge Mukasey is eminently qualified for this position. For almost 20 years he served as U.S. District Judge for the Southern District of New York, presiding over prominent terror trials and gaining familiarity with complex national security issues that continue to challenge our Nation.

Specifically, Judge Mukasey presided over the trial of the ''Blind Sheik,'' who was involved in planning the 1993 World Trade Center bombing. Upon conviction, Judge Mukasey sentenced the terrorist to life in prison. The Second Circuit Court of Appeals, in affirming the verdict, praised Mukasey by saying: ''The trial judge, the Honorable Michael B. Mukasey, presided with extraordinary skill and patience, assuring fairness to the prosecution and to each defendant and helpfulness to the jury. His was an outstanding achievement in the face of challenges far beyond those normally endured by a trial judge.'' Indeed, Judge Mukasey's ruling in the Blind Sheik case presented extraordinary challenges—his ruling drew death threats that required him to receive years of 24-hour armed protection.

Yet Judge Mukasey maintained his objectivity as a judge, ruling years later that while Jose Padilla—a U.S. citizen later convicted of Federal terrorism support charges—could be held by the government as an enemy combatant, he was also entitled to legal counsel. One of Padilla's defense lawyers who said he had ''more cases before Mukasey than I can count,'' praised the judge saying, ''I don't always agree with where he comes out . . . [but] I am always happy to draw him as a judge. You are going to get your day in court.'' Another of Padilla's lawyers said about Judge Mukasey, ''I admire him greatly,'' describing herself as ''another weeping fan.''

Since his nomination, many of Michael Mukasey's colleagues and lawyers who appeared before him have offered statements of praise and support. While it would be impossible to reiterate them all, perhaps former U.S. Attorney Mary Jo White's statement best encapsulates the general sentiment. She said that Judge Mukasey ''is a man of great intellect and integrity with an unswerving commitment to the rule of law. He is independent, fair-minded and has a wealth of relevant experience from his years of service on the bench, in the private sector and as an assistant United States attorney in the Southern District of New York.'' I agree that Judge Mukasey's intellect, integrity, and experience make him uniquely qualified to serve as Attorney General.

It is, however, imperative that our Attorney General put his oath to protect and uphold the Constitution before

all other loyalties. As such, I looked to Judge Mukasey for assurances that he would put the Constitution first. Judge Mukasey gave the first of such assurances on October 5, 2007, the day that he was nominated, when he said, ''The department faces challenges vastly different from those it faced when I was an assistant U.S. attorney 35 years ago. But the principles that guide the department remain the same—to pursue justice by enforcing the law with unswerving fidelity to the Constitution.'' After studying his record and participating in the confirmation process, I am confident that Judge Mukasey's great respect for the Constitution and the rule of law is sincere.

The Justice Department has undergone difficult times of late, but I know Judge Mukasey has the integrity and intellect to carry out the necessary work to restore the American public's trust in the department. America has been well-served by Judge Mukasey's past public service and is fortunate that such an accomplished individual—who entered retirement just one year ago—is willing to answer the call to public service once again. I thank Judge Mukasey for his continued sacrifice.

I am pleased to vote in favor of Judge Michael Mukasey's nomination to be Attorney General of the United States and look forward to working with him in the future.

● Mr. MCCAIN. Mr. President, I am pleased the full Senate today is considering the nomination of Judge Michael Mukasey as Attorney General of the United States. I strongly support his confirmation.

As many of you know, the President nominated Judge Mukasey on September 17; however, the Senate Judiciary Committee did not vote on his nomination until Tuesday. This ranks as one of the longest spans between a nomination and a confirmation vote for an Attorney General nominee. This is particularly unfair to the American people who deserve to have in place a chief enforcer of our Nation's laws.

I believe Judge Mukasey is the right nominee to enforce our laws, particularly during this time of war. As a Federal judge, he presided over one of the country's busiest trial courts and one that has overseen several terrorism-related cases. These included the trial of the terrorist known as ''the Blind Sheikh,'' a man who was convicted of conspiracy to destroy the World Trade Center.

In comprehensive responses to questions posed by members of the Senate Judiciary Committee, Judge Mukasey exhibited mainstream legal views on constitutional checks and balances. He stated that the President cannot waive congressionally mandated restrictions on interrogation techniques, including those included in the ''McCain amendment'' and the Military Commissions Act. This is a particularly important conclusion given that, under these laws, anyone who engages in waterboarding, on behalf of any U.S. Government agency, puts himself at risk of civil liability and criminal prosecution.

Judge Mukasey also, in a separate letter, acknowledged that the interrogation technique known as waterboarding is ''over the line'' and ''repugnant.'' These are important statements, and I expect that they will inform his views as Attorney General. I strongly urge that, in that role, Judge Mukasey will publicly make clear that waterboarding is illegal and can never be employed.

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. Along with Senators WARNER and GRAHAM, I stated then my 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 one of the authors of that statute, I would note that the MCA specifically prohibits acts that inflict ''serious and nontransitory mental harm'' that ''need not be prolonged.'' Staging a mock execution by inducing the misperception of drowning is a clear violation of this standard. For this reason, during the negotiations that led to the MCA, my colleagues and I were personally assured by administration officials that this language, which applies to all agencies of the U.S. Government, prohibits waterboarding. Many of us share Judge Mukasey's revulsion at the use of waterboarding, and I welcome his commitment to further review its legality once confirmed. I expect that he will reach the same conclusion.

I sincerely hope that the recent public debate over the use and legality of waterboarding is America's last. In discussing this practice, we are speaking of an interrogation technique that dates from the Spanish Inquisition, one that has been a prosecutable offense for over a century, one that was employed by the Khmer Rouge in Cambodia and which is reportedly being used by the thugs in Burma today against the innocent monks protesting their repression. Waterboarding simply has no place in the America I know. Let us take it off the table, once and for all, and move beyond this debate.

There is evil in the world today, and it takes form in those who commit themselves to the destruction of America and the ideals we hold dear. Let us fight them, let us defend America, but let us in so doing never forget that we are, first and foremost, Americans. Make no mistake—we will prevail—but we must wage this war with fidelity to our laws and deepest values. These laws and values are the source of strength, not weakness, for though we are stronger than our enemies in men and arms, we are stronger still in ideals. We will win the war on terror not in spite of devotion to our cherished values, but because we have held fast to them.

Based on the statements and responses that this nominee has provided over the past week, I believe that Judge Mukasey shares this view. He is a consensus nominee, one with a reputation as a rigorous, independent, and honest thinker. I am pleased to offer him our support and I hope that my colleagues will join us in voting for confirmation.●

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, without losing my right to the floor, I yield to the distinguished Senator from Pennsylvania on his time to ask a question of the Chair.

Mr. SPECTER. Mr. President, how much time is left on each side?

The PRESIDING OFFICER. The Senator from Pennsylvania has 1 hour. The majority has a total time of 1 hour 5 minutes.

Mr. SPECTER. Mr. President, I know of only one additional Senator who wishes to speak in favor of Judge Mukasey, and that request has been limited to 5 minutes. So I ask him to come to the floor or anyone else who wishes to speak on behalf of Judge Mukasey to come to the floor.

If I may consult with my colleague, the distinguished chairman, perhaps we can take an inventory now as to how much time the other speakers will want so we can give our colleagues an idea as to when we will be voting.

Mr. LEAHY. Mr. President, Senators are waiting to be recognized. I ask unanimous consent—the time allotted to me is 20-some-odd minutes—that when he is recognized, the Senator from Vermont, Mr. SANDERS, be recognized for 12 of my 24 minutes. Perhaps while the next Senator is speaking, I will make an attempt to find out how much more time we have so I can report to the Senator from Pennsylvania. I ask unanimous consent that when he is recognized, the Senator from Vermont, Mr. SANDERS, be recognized for 12 minutes of my time.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. Mr. President, I reserve the remainder of my time. I yield the floor.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. SALAZAR. Mr. President, I rise today to speak about the nomination of Judge Michael Mukasey to be the next U.S. Attorney General. I come to the floor tonight with a heavy heart

because I had hoped I would have been able to come to the floor and make a statement in support of Judge Mukasey.

I reviewed the answers he gave to the Judiciary Committee and the written responses he gave to important questions, including the question of torture. After reviewing that information, I also met with Judge Mukasey in my office in the Senate office buildings. He was very generous with his time, and I very much appreciate the time he gave me to review some of the fundamental questions.

There is no doubt that Judge Mukasey is a brilliant man, a talented and successful judge who has given a great deal to this country. So it is with a heavy heart that I have reached the conclusion that I cannot and will not support his nomination. I will not support his nomination because there is no room for equivocation on the American position on the fundamental issue of torture. There is no room for equivocation on that issue.

Before coming to the Senate, I had the great privilege of serving as the attorney general of the State of Colorado. For me, it was an enormous responsibility and one which carried many duties. There were duties of making sure that over 10,000 people were put into prison, some of them serving a lifetime in prison. It was an enormous duty in terms of rendering tens of thousands of legal opinions to a vast State agency, and I understood the responsibilities of being an attorney general. Those responsibilities, first and foremost, were to make sure I was upholding the oath of office I had taken to the Constitution of the State of Colorado, to uphold the constitutional laws in my State, and to enforce those laws and to make sure no one was above the law.

I also served as legal counsel to the Governor and to the head of State agencies, where I provided them legal counsel that a lawyer would provide to their client. As attorney general, it was not often that my oath to enforce Colorado's constitutional laws came into conflict with my responsibilities to advise and to serve the Governor. But when it did, it was my duty—it was my solemn duty—to defend the rule of law, not the Governor or the executive agency or the agency heads. On some occasions, driven by that solemn duty to enforce that law, I had to take my own clients to court to enforce the rule of law, and I did that.

The Attorney General of the United States must likewise enforce our laws because very simply we are a nation of laws, and that is what makes us a special place on this globe.

This role today is more important than at any other time in the history of the Justice Department. Trust in the Department is at an alltime low given the high-profile memos that now have become public which enabled torture to occur by the agents of the United States, which allowed for the firing of nine U.S. attorneys and other reports of politicization within the Department of Justice, which should never be politicized because it enforces our laws. Therefore, the next U.S. Attorney General must restore the confidence of the American people that the Justice Department will enforce the law regardless of the Attorney General's personal beliefs or who happens to sit in the Oval Office as President of these United States.

I am troubled that Judge Mukasey is unwilling to clearly and unambiguously state that he will uphold U.S. law barring the use of waterboarding. I explicitly asked Judge Mukasey in my office what he would do as Attorney General if he were asked whether an agent of the United States could use waterboarding in interrogation settings. Judge Mukasey's response to me was disappointing. He said he did not know because it depended on whether there was intent to cause pain. That answer, in my view, is simply unacceptable given the legal history of this issue in this country.

Under Common Article 3 of the 1949 Geneva Conventions, the following acts are prohibited at any time and at any place: First, ''violence to life and person, in particular . . . cruel treatment and torture, and, two, outrages upon personal dignity, in particular, humiliating and degrading treatment.''

The War Crimes Act, as amended by the Military Commissions Act in 2006 by this Congress, prohibits breaches of Common Article 3 of the Geneva Conventions which is defined in that legislation to include ''torture and cruel and inhumane treatment.'' Torture is further defined as:

> The act of a person who commits, or conspires or attempts to commit an act specifically intended to inflict severe physical or mental pain or suffering upon another person.

On October 5, 2005, we in this Chamber passed, by a vote of 90 to 9—only nine Senators in this Chamber voting against the legislation—the Detainee Treatment Act, otherwise known by many of us as the McCain amendment. The amendment states:

> No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhumane, or degrading treatment or punishment.

By our most basic human sensibilities, waterboarding, whereby water is forced into the nose, mouth, or lungs of a person to create the sensation that they are drowning and dying, is torture, and it is illegal. The feeling—from those who have spoken about this at length—is one that causes struggle, panic, ingestion of water, vomiting, and psychological trauma.

This truth, Mr. President, that this is torture, has been affirmed by the top lawyers in the Army, the Navy, the Air Force, and Marines, both current and retired. It has been affirmed by my colleagues, by some of my most respected colleagues on the Republican side of the aisle, for whom I have tremendous respect.

Through our history, we have prosecuted those who have used the technique against our own people as criminals of war. When Japanese soldiers waterboarded American prisoners of war in World War II, we convicted them for their crimes. We convicted them for their crimes. When our own soldiers, over 100 years ago, used waterboarding in the 1898 Spanish-American War in the interrogation of Filipino insurgents, they were court-martialed. In Vietnam, U.S. generals declared waterboarding to be illegal and strictly enforced the ban on its use.

Mr. President, I very much recognize the importance of the advice and consent clause of our Constitution, in our working with the President in the consent function that we play with respect to his Cabinet appointments. I have worked very hard for 3 years on many of those confirmations in an effort to develop the kind of cooperation and collaboration that is required. However, Mr. President, there are some fundamental core principles for which we must stand. These principles are tested, no doubt, in the face of violence and war, but it is in these moments when these principles are all the more important. The fact that we do not torture, the fact that we in this Nation do not torture is fundamental to who we are as a people, whether it is in conflict, such as the conflict we are in today, or conflicts that have happened in the past in this Nation.

For me, Mr. President, this is not a complex issue.

Mr. President, I ask unanimous consent for 1 more minute.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SALAZAR. For me, Mr. President, this is not at all a complex issue. It is not open to interpretation or to equivocation. I will say it again: In my view, waterboarding is torture, it is illegal, and it is inhumane. And Judge Mukasey has refused to acknowledge that fact. Mr. President, I cannot, in good conscience, overlook Judge Mukasey's equivocation on torture.

Our laws are clear. We need an Attorney General who will enforce those laws, including the laws against torture, no matter what. Mr. President, I will be voting against Judge Mukasey, and I would urge my colleagues to do the same.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. GRAHAM. Mr. President, I would ask for 5 minutes.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. And I thank the Senator from Vermont. I appreciate that.

Mr. President, I will be voting for Judge Mukasey because I think he is the solution, not the problem. My good friend from Colorado made a very eloquent statement, and I respect him

greatly. This has been a good debate, and it has been long overdue.

Where do we go, and how do we get there? What do we want to do to fight this war? What is in bounds, what is out of bounds? It is very tough, America. We are fighting a vicious enemy, one not in uniform, and one that will do anything to wreak havoc on this world; an enemy that would kill a child in a heartbeat and not think about it, in the name of God. So we have a real task ahead of ourselves, very difficult, and we have a great military.

My question for my colleagues is, the fact that our military would do the things that Senator SALAZAR said, consciously take waterboarding off the table, does that make us weaker? I don't think so. I go to bed at night feeling pretty good about America when our military lawyers come before the Congress and say: We don't do that. We don't do that.

Now, what does our enemy do when they capture one of our soldiers? We all know. They are brutal. They are horrible. The fact we don't cut their heads off, is that a sign of weakness? The fact that we will give them a lawyer when they won't give us one; that we will base our judgments on evidence, not revenge and hatred, does that make us weaker? No.

The ticking time bomb is not the scenario of a terrorist who may possess some special knowledge. The ticking time bomb is a world that is losing its way. There is no shortage of people who will cut your head off in this world. There is a shortage of people who will stand up for a better way. We know what bad people will do to good people. The question is, what do good people do to bad people?

We are good people, and we are struggling. And I think Judge Mukasey is part of the solution. He has lived a good life in the law, and he has been asked a question about solving a problem not of his making.

If I thought, I say to Senator SALAZAR, he really believed that waterboarding, at the end of the day, was the legal way to do business, I wouldn't vote for him. He is in a bind. He can't answer that question. But he will one day because I have asked him. And he doesn't have this theory of the law that there is only one branch of Government in a time of war that has been pushed by this administration to the point of being absurd.

He is a mainstream legal thinker. He answered my question that there is no power given to the President, inherent or otherwise, to avoid the Geneva Conventions obligations of this country or to set aside the McCain amendment. That was music to my ears. He is bound.

The question for us, as we have been a part of the conventions for a long time, and we have led the world for a long time by being different from our enemy, do we reserve to our Executive in those special circumstances the right to set the conventions aside? You see, we are threatened by someone out there who has no boundaries, a group that has no boundaries. So do we reserve to ourselves the ability to treat them any way we want to because the means justifies the end?

Well, let me tell you what will happen if we go down that road, and where we will wind up. What will we say to the Chinese Communist dictator who waterboards the Christians because they are threatened by the Bible? What do we say to people in China who will torture the Buddhist monk because they are threatened by a humble, decent religion? What do we say in Venezuela? What do we say anywhere in the world when people who feel threatened use horrible tactics simply because they are threatened?

This is a good man of the law, Judge Mukasey. Over time, Senators SCHUMER and FEINSTEIN will be shown to have done the country some good—a lot of good. And to those who cannot vote for Judge Mukasey because he didn't answer this question as directly as you would like, I understand. But we are about to fix a problem in the Justice Department that needs to be fixed, and we are going to have an honest, good debate about how to win this war.

I can tell you right now, the only way we will win this war is not just by killing because this is not about how many of them we can kill. That is an endless number. This is not about a capital to conquer, an air force to shoot down, or a navy to sink. This is about ideas. Our way of living is better than theirs, only if we will have the courage and the common sense to embrace it and not be afraid to be good in a time where there is evil.

God bless you.

The PRESIDING OFFICER. The Senator from Vermont is recognized for 12 minutes.

Mr. SANDERS. Let me thank my colleague from Vermont, Senator LEAHY, for yielding, and applaud him for the role he is playing on the Judiciary Committee.

Mr. President, several weeks ago, I informed the citizens of Vermont that I would be voting against the confirmation of Judge Mukasey to be Attorney General, and tonight I am going to, in fact, be casting a ''no'' vote.

Mr. President, there are several reasons I will vote no on Judge Mukasey. First, like many of my colleagues, I was deeply disturbed by his response to the question of waterboarding. He apparently does not know whether waterboarding is torture. Well, millions of Americans know waterboarding is torture. People all over the world know waterboarding is torture. The Geneva Conventions are quite clear about waterboarding being torture. And, frankly, I don't think it is too much to ask for us to have an Attorney General who knows waterboarding is torture. That is one reason I am voting against Judge Mukasey, but there is a second reason, and perhaps maybe an even more important reason.

For the last 6 years, it is clear that we have had a President who does not understand what the Constitution of the United States is about. What this President believes, essentially, is that he can do anything he wants, at any time, against anybody in the name of fighting terrorism. And he happens to believe the war on terrorism is unending. It is going to go on indefinitely. I think it is very important that we have an Attorney General who can explain the Constitution to a President who clearly does not understand it. Unfortunately, Mr. Mukasey is not that person.

In the last 6 years under President Bush, we have seen the National Security Agency start a program which allows wiretapping without first obtaining a court order, to my mind, in violation of the Constitution. We have seen personal records that have been extensively mined for data. How many millions? Who knows? Nobody in the Senate really knows. We don't have access to that information. It is massive amounts of data mining, in clear violation of the privacy rights and the laws of America under this President.

We have seen the phenomenon of extraordinary rendition, which has shifted detainees to prisons in countries abroad which allow torture. We have seen the firing and the politicization of the Office of the U.S. Attorney. We have seen detainees of the United States being denied the oldest right in the Western legal system—the right to habeas corpus. We are running a prison camp in Guantanamo where prisoners have minimal legal rights, which is an international embarrassment for us as we struggle against international terrorism. And we have seen many other assaults by this President on our constitutional rights and on the laws of this country.

We have a President who clearly does not understand the separation of powers; that the Congress of the United States is an equal branch of our Government; that the Judiciary is an equal branch of our Government; that the executive branch does not have all of the power.

A little while ago I was on a statewide TV program in Vermont. Somebody called in and they said: When is Congress going to begin to stand up to this President?

That is a good question, and I didn't have a good answer. But what I can tell you, the time is long overdue for us to begin to stand up to this President, who thinks he can veto virtually every piece of legislation we send him, who ignores the Constitution of this country—I think it is time we begin to stand up.

I have heard some of my colleagues say, if we reject Mr. Mukasey, the President is not going to send us another nominee. That is the right of the President of the United States. But we have our rights as well. We have the right to demand an Attorney General

who supports, strongly, the Constitution and is prepared to tell the President when he is acting against our Constitution. That is our right. It is about time we began to defend our right.

I can't blame the President for taking over the rights of Congress, if Congress is not prepared to stand up and fight back. I think that time is long overdue.

Mr. President, if you do not want to send us another nominee, that is your right. We have our rights as well. I will be voting against Mr. Mukasey. I hope my colleagues do as well.

In conclusion, I ask unanimous consent that letters of opposition and concern from the American Civil Liberties Union, the Leadership Conference on Civil Rights, and Common Cause be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

AMERICAN CIVIL LIBERTIES UNION,
Washington, DC, November 5, 2007.

Re Nomination of Michael Mukasey for Attorney General

Hon. PATRICK LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. ARLEN SPECTER,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

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 if you have any questions regarding this issue.

Very truly yours,

CAROLINE FREDRICKSON,
Director.

CHRISTOPHER E. ANDER,
Legislative Counsel.

WASHINGTON, DC,
November 5, 2007.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. ARLEN SPECTER,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SPECTER: On behalf of the undersigned organizations, we write to express our opposition to the confirmation of Judge Michael B. Mukasey to the office of Attorney General. At his hearing and in his responses to written questions, Judge Mukasey refused to condemn waterboarding as torture, endorsed broad assertions of executive authority, and failed to make firm commitments to the enforcement of civil rights. For these reasons, we are compelled to oppose his nomination.

What is urgently needed in our next Attorney General is an unequivocal commitment to thoughtfully and independently uphold the rule of law. However, on human and civil rights issues, it is difficult to distinguish Judge Mukasey's views from the controversial views of this Administration. It seems certain that, after his careful avoidance of making commitments that might be antithetical to the Administration's interests, Judge Mukasey is either unwilling to exercise the independence we need in our next Attorney General on critical issues, or his views align perfectly with those of the President.

On the issue of interrogation techniques, Judge Mukasey acknowledged that the law holds that torture is unlawful, but declined to state whether waterboarding is torture. Waterboarding, a technique defined as the use of a wet towel to induce the misperception of drowning, has been declared unlawful by all four current Judge Advocate Generals of our armed services. Judge Mukasey's condemnation of this technique as ''repugnant,'' while true, is inconsequential; what counts is his legal opinion of whether the practice is torture. In spite of the fact that waterboarding is widely classified by military officials and human rights experts as unlawful torture, Judge Mukasey refused to answer this question directly.

Judge Mukasey further endorsed a view of executive authority that greatly expands the power of the President at the expense of the other branches of government. Judge Mukasey suggested he would allow the President to engage in warrantless surveillance of persons in the United States in violation of congressional laws. Indeed, he outlined a view of the Constitution that privileged the view of the executive branch over that of Congress on matters of constitutional interpretation, making it possible for the President to disregard the laws of Congress based on the President's constitutional judgment.

In fact, under this view, the President's failure to enforce a congressionally-enacted law would prevent the courts from ever having an opportunity to weigh in, making the President the final arbiter of constitutionality of our laws.

Finally, with respect to questions regarding how he would improve civil rights enforcement, Judge Mukasey offered platitudes, but no firm commitments. Civil and voting rights enforcement have been low priorities within the Department of Justice, making it especially important that the next Attorney General have a thorough understanding of our civil rights laws and be committed to the vigorous and unbiased enforcement of those laws. Judge Mukasey failed to offer solutions to the extremely low number of cases brought by the Civil Rights Division on behalf of women and minorities in employment discrimination cases. On an issue as central to the civil rights community as voting rights, Judge Mukasey would not commit to the straightforward proposition that a voter identification requirement that disproportionately impacts minorities could violate Section 2 of the Voting Rights Act. His responses to questions concerning civil and voting rights enforcement evidenced little understanding of the problems that currently plague the Civil Rights Division.

Nowhere is the Senate's constitutional role in reviewing a presidential cabinet nominee more important than in the case of a prospective Attorney General. Judge Mukasey has failed to deliver on the expectation that he would be willing to challenge this Administration's widely condemned human and civil rights policies. As a result, there is serious doubt about his suitability for the position of Attorney General and about the impact his tenure would have on civil and human rights in this country and elsewhere. Thus, we must urge you to not confirm Judge Mukasey.

Thank you for your consideration. If you have any questions, please feel free to contact LCCR Vice President and Director of Public Policy Nancy Zirkin or LCCR Counsel and Policy Analyst Paul Edenfield.

Sincerely,

Leadership Conference on Civil Rights.
AFL–CIO.
AFSCME.
American-Arab Anti-Discrimination Committee (ADC).
Asian American Justice Center.
Global Rights: Partners for Justice.
Human Rights First.
International Union, United Auto Workers.
National Association for the Advancement of Colored People (NAACP).
National Fair Housing Alliance.
National Urban League.
Open Society Policy Center.
People For the American Way.
Service Employees International Union (SEIU).

COMMON CAUSE,
Washington, DC, November 5, 2007.

Senator PATRICK LEAHY,
Chair, Senate Committee on the Judiciary, Washington, DC.

DEAR SENATOR LEAHY: Common Cause believes that it would be a serious mistake for the Senate Judiciary Committee to confirm Judge Michael Mukasey's nomination as attorney general to replace Alberto Gonzales.

In his nomination hearings before the Senate Judiciary Committee, Judge Mukasey provided evasive answers to critical questions about whether ''waterboarding'' is torture, feigning ignorance of the well-known procedure and dodging the question when it was defined for him.

An attorney general's first job is to protect the rule of law, not to protect a President. We have just seen the damage caused when an attorney general places partisan loyalty above law. The country cannot withstand more of such disregard for the rule of law.

As the Committee knows—and now the American public knows too well—waterboarding has been an infamous form of torture dating back as far as the Spanish Inquisition. The United States has both prosecuted waterboarding as a war crime when used against our soldiers and court marshaled a U.S. military officer who used it against our enemies, George Washington University Professor Jonathan Turley wrote last week.

Senator Charles Schumer (D–NY) stated that in conversations with Judge Mukasey as late as Friday, Judge Mukasey assured him that Congress could pass a law banning waterboarding and other forms of torture and the President would have absolutely no authority to ignore such a law. But, under the Geneva Convention, adopted by the United States as law, it is already against the law to use waterboarding.

Judge Mukasey's disingenuous responses about torture shows a contempt for Congress and a disturbing willingness to turn his back on the law when the alternative—acknowledging illegal torture—could have troubling implications for the President who nominated him.

This is unacceptable from a nominee to America's top law enforcement position. And it is equally unacceptable for the United States Congress to turn its back on its constitutional duty.

Judge Mukasey's non-answers on torture do not stand alone. We are equally concerned about his equivocations on the President's power to conduct a secret program of warrantless wiretapping, despite laws duly enacted by Congress and protections afforded to all Americans by the Constitution.

It is the hope of the nation that a new attorney general will be a fresh start for the Justice Department that Gonzales tarnished through his partisanship and left in tatters. That hope cannot be served by a nominee who begins by dissembling over what the law is in order to protect the Administration and the Justice Department from possible unpleasant ramifications even before he has been confirmed. It is difficult to see how such a nominee could repair the integrity and reputation of the Justice Department, heighten sagging morale or stem the exodus of career professionals fleeing that agency.

Common Cause believes this is one of the most urgent issues of our day: a President who usurps greater and greater powers without regard for the law or Constitution, and a Congress that stands idly by and lets it happen. Common Cause took a stand when the actions of President Nixon threatened to unravel America's democracy, and we take the same stand now.

The American people are watching what you do this week. The whole world is watching. We need you to demand respect for the rule of law, the Constitution, and the role of the United States as a reliable world partner dedicated to international justice. It is up to you to restore voters' confidence in the vitality of America's democracy. And it is up to you to safeguard our troops abroad, who become more vulnerable to torture when we condone it.

Common Cause urges you to stand firm and vote against the confirmation of Judge Mukasey as our next attorney general. We urge you to turn the tide on abuse of executive power and show America that they can depend on you to defend the Constitution and the rule of law.

Sincerely,

BOB EDGAR,
President and CEO.

The PRESIDING OFFICER. Who yields time?

Mr. HARKIN. Mr. President, how much time do I have?

The PRESIDING OFFICER. The Senator from Iowa has 10 minutes.

Mr. HARKIN. Mr. President, despite the many positive attributes of Judge Mukasey, I cannot support his nomination for Attorney General. The next Attorney General must be more than a capable steward of the Department of Justice. I have heard a lot about that, that he can run it well.

Given this administration's disdain for the rule of law, it is imperative the next Attorney General be a strong and independent voice for a return to the very basic principle that we are a government of laws and not of the King—the President. Regrettably, I do not believe Judge Mukasey will be that voice.

Over the last 6 years, this administration, supported by faulty legal opinions from the Justice Department, has claimed it can ignore acts of Congress. The President has argued that, despite the fact that since 1978 the Foreign Intelligence Surveillance Act has been the law of the land, he, the President—he has the authority, he says, despite the law, to eavesdrop on American citizens without a warrant or judicial review. He, the President, believes—the President, the King—he can seize American citizens on American soil, indefinitely detain them without charges, without providing the accused access to counsel, without judicial review. He—the President, the King—believes he can utilize interrogation techniques long considered immoral, ineffective, and illegal, regardless of the laws and treaties Congress has approved.

As Justice Sandra Day O'Connor wrote, however, ''[a] state of war is not a blank check for the President when it comes to the rights of the nation's citizens.''

At a time when we sorely need an Attorney General who will stand up for the rule of law, Judge Mukasey has expressed a troubling view of unchecked Executive power. For example, Judge Mukasey asserted that the President can violate congressional statutes where the President claims broad authority to ''defend the Nation.'' That is a loophole big enough to drive anything through. Judge Mukasey refused to answer whether he believes American citizens, detained by the President, have the right to habeas corpus, a right that goes back to 1215; the Magna Carta, articles 38 and 39 of the Magna Carta. You go read it. It says the King can't pick you up and throw you in jail and hold you there unless it is supported by evidence and testimony from your peers. That is the right of habeas corpus, enshrined, article I, section 9 of our Constitution. Mukasey refused to answer whether he believes American citizens have the right to habeas corpus when they are detained by the President.

Similar to many of my colleagues—the Senator from Vermont and the

Senator from Colorado talked about this—I am deeply troubled by the judge's failure to assert that waterboarding is illegal, a process that simulates death by real drowning. Everybody is focused on waterboarding. Sadly, he also refused to answer that other terrible practices which this administration has used are illegal. These include electrical shocks, beatings, the use of dogs, forcing prisoners to stand naked, induced hypothermia. Judge Mukasey doesn't know—he doesn't know whether these are illegal. Imagine that.

Let there be no misunderstanding. Whether waterboarding is illegal is not a difficult question. This Senate has repeatedly stated it, going back at least to the ratification of the Geneva Convention in 1955, that torture is a violation of our highest values and simply not permitted. In 2005, we adopted the McCain amendment, 90 to 9, 90 votes to 9. The amendment stated that cruel, degrading or inhuman treatment of detainees was prohibited.

Last year, the Military Commission Act expressly made clear that the President is bound by the prohibitions against cruel, inhuman, and degrading treatment of prisoners. Yet Judge Mukasey says he doesn't know. He can't determine whether waterboarding is illegal because he has not seen the evidence. He has not seen the classified material.

You don't need classified material. You don't need any classified material on this.

RADM John Hutson, former Judge Advocate General of the Navy, testified that, ''other than, perhaps the rack and thumbscrews, waterboarding is the most iconic example of torture in history.'' He added, ''[I]t has been repudiated for centuries.'' Going back to the Spanish Inquisition and including World War II, the U.S. military has brought charges against those who practice this technique. In adopting the Military Commission Act, many Senators made clear that interrogation techniques such as waterboarding are illegal and constitute ''grave breaches'' of the Geneva Conventions.

Given this law, given the history, it is disappointing that an esteemed judge, with the highest reputation in our legal community, would not unequivocally state that, of course, waterboarding is both torture and it is illegal. It wasn't a difficult question. It is a question any serious candidate for Attorney General should answer. Because he could not answer it, he is not qualified to be Attorney General.

Are we going to have another Attorney General who is going to kowtow to the King—the President—I am sorry, I get those terms kind of confused when I am talking about Bush. I don't know whether he is King or President. According to the last Attorney General, he was King. Maybe this one believes the same thing. He can do whatever he wants to. But even in 1215, the King of England was held to the standard of habeas corpus. I guess we want to turn the clock back to before the Magna Carta.

I am also troubled by Judge Mukasey's refusal to commit to recommend to the President that the detention center at Guantanamo Bay be closed. He said, ''There are substantial problems with Guantanamo, both problems of reality and problems of perceptions.'' If he believes that, why wouldn't he join with Secretary of Defense Gates and former Secretary of State Colin Powell in recommending that it be closed?

I have a petition, signed by more than 1,000 people from around the United States, urging that our next Attorney General be committed to closing down the detention facility at Guantanamo Bay.

I ask unanimous consent it be printed in the CONGRESSIONAL RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

TEXT OF PETITION

Revelations of human rights abuses at the prison at Guantanamo Bay have damaged America's reputation and impeded our efforts to fight terrorism.

By continuing to isolate detainees on Guantanamo Bay without bringing charges against them, we have forfeited our moral leadership and hindered our ability to rally support in our fight against terrorism. Closing this facility is our single best opportunity to rally our allies in a more effective fight against terrorism and reduce the risk to Americans traveling abroad.

Mr. HARKIN. Mr. President, issues such as torture and Guantanamo Bay, I have to admit, are somewhat personal to me. It was 20-some years ago—I am sorry, 37 years ago, now that I think about it, 1970—when I was a congressional staffer on the House side, for a committee that went to Vietnam to investigate our involvement in the war in Vietnam. During that trip over, through a series of circumstances and because of the bravery of a couple of young people, I was able, with two Congressmen—Congressman ''Gus'' Hawkins from California and Congressman Bill Anderson from Tennessee—to uncover the infamous tiger cages on Con Son Island off the coast of Vietnam.

What did we find there? Inhuman, degrading, terrible conditions, where the Vietnamese had imprisoned civilians—students, human rights activists, along with North Vietnamese POWs—being tortured almost on a daily basis. It would take me more time than I have this evening to be able to describe to you the horrors we saw when we broke into this prison. It was all done with the full knowledge and consent and supervision of the U.S. Government. That is proven. That is on the record. It is on the record.

I saw the damage that it did, what that did to us. We were always saying to the North Vietnamese: Treat our prisoners according to the Geneva Conventions, when our colleague JOHN MCCAIN was there, and others. Yet we were doing the same thing in Vietnam. If you want to go into the court of world opinion, you better go in with clean hands; the court of equity. What we are doing now in Guantanamo covers all that up. It does damage to our reputation. It makes us like them.

The one thing we proved in the 1950s when Joseph McCarthy stood on the floor of this Senate—one thing we proved then is we did not have to be like the Communists to beat them. We don't have to be like the terrorists to beat them. The more we are like them the more likely we are to lose. We need an Attorney General of the United States who has the guts to stand before the committee and say he is going to tell the King that the King is wrong, and this Attorney General nominee will not do that.

Oh, he may run a good department. Oh, he may do all the right things. But we need an Attorney General to tell this King he is wrong and that the rule of law will apply and the rule of law says we will not torture. We will not treat people with inhumane treatment. We will abide by the Geneva Conventions. We will not be like our enemies.

That will send a stronger signal to the world than anything else we could do. For those reasons I, in good conscience, cannot in any way support this nominee for Attorney General.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. HARKIN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SPECTER. Mr. President, I ask the Senator from Connecticut how much time he would like.

Mr. LIEBERMAN. Up to 5 minutes.

Mr. SPECTER. I yield 5 minutes to Senator LIEBERMAN, then Senator MCCONNELL, the Republican leader, will speak.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. LIEBERMAN. Mr. President, I thank my friend from Pennsylvania. I have spoken before on the Senate floor about the nomination of Judge Michael Mukasey to be our next Attorney General. I can be brief.

I have listened to my colleagues. I respect what they have said. I have listened to those who have spoken against Judge Mukasey's nomination. I am compelled to rise and speak because, with all respect, based on knowing this man for 43 years, I believe people are not treating him fairly who are contemplating voting against him.

I respect the opinions that have been stated. But based on this long knowledge of this good man, I think he deserves to be confirmed by the Senate by a very strong vote. I met Michael

Mukasey when we first arrived together at law school—the same law school, Yale Law School.

As I have said on the Senate floor before, the young man I met then—smart, sensible, honorable, good sense of humor—is very much the same man who has been nominated by President Bush to be our next Attorney General, except, of course, that he is older and wiser and has had extraordinary experiences as an attorney in private practice, as a very successful assistant U.S. attorney, as a Federal judge respected by all who came before him, and now, in really a twist of fate, having retired from the bench, gone back to private practice, he comes to the attention of President Bush and is nominated as Attorney General.

He carries with him all the attributes one would expect and want of an Attorney General. I would add this: He is exactly the right person to be Attorney General at this moment in our Nation's history, after the travails the Department has been through, the accusations of excessive political interference there, the questions about the judgment of the previous Attorney General. I cannot think of a nominee for Attorney General who will be more independent of the President nominating him than Michael Mukasey in a long time.

Think about it. President Kennedy nominated his brother. President Carter nominated Griffin Bell, his attorney and close friend from Atlanta. President Reagan nominated his own lawyer, William French Smith, to be Attorney General, and so on. President Bush and Michael Mukasey, as far as I know, did not know each other before his consideration for this position. But he impressed the President based on his experience, his knowledge, his record; particularly his record in dealing with difficult cases regarding terrorism.

He has the integrity, the sound legal judgment, and the tremendous work ethic to raise this Department up to where we need it to be, to raise the morale of the employees of the Department.

If you look at the whole record of his experience, it seems to me, as I have listened to my colleagues who are opposing him, they are in large part expressing their opposition to the administration, to the judgments made by the previous Attorney General, and not being fair to this nominee.

Judge Michael Mukasey is a man of the law. He is not a man of politics. If he was a man of politics, he would have said waterboarding is illegal because he knew that is what many Members of the Senate wanted him to say. But he did not believe, as a matter of law, as a man of law, that he was justified in saying that.

I hope all my colleagues have read Judge Mukasey's response to the letter that was sent to him by the chairman of the Judiciary Committee and other members on this question of waterboarding because it tells you who Judge Mukasey is and what kind of Attorney General he will be. It is a reasoned opinion. It is a straightforward opinion. It is an opinion based on law.

He says waterboarding to him personally is repugnant. He says, he opines, as a matter of law, that waterboarding done by employees of the Department of Defense is illegal. I have not heard that enough in this debate. He says that explicitly in this letter. Why? Because the law says it is illegal.

The Detainee Treatment Act refers to the field manual of the Department of Defense, and that field manual said waterboarding is illegal; therefore, Judge Mukasey says waterboarding is illegal.

But then he says: I cannot say that for other employees of the Federal Government, particularly employees of the intelligence community, because there is no law that says that. And I would have to have the evidence of what it is, the previous legal opinions to do so. So he answered as a man of law, not a man of politics.

He is extremely well suited to be the Attorney General America needs now. I say this based on long knowledge of this man and his record. He ought to be confirmed overwhelmingly.

I regret that appears not to be what will happen. But I take some comfort from the fact that he will be confirmed. I am confident those who are his detractors today will become his admirers over the next year and a half as he conducts himself as the Attorney General of the United States.

Mr. MCCONNELL. Mr. President, I am pleased that today, 7 weeks after he was nominated, the Senate will finally vote on the confirmation of Judge Michael Mukasey to be our Nation's 81st Attorney General.

Judge Mukasey's nomination is the culmination of a process in which the President was extremely solicitous of the views of the Democratic majority. In fact, it's hard to imagine how he could have been any more bipiartisan with respect to this nominee. Just to recap:

Our Democratic friends did not want the former Attorney General to continue in office. Well, he has resigned.

Our Democratic colleagues wanted to be consulted on whom the next Attorney General should be. Well, the administration consulted extensively with them.

Our Democratic colleagues said that if the ''President were to nominate a'' conservative ''like a Mike Mukasey,'' he ''would get through the Senate very, very quickly.'' Well, the President did not nominate someone ''like'' Mike Mukasey; he nominated Mike Mukasey himself. And the President received widespread acclaim for choosing a ''consensus'' nominee.

So it is apparent that the President acted in a very bipartisan fashion. Did our Democratic friends reciprocate? Let's review the record:

First, they held up the nomination for weeks before even scheduling a hearing, a failure to act which the Washington Post termed ''irresponsible.''

Then, despite the fact that Judge Mukasey testified for 2 days and answered over 250 questions, our Democratic colleagues asked him an additional 500 written questions. By contrast, Attorney General Reno did not receive any written questions until after she was confirmed.

Then it took our Democratic colleagues over 2 weeks to schedule a markup. Again, by contrast, the Judiciary Committee marked-up Attorney General Reno's nomination on the very same day it finished her hearings.

By the time the Mukasey nomination was marked-up, this ''consensus'' nominee had somehow become ''controversial.'' How did this happen? The answer is that Judge Mukasey fell victim to the politicization of the confirmation process, just like another recent nominee who suddenly became ''controversial.''

Both Leslie Southwick and Michael Mukasey were nominated because they were consensus candidates:

Judge Southwick previously had been unanimously approved by Democrats on the Judiciary Committee.

And Judge Mukasey had been repeatedly recommended by a Democratic member of that committee, not just for a 15-month stint as Attorney General but even for a lifetime position on the Supreme Court.

Judge Southwick was suddenly deemed controversial because of two opinions out of 7,000. He didn't write either of them and at any rate, both opinions existed when the Judiciary Committee earlier approved him to another lifetime Federal judgeship.

And Judge Mukasey suddenly became controversial because of one question out of the 750 oral and written questions he was asked. That one question was whether waterboarding terrorist killers legally constitutes torture in all applications, regardless of circumstances and regardless of how many American lives might hang in the balance.

Well-known members of the vast Right Wing Conspiracy, like Professor Alan Dershowitz of Harvard Law School and Stuart Taylor of National Journal, say the answer to that question is no. But Judge Mukasey didn't say anything even close to that. He was far more reserved.

Rather, Judge Mukasey promised to bring his trademark thoughtfulness to bear in answering this question, and swore that he would rather resign than countenance any illegality. In doing so, Judge Mukasey answered the question the way his Chief Recommender, our friend, the senior Senator of New York, said it ought to be answered, namely, ''carefully.''

Specifically, in 2004, Senator SCHUMER implored us to be ''reasonable'' and not get into ''high dudgeon'' about the issue of torture. He noted:

There are probably very few people in this room or in America who would say that torture should never, ever be used, particularly if thousands of lives are at stake.

Our friend from New York noted that it is easy to ''sit back in the armchair'', as he put it, and demagogue the issue. But ''when you're in the foxhole,'' as he described it, ''it's a very different deal.''

Senator SCHUMER said he respected ''the fact that the President is in the foxhole every day. So he can hardly be blamed for asking'' his Attorney General or his White House counsel or the Defense Department ''to figure out when it comes to torture, what the law allows and when the law allows it and what there is permission to do.'' But, our friend from New York correctly cautioned, the legal analysis has ''to be done carefully.''

Judge Mukasey applied just such a careful analysis to this legal question. And an important part of carefulness, of course, is not to prejudge the legality of an intelligence program that one is not read into, and that concerns interrogation techniques that, even if used, are classified.

But despite the fact that Judge Mukasey answered the question in the same thoughtful manner that our friend from New York noted it demands, and despite the fact that Judge Mukasey was much more reserved in his pronouncements than Professor Dershowitz, this once-consensus candidate is now controversial. If my Democrat colleagues vote against Judge Mukasey because of his comments on waterboarding, it must mean they also would vote against Professor Dershowitz and Senator SCHUMER if they were nominated for Attorney General.

I have a hard time believing that my Democratic colleagues would vote against Professor Dershowitz's nomination to be Attorney General. And I have an even harder time believing that our colleagues would vote against Senator SCHUMER if he were nominated to this position.

In conclusion it should not have taken nearly this long to process Judge Mukasey's nomination. I am glad that tonight, almost 2 months after he was nominated, the waiting will finally end, and that Judge Mukasey will soon get to work at the Justice Department, the thing our Democratic colleagues said they wanted all along.

The PRESIDING OFFICER. The majority leader.

Mr. REID. Mr. President, I yield back the time of the majority except for the statement I am going to give.

Mr. LEAHY. Mr. President, parliamentary inquiry: Is there still time reserved to the Senator from Vermont?

The PRESIDING OFFICER. Yes, there is.

Mr. LEAHY. How much?

The PRESIDING OFFICER. Ten minutes.

Mr. LEAHY. I don't want to interfere with the majority leader, but I am not about to yield back that time, if I might mention for a moment, and then I will yield it back so he may speak, I hate to see records made on this floor that bear absolutely no relationship to the facts. The suggestion was made that there was one question on waterboarding out of hundreds of questions and that created the problem. Unlike Senators who may have spoken that way, I was there. I was there through the whole hearing on the first day. I was there through the whole hearing on the second day. I am probably the only Senator, other than possibly Senator SPECTER, who was there for every bit of it. There were several questions on this issue. In fact, the reason that as chairman I had a second day of hearings is because of some of the questions that were raised on the first day of hearings. I took the transcript and read it during that night because of it. There were questions on executive privilege, but there were questions on waterboarding.

Contrary to suggestions which seem to be more for political cover by some who may want to vote one way or the other, we do not need a new law on waterboarding. President Teddy Roosevelt did not need a law on that to find people had violated our laws 100 years ago. We did not need a new law on the question of waterboarding to prosecute Japanese war criminals for waterboarding Americans. We have not needed it at all. It is against the law. We do not need it. None of the military who write our Uniform Code of Military Justice need a new law to find it wrong. None of the Judge Advocate Generals need a new law to find it wrong. They have declared it wrong.

Our treaties, our other obligations find it wrong. Up until the last week or so of this administration, we would have objected to any other country using such techniques on Americans as wrong.

I understand the White House determines what their nominees want to say. That is fine. I have not lobbied any Senator one way or the other on this issue. But let us not pretend there was one question out of hundreds on waterboarding. There were many questions. Several Senators asked questions on this, more on the philosophy of: Is a President above the law? Can the President arbitrarily set people in this country above the laws of America or do the laws that we pass and their assignment to law by Presidents, is that a law that applies to every single American, including the President of the United States? Most of us feel the same way we learned in civics 101, that no one in America is above the law. That is the issue we raised in the Judiciary Committee. Those who are voting no on this is because they felt a great deal of concern about the answers.

Nobody questions Judge Mukasey's legal abilities. I find him a very attractive candidate for Attorney General. I do not find the ability to continue to vote for a myth that somehow the President is above the law anymore than those of us who voted to confirm General Petraeus were, as the White House then wanted to say, saying that we believed in everything the President was doing in Iraq. Many of us voted against the war in Iraq who then voted for General Petraeus because of his ability as a four star general. They are entirely different things. The suggestion otherwise, I find beneath the quality of discourse in this great body. I resent it. I reject it. Let people make up their mind how to vote one way or the other, but don't vote on red herrings. Don't vote on made-up ideas that we need to pass some law in the future and then, of course, we can be tough. In the future, we will do something and then we can be tough. That is sort of like saying: Gosh, if we had known we weren't being told the truth, we might have voted differently on Iraq. If we knew that waterboarding was bad, we might have voted differently.

Vote one way or the other. I will not question the motives of any Senator, no matter how they vote, either for or against this nominee. But let's not do it on a hypocritical pretext that the President is above the law when he is not or that the President can put any American above the law because he cannot. Let us not pretend that torture is not torture because it is, and it is beneath the great ideals of the most wonderful Nation on Earth.

I thank the Senator from Nevada and yield back the remainder of my time.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. REID. Mr. President, the hearing in this matter on Judge Mukasey was good. The Judiciary Committee, with Senators LEAHY and SPECTER, did a good job, a full airing of this man's qualifications and ideas were present before the American people and the Senate. The debate that has transpired today dealing with Michael Mukasey has been extremely good. It has been good for the process. It is good for the American people to understand that the chief law enforcement officer of this country has had a fair hearing and a good debate in the Senate.

I will vote against the nomination of Michael Mukasey for Attorney General. My historical analysis is different than that of my good friend, the senior Senator from Kentucky, much different. It is regrettable that I must vote no. When the President first nominated Michael Mukasey, I was fully prepared to support him. That is the history I remember.

Judge Mukasey has a stellar reputation for integrity and judicial excellence throughout his decades of Government service. He has an excellent academic background. I was pleased to see that after the Gonzales debacle and with the Justice Department in shambles, the President finally relented to pressure from Senate Democrats to look beyond his inner circle at this most important appointment.

I considered it significant that an administration that has shown such contempt for the other two branches of Government, particularly judges, would turn to a candidate who served in the judicial branch for so many years. So like many Democrats, I was predisposed to support this nomination. In fact, I was prepared to embrace this nomination. I, too, met with Judge Mukasey and told him I was impressed with his credentials and his background and I hoped the hearing went well.

Well, the hearing didn't go well, from my perspective. During this confirmation process, Judge Mukasey expressed views about Executive power that I and many other Senators found deeply disturbing. I was outraged by his evasive hair-splitting approach to questions about the legality of waterboarding. After his initial comments, Judge Mukasey was given every opportunity to address these concerns. But he was unable to state clearly that waterboarding is torture and, therefore, illegal under U.S. law. This is not a difficult or complex legal question. It does not require high-level security briefings.

I agree with former Navy General Counsel Alberto Mora and former Assistant Secretary of State John Shattuck who wrote in an op-ed this week:

The question of whether waterboarding constitutes torture is a no-brainer.

Why is it a no-brainer? My friend, former Nevadan and now a long-time Federal Judge Evan Wallach, a former decorated Vietnam combat veteran who came back from military service in the first Gulf War and is now a leading expert on the law of war, wrote in a recent Washington Post article—in fact, it was last Sunday on the front page of the opinion section—

The media usually characterize the practice as ''simulated drowning'' [but] that's incorrect. To be effective, waterboarding is usually real drowning that simulates death.

The only difference between actual drowning and waterboarding is that the waterboarding process is halted before death. Victims inhale water, suffocate, and often pass out. Who could reasonably argue this is anything other than torture?

Judge Wallach further points out, in a related law review article in the Columbia Law Review, that even under the extreme and now disavowed legal theories of former Justice Department officials such as John Yoo, waterboarding still constitutes torture.

''Can there be any question,'' Judge Wallach asks, ''that water torture, the repetitive artificial drowning and revival of another human being, falls within their memo's parameters?'' No. There can be no question at all.

Notwithstanding the novel legal theories of the Bush administration, whose approval rating as we speak is 23 percent—and we wonder why—it has long been settled law in this Nation and around the world that waterboarding is torture and it is illegal. Civil and military courts in the United States have rejected waterboarding, as Senator LEAHY has said more than once today, for more than 100 years, whether directed at or committed by Americans.

U.S. soldiers were court-martialed for using water torture to question Filipino guerrillas during U.S. occupation of the Philippines after the 1898 Spanish-American war. After World War II, the United States prosecuted and convicted Japanese soldiers for waterboarding American allied prisoners of war. During the 1980s, a Texas sheriff was sentenced to 10 years in prison for using waterboarding to force confessions of prisoners. So this is not a new debate, nor an unsettled question.

Judge Mukasey doesn't need a classified briefing from the Bush White House to answer the question, is waterboarding torture. He has more than 100 years of established American law on which to base his position. His position was evasive without any question, misleading. That is why it is so disturbing that for all his impressive years on the bench, Judge Mukasey could not give a simple straightforward answer to the question posed by members of the Judiciary Committee, Democrats and Republicans. His lengthy nonresponsive answer was wrong. This was a question that demanded brevity and certainty, not lawyerly semantics.

My Republican colleagues, JOHN MCCAIN, LINDSEY GRAHAM and JOHN WARNER, who served as leaders in the Senate on this issue, recently issued a detailed legal analysis that concluded waterboarding ''represents a clear violation of the U.S. law.''

For purposes of this debate, let's give a little added credence to a man who served 7 years in a Vietnamese prison camp and was tortured more than half the time he was there—the rest of the time was in solitary confinement—JOHN MCCAIN. Let's give that a little more foundation.

Former and sitting Judge Advocate Generals agree. On Friday in a letter to the chairman of the Judiciary Committee, several prominent former Judge Advocate Generals declared unequivocally:

Waterboarding is inhumane, it is torture, and it is illegal . . . Waterboarding detainees amounts to illegal torture in all circumstances.

I could continue at length quoting military and civilian experts who all agree the answer to this question is settled. And it is settled. But why is this issue of waterboarding so critical for the chief law enforcement officer of our country, the U.S. Attorney General? Tremendous damage has been done to the moral credibility of our great country, both in the eyes of our allies and of our enemies abroad, by the widespread belief that our country, the United States, has used waterboarding and other abusive interrogation techniques. The United States of America has done that? All over the world now they know it.

As a result, our allies have at times refused to cooperate with us in the fight against terrorism, under constraints from their own laws and public opinion at home.

Even if the Bush administration is no longer utilizing waterboarding—which I do not know now—the President's refusal to publicly disavow it gives license to our enemies abroad to use it. This puts our troops and any citizen who may fall into our enemies' hands at risk and serves as an ongoing recruiting tool for militant extremists.

How do these evil people, who are trying to do damage to this country—how are they using the fact that America tortures people they want to get information from? How is this a recruiting tool for these bad people? A pretty good one, I would think.

President Bush claims we must not disclose our techniques to the enemy. But I contend we should shout from the hills and the rooftops for all to hear, that no matter how hateful the actions of our enemies, we will never relinquish our most treasured commitment to human rights.

That is America, Mr. President—not water torture, not thumb screws, not the rack.

We should make it clear to all the world that no matter what our enemies do, our core American values cannot be shaken. We are a constitutional form of government. We deserve an Attorney General who will uphold this message to the world.

Judge Mukasey's answer to the waterboarding question was important in itself, but it also raised for me serious doubts about whether he is prepared to be the truly independent voice that the Justice Department, which is now in shambles, so desperately needs. If he cannot stand up to the President on such a question of profound importance and simplicity with a clear legal answer, how can we be sure he would be more than just another mouthpiece for an administration that treasures secrecy and loyalty above all?

I respect Judge Mukasey's long career in public service. I have said that before. We have met in person. I have said that before. And there is no question he is an intelligent man. In the past, he has been very capable.

If he is confirmed, the eyes of every American will be on him as he faces the unenviable task of depoliticizing the Department of Justice and restoring the integrity that was so lacking under his predecessor, Alberto Gonzales. He will have my earnest support in that challenge.

But in light of his responses during and following his confirmation hearings, I cannot stand by him today with my words or my vote.

One day, Mr. President, historians will expend countless reams of paper and barrels of ink writing the story of the Bush-Cheney administration's extremism in support of its never-ending

quest to expand the reach of their Executive power. There is no question that this time will be remembered as a dark chapter in America's otherwise steady march toward justice.

But for now, all we can do is honor the trust and authority given to us as individual Senators by the American people and do what we, as Senators, can to turn the page to a brighter day because it needs to be turned.

What we can do today is reject this nomination. The next Attorney General must be able to stand up to the President and stand up for the rule of law.

If confirmed, I hope Judge Mukasey is up to that challenge. But because he has not given me confidence of his independence, I will vote against confirmation, and I urge my colleagues to do the same.

Mr. President, I ask for the yeas and nays on the nomination of Mike Mukasey to be Attorney General of the United States.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is, Will the Senate advise and consent to the nomination of Michael B. Mukasey, of New York, to be Attorney General?

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from New York (Mrs. CLINTON), the Senator from Connecticut (Mr. DODD), and the Senator from Illinois (Mr. OBAMA) are necessarily absent.

I further announce that, if present and voting, the Senator from Delaware (Mr. BIDEN) would vote ''nay.''

Mr. LOTT. The following Senators are necessarily absent: the Senator from Tennessee (Mr. ALEXANDER), the Senator from Texas (Mr. CORNYN), and the Senator from Arizona (Mr. MCCAIN).

Further, if present and voting, the Senator from Tennessee (Mr. ALEXANDER) and the Senator from Texas (Mr. CORNYN) would have voted ''yea.''

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 53, nays 40, as follows:

[Rollcall Vote No. 407 Ex.]

YEAS—53

Allard	Dole	Martinez
Barrasso	Domenici	McConnell
Bayh	Ensign	Murkowski
Bennett	Enzi	Nelson (NE)
Bond	Feinstein	Roberts
Brownback	Graham	Schumer
Bunning	Grassley	Sessions
Burr	Gregg	Shelby
Carper	Hagel	Smith
Chambliss	Hatch	Snowe
Coburn	Hutchison	Specter
Cochran	Inhofe	Stevens
Coleman	Isakson	Sununu
Collins	Kyl	Thune
Corker	Landrieu	Vitter
Craig	Lieberman	Voinovich
Crapo	Lott	Warner
DeMint	Lugar	

NAYS—40

Akaka	Inouye	Nelson (FL)
Baucus	Johnson	Pryor
Bingaman	Kennedy	Reed
Boxer	Kerry	Reid
Brown	Klobuchar	Rockefeller
Byrd	Kohl	Salazar
Cantwell	Lautenberg	Sanders
Cardin	Leahy	Stabenow
Casey	Levin	Tester
Conrad	Lincoln	Webb
Dorgan	McCaskill	Whitehouse
Durbin	Menendez	Wyden
Feingold	Mikulski	
Harkin	Murray	

NOT VOTING—7

Alexander	Cornyn	Obama
Biden	Dodd	
Clinton	McCain	

The nomination was confirmed.

Mr. MENENDEZ. Without objection, the motion to reconsider is laid on the table.

The President shall be notified of the Senate's action.

LEGISLATIVE SESSION

The ACTING PRESIDENT pro tempore. The Senate will resume legislative session.

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2008—CONFERENCE REPORT—Continued

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The conference report was agreed to.

Mrs. FEINSTEIN. Mr. President, I move to reconsider the vote, and I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. REID. Mr. President, there will be no more rollcall votes this week. The first vote next week will be at 10:10 Tuesday morning.

I note the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senate will be in order. Members will take their conversations off the floor.

UNANIMOUS CONSENT REQUEST—S. 1233

Mr. DURBIN. Mr. President, I ask unanimous consent that the Senate may proceed to the consideration of Calendar No. 335, S. 1233, at any time determined by the majority leader, following consultation with the Republican leader; that when the bill is considered, the only amendments in order to the bill, other than the committee-reported amendment, be first-degree amendments that are relevant to the subject matter of the bill and that they be subject to relevant second-degree amendments; that upon the disposition of all amendments, the committee-reported substitute amendment, as amended, if amended, be agreed to; the bill, as amended, be read the third time, passed, and the motion to reconsider be laid upon the table; that the title amendment be agreed to, and the motions to reconsider be laid upon the table, en bloc; that any statements relating thereto be printed in the RECORD.

The PRESIDING OFFICER. Is there objection?

Mr. CRAIG. I object.

The PRESIDING OFFICER. Objection is heard.

UNANIMOUS CONSENT REQUEST—S. 1315

Mr. DURBIN. Mr. President, I ask unanimous consent that the Senate may proceed to the consideration of Calendar No. 336, S. 1315, at any time determined by the majority leader following consultation with the Republican leader; that when the bill is considered, the only amendments in order to the bill, other than the committee-reported amendment, be first-degree amendments that are relevant to the subject matter of the bill and that they be subject to relevant second-degree amendments; that upon the disposition of all amendments, the committee-reported substitute amendment, as amended, if amended, be agreed to; the bill, as amended, be read the third time, passed, and the motion to reconsider be laid upon the table; that the title amendment be agreed to, and the motions to reconsider be laid upon the table, en bloc; that any statements relating thereto be printed in the RECORD.

The PRESIDING OFFICER. Is there objection?

Mr. CRAIG. I object.

The PRESIDING OFFICER. Objection is heard.

UNANIMOUS CONSENT REQUEST—S. 2168

Mr. DURBIN. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 459, S. 2168; further that the committee amendments be agreed to; the bill, as amended, be read the third time and passed; the motion to reconsider be laid upon the table, with no intervening action or debate; that any statements relating to the bill be printed in the RECORD.

The PRESIDING OFFICER. Is there objection?

Mr. CRAIG. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

Mr. CRAIG. Mr. President, I wish to discuss my opposition to two bills reported by the Veterans' Affairs Committee, but I continue to hope we can resolve the concerns I will address today.

Unanimous consent has been sought to pass two controversial bills: S. 1233,