

October 12, 2007

Dear Majority Members of the Senate Judiciary Committee:

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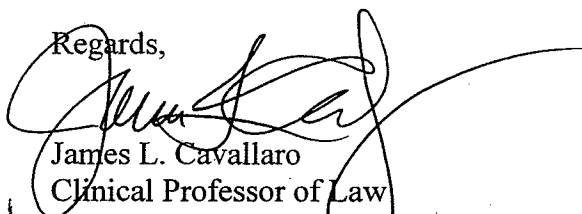
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We write to urge you to take the opportunity of Judge Michael Mukasey's confirmation hearing on October 17, 2007, to reassert this country's repudiation of torture in the wake of recent media revelations of previously undisclosed high-level memoranda that legitimate abusive practices. In an age in which the Director of the Central Intelligence Agency investigates his own Inspector General following the latter's probes into detainee treatment policies (*NY Times*, Oct. 12, 2007), accountability has been turned on its head. It is time to turn it right side up again. The Senate confirmation proceedings on the candidacy of Michael Mukasey to the position of Attorney General of the United States provide an ideal opportunity in this regard. As scholars and practitioners in the field of human rights, we believe that only by speaking in the language of the criminal law can we begin to challenge impunity and move toward deterring torture.


In the page that follows, we provide background information (including a visual aid) and a suggested question for the nominee.

We thank you in advance for your attention to this matter. We remain at your disposition to respond to any questions you may have about this matter by email ([jcavalla@law.harvard.edu](mailto:jcavalla@law.harvard.edu) or phone: 617-495-5204; 617-669-8606).

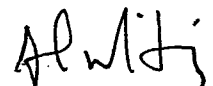
Regards,



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### Suggested question for the nominee

Waterboarding is torture.<sup>i</sup> It was criminal before the Military Commissions Act of 2006, and it remains criminal after the Military Commissions Act.<sup>ii</sup> Crimes call for investigation and prosecution. We prosecuted a sheriff and his deputies for subjecting their prisoners to water torture in 1984 in Texas.<sup>iii</sup> When Japanese soldiers waterboarded U.S. servicemen during World War II, our military commissions convicted them of war crimes.<sup>iv</sup> We even prosecuted our own for water torture in 1901 after the Spanish-American War,<sup>v</sup> and again in the Vietnam War, after a photo (below) was published on the front page of Washington Post of one of our soldiers waterboarding a Vietnamese detainee.<sup>vi</sup> It took us only 38 days between the time that photo<sup>vii</sup> was published during the Vietnam War and the day that soldier was court-martialed.<sup>viii</sup> Today, [October, 17, 2007], thirteen days have already passed since reports were released of our Justice Department's secret authorization of waterboarding; years have gone by since initial reports of the CIA's use of it.<sup>ix</sup>

- Will you commit to investigating and prosecuting those who have used, ordered, and authorized the use of waterboarding if you are confirmed as Attorney General? Will you do this, for the safety of our servicemen, for the safety of our country, for our humanity?

Anyone unable to make this pledge is not suited to be the highest law enforcement officer in the land.



“Soldiers in Vietnam use the waterboarding technique on an uncooperative enemy suspect near Da Nang in 1968 to try to obtain information from him.” (United Press International)<sup>x</sup>

## Endnotes

<sup>i</sup> Physicians for Human Rights, Human Rights First, "Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality," Aug. 2007, <http://physiciansforhumanrights.org/library/documents/reports/leave-no-marks.pdf>, p. 17-19.

<sup>ii</sup> *Id.*; 152 Cong. Rec. S10,235- S10,236 (daily ed. Sept. 28, 2006) (Statement by Sen. Durbin) ("For example, the bill [on Military Commissions] would make it a crime to use abusive interrogation techniques like waterboarding, induced hypothermia, painful stress positions, and prolonged sleep deprivation."); 152 Cong. Rec. S10,413 (daily ed. Sept. 28, 2006) (Statement by Sen. McCain) ("Still, I am confident that the categories included in this section [of the Military Commissions bill] will criminalize certain interrogation techniques, like waterboarding and other techniques that cause serious pain or suffering that need not be prolonged--I emphasize 'that need not be prolonged.'"); 152 Cong. Rec. S10,384 (daily ed. Sept. 28, 2006) (Statement by Levin) ("I am in complete agreement with Senator Warner that each of these practices [including (1) Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; (2) applying beatings, electric shock, burns, or other forms of physical pain; (3) 'waterboarding'; (4) using military working dogs; (5) inducing hypothermia or heat injury; (6) conducting mock executions; and (7) depriving the detainee of necessary food, water, or medical care] is a grave breach of Common Article 3. I agree that these practices are unlawful today and that they will continue to be unlawful if this bill is enacted into law."); 152 Cong. Rec. S10,390 (daily ed. Sept. 28, 2006) (Statement by Sen. Warner) ("The types of conduct described in [Kennedy's] amendment [to the Military Commissions bill, which lists 'waterboarding,' among others], in my opinion, are in the category of grave breaches of Common Article 3 of the Geneva Conventions.").

<sup>iii</sup> *U.S. v. Lee*, 744 F.2d 1124, 1125 (5th Cir. 1984).

<sup>iv</sup> See Wallach, Evan, "Drop by Drop: Forgetting the History of Water Torture in U.S. Courts," *Columbia Journal of Transnational Law*, 2007 (citing Charge, Record of Trial, *United States v. Sawada*, 5 L. Rep. Trials of War Criminals 1 (1948), Judge Advocate General's Office File No. 119-19-5 (1946), at 1, available at National Archives; *United States v. Hideji Nakamura*, U.S. Military Commission, Yokohama, 1947, available at National Archives, NND 735027, Record Group 153: Office of the Judge Advocate General (Army), Entry 143: War Crimes Branch; Case Files, 1944-49, Box 1025, File No. 36-219-Vol. I).

<sup>v</sup> ABC News, "History of an Interrogation Technique: Water Boarding," Nov. 29, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1356870>; Human Rights Watch, "Attorney General Nominee Should Repudiate Torture Memos: Gonzales and administration officials should be investigated," Oct. 4, 2007, <http://hrw.org/english/docs/2007/10/04/usdom17021.htm>.

<sup>vi</sup> "Interrogation," *The Washington Post, Times Herald* (1959-1973), Jan 21, 1968, pA1, available at <http://hrw.org/pub/2006/washingtonpost012168.pdf>. See also "History of an Interrogation Technique: Water Boarding," ABC News, 29 Nov. 2005, available at: <http://abcnews.go.com/WNT/Investigation/story?id=1356870>; Pincus, Walter, "Waterboarding Historically Controversial," *Washington Post*, 5 Oct 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>.

<sup>vii</sup> <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>

<sup>viii</sup> Lewy, Guenter. *America in Vietnam*. New York: Oxford University Press, 1980, p.329, [http://books.google.com/books?id=xq2dMUWPKxoC&pg=PA329&lpg=PA329&dq=vietnam+water+court+martial+torture&source=web&ots=IHPEvIGoaC&sig=qmMV9\\_Tbf2c3Duq7kO4f0LR6ETA](http://books.google.com/books?id=xq2dMUWPKxoC&pg=PA329&lpg=PA329&dq=vietnam+water+court+martial+torture&source=web&ots=IHPEvIGoaC&sig=qmMV9_Tbf2c3Duq7kO4f0LR6ETA).

<sup>ix</sup> ABC News, "CIA's Harsh Interrogation Techniques Described," Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866>; Newsweek, "A Tortured Debate," June 21, 2004, <http://www.msnbc.msn.com/id/5197853/site/newsweek/>; *New York Times*, "Secret U.S. Endorsement of Severe Interrogations," Oct. 4, 2007,

<http://query.nytimes.com/gst/fullpage.html?res=990CE3DD1130F937A35753C1A9619C8B63>; ABC News, "History of an Interrogation Technique: Water Boarding," Nov. 29, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1356870>.

<sup>x</sup> Pincus, Walter, "Waterboarding Historically Controversial," *Washington Post*, 5 Oct 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>. "Interrogation," *The Washington Post, Times Herald* (1959-1973), Jan 21, 1968, pA1, available at <http://hrw.org/pub/2006/washingtonpost012168.pdf>.