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Mukasey Unsure About Legality of Waterboarding

By [SCOTT SHANE](#)

WASHINGTON, Oct. 30 — In an effort to quell growing doubts in the Senate about his nomination as attorney general, [Michael B. Mukasey](#) on Tuesday declared that waterboarding and other harsh interrogation techniques “seem over the line or, on a personal basis, repugnant to me” and promised to review the legality of all such techniques if confirmed.

But Mr. Mukasey told Senate Democrats he could not offer an opinion on whether waterboarding, which simulates drowning, is illegal torture because he has not been briefed on the details of the classified technique and does not want to suggest that [Central Intelligence Agency](#) officers who have used such techniques may be in “personal legal jeopardy.”

It was unclear whether the answers would be enough to win endorsement from the committee, where the torture issue has threatened to block the confirmation of Mr. Mukasey, who served for 18 years as a federal judge in New York.

Mr. Mukasey gave his answer in a four-page letter delivered Tuesday afternoon to Senator [Patrick J. Leahy](#), chairman of the Senate Judiciary Committee, and the other nine Democrats on the committee.

Mr. Mukasey noted that Congress had not explicitly banned the use of waterboarding by the Central Intelligence Agency, though the method was outlawed for use by the military in the Detainee Treatment Act of 2005. That left room for interpretation as to whether waterboarding or any other technique is prohibited as “cruel, inhuman, or degrading” treatment, he wrote.

“As a judge,” he wrote, he would “put aside even strongly held personal beliefs,” because “legal questions must be answered based solely on the actual facts, circumstances, and legal standards presented.” In the absence of knowing exactly how specific classified interrogation techniques have been used, he said, he did not want to offer legal opinions on “hypotheticals.”

All 10 Democrats on the Senate Judiciary Committee wrote to Mr. Mukasey last week asking that he clarify his position on waterboarding. “Your unwillingness to state that waterboarding is illegal may place Americans at risk of being subject to this abusive technique,” the senators wrote.

The initial response Tuesday night from committee Democrats suggested that Mr. Mukasey had not assuaged their concerns on the torture issue.

“I remain very concerned that Judge Mukasey finds himself unable to state unequivocally that waterboarding is illegal and below the standards and values of the United States,” Mr. Leahy, of Vermont, said in a statement. He said he would consider Mr. Mukasey’s written answers to other questions and consult other

committee members before scheduling a vote on the nomination.

Another Democrat, Senator Dick Durbin of Illinois, said Mr. Mukasey had “spent four pages responding and still didn’t provide an answer” to the question, “Is waterboarding illegal?”

“Judge Mukasey makes the point that in the law, precision matters. So do honesty and openness. And on those counts, he falls far short,” Mr. Durbin said.

Senator [Arlen Specter](#) of Pennsylvania, the committee’s top Republican, did not comment in response to the letter, said an aide, Blair Latoff. Another Republican on the committee, Senator [Lindsey Graham](#) of South Carolina, praised Mr. Mukasey’s response.

“I think Judge Mukasey did himself some good with this letter,” Mr. Graham said. “He helped his cause with me.”

But Mr. Graham, a former military lawyer who said he believes that waterboarding is unquestionably torture, said he had “a couple of areas that I want to flesh out” before committing to vote in favor of confirmation.

The committee is scheduled to meet Thursday, but a vote at that time looked unlikely Tuesday night. An aide to Senator Leahy said the committee was still waiting for what are expected to be Mr. Mukasey’s voluminous written replies on subjects ranging from civil rights to antitrust law and would not set a vote until his answers are received and considered.

Mr. Mukasey, named by President Bush Sept 17. as his choice to replace the much-criticized [Alberto R. Gonzales](#) as attorney general, was initially expected to be confirmed easily. His name had been suggested by a Democrat, Senator [Charles Schumer](#) of New York.

But his equivocation at his Senate confirmation hearing on the question of whether waterboarding was torture, and his assertion that the president’s constitutional powers can sometimes trump a particular law, drew sharp criticism from Democrats and human rights groups.

Waterboarding involves strapping a prisoner to a board tipped to lower his head, covering his face with cloth and pouring water over the cloth to produce a feeling of suffocation. In a variation, the prisoner’s face is covered with cellophane with a hole at the mouth to allow water to flow in.

Variations of the technique, designed to stimulate the prisoner’s gag reflex and give him a feeling of imminent drowning, have been used for centuries.

The C.I.A. used waterboarding against some high-level [Al Qaeda](#) operatives at secret overseas sites, and it emerged as a symbol of the Bush administration’s embrace of harsh physical pressure in interrogation.

Gen. [Michael V. Hayden](#), the C.I.A. director, has said in recent speeches that of about 100 Al Qaeda suspects held since 2002 at the agency’s secret jails, fewer than one-third had been subjected to harsh interrogation techniques.

In still-secret legal opinions in 2005, the Justice Department ruled that even the toughest C.I.A. techniques,

including waterboarding, were legal. One opinion, according to current and former officials, said that at least in some circumstances, the techniques did not amount to “cruel, inhuman or degrading” treatment, which is banned by treaty and American law.

Pressed about waterboarding by Senator Sheldon Whitehouse, Democrat of Rhode Island, on the second day of his confirmation hearing, Mr. Mukasey replied: “I don’t know what is involved in the technique.”

That reply did not satisfy some senators, who noted that the technique has been widely described in the press. Four Democratic senators who are running for president, [Hillary Clinton](#), [Barack Obama](#), [Joseph Biden](#) and [Christopher Dodd](#), said this week that they would not support Mr. Mukasey based on his initial testimony on waterboarding.

Waterboarding has also been a flashpoint among Republican presidential candidates. Last week, after [Rudolph W. Giuliani](#), the former New York mayor, said he wasn’t sure about waterboarding because he thought “the liberal media” might not have described it properly, Senator [John McCain](#) of Arizona, who was tortured himself as a prisoner in North Vietnam, shot back.

“All I can say is that it was used in the Spanish Inquisition, it was used in [Pol Pot](#)’s genocide in Cambodia, and there are reports that it is being used against Buddhist monks today,” Mr. McCain said.

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