



**VIA FACSIMILE and
FEDERAL EXPRESS**

January 7, 2008

The Honorable Michael Mukasey
Attorney General of the United States
U. S. Department of Justice
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Dear Mr. Attorney General:

On behalf of the American Civil Liberties Union, a non-partisan organization with over half a million members and 53 affiliates throughout the nation, we are writing in regard to your decision to launch a criminal investigation into the destruction of CIA interrogation tapes to be headed by Deputy U.S. Attorney John Durham of Connecticut. While we acknowledge the significance of your decision to both launch the investigation and accept the recusal of the U.S. Attorney for the Eastern District of Virginia, we urge you to go further. To truly do justice and help restore America's confidence in the impartiality of the Department of Justice, we urge you to appoint an outside independent prosecutor and to broaden the scope of the inquiry beyond the narrow issue of evidence destruction. It is time for a prosecutor to examine the complete picture of illegal activities by the government in its intelligence and homeland security operations since 9/11, which includes the use of illegal interrogation techniques such as "waterboarding" and others. Given its role in the development of illegal policies relating to torture and abuse, the Department of Justice is utterly conflicted and any decision it renders on prosecutions will necessarily be suspect. Moreover, any decision relating to the destruction of videotapes will necessarily beg the question of the underlying illegal activities.

I. Appointment of Outside Special Counsel

The rule on appointment of an independent prosecutor is clear. Justice Department regulations require the Attorney General to appoint an outside special counsel when a three-prong test is met. First, a "criminal investigation of a person or matter [must be] warranted." 28 C.F.R. 600.1. Second, the "investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department." *Id.* Third, "under the circumstances it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter." *Id.* If the regulation's three-prong test is met, then the Attorney General must select a special counsel from outside the government, *id.* at 600.3, who would have the authority to secure necessary resources for the investigation and prosecution and have full investigatory and prosecutorial powers, *id.* at 600.3-600.6.

a. Criminal Investigation is Warranted

While possible obstruction of justice by government officials would be serious crimes that corrupt core values of our democracy, the content of the videotapes may reflect even graver crimes. A Special Counsel's investigation should include not only the destruction of the tapes but also whether or not the interrogations themselves constituted criminal acts such as torture.

Based on prior government investigations, documents obtained by the ACLU through our Freedom of Information Act litigation, and numerous media reports, there is credible evidence that acts authorized, ordered, and committed by government officials constitute violations of federal criminal statutes. The range of alleged crimes is breathtaking in its scope. The potential crimes range from the authorization of the use of torture and abuse by top officials in the White House, Justice Department, CIA, and Defense Department to an array of documented torture and abuse techniques carried out by U.S. personnel or government contractors in prisons and torture cells located throughout the world. Waterboarding and other forms of torture and abuse violate existing federal criminal laws, including the War Crimes Act, 18 U.S.C. 2441, the Anti-Torture Act, 18 U.S.C. 2340-2340A, and general criminal laws such as federal statutes that criminalize conduct such as assaults by or against U.S. nationals in overseas facilities used by the federal government. There also are numerous federal criminal laws against obstructing or interfering with government investigations or court proceedings. Not only is it clear, as you have already determined, that the destruction of evidence warrants criminal investigation, but it is also just as clear that the underlying activities also warrant the same treatment.

b. Conflict of Interest

i. Officials Attempted to Shield Others from Prosecution

From the very start of the torture program, the White House has played a central role in trying to shield government officials from criminal prosecution. Only an independent prosecutor can avoid all conflicts of interest in investigating and prosecuting any persons within the White House who committed any crimes. The very decision by President Bush to try to deny the protections of the Geneva Conventions to alleged Taliban and al-Qaeda detainees was made based on a memorandum that advised how to avoid applicability of the War Crimes Act. In a draft memorandum for the President dated January 25, 2002, then-White House counsel Alberto Gonzales advised against application of the Geneva Conventions to al-Qaeda and Taliban detainees. He stated that a "positive" reason for denying Geneva Convention protections to these detainees was that denial of the protections would "[s]ubstantially reduce[] the threat of domestic criminal prosecution under the War Crimes Act." Gonzales advised the President that his determination of the inapplicability of the Geneva Conventions "would provide a solid defense to any future prosecutions."

While questions may remain about individual knowledge and culpability, there is clear evidence of White House involvement in the formulation of policies that resulted in or encouraged the use of illegal torture practices. The Justice Department ought not be

involved in the investigation of criminal culpability of White House officials on these issues.

ii. Justice Officials Involved in Development of Interrogation Policies

In the absence of an appointed independent prosecutor, all prosecutorial authority for violations of federal criminal law remains concentrated in the Criminal Division of the Justice Department and the individual U.S. Attorney offices. While John Durham may have investigatory responsibilities, you have retained for yourself and the Deputy Attorney General ultimate prosecutorial authority. Accordingly, the conflicts of key Justice Department personnel cannot be overcome simply by shuffling the assignments of U.S. Attorneys.

The head of the Criminal Division is Assistant Attorney General Alice Fisher. While serving as a deputy in the Criminal Division from 2001 through 2005 overseeing terrorist suspect prosecutions, Fisher participated in meetings on interrogations. In May 10, 2004, emails, an FBI agent identified Fisher as attending meetings on interrogation techniques. The FBI agent who authored the emails subsequently told Senator Levin in an interview that he had detailed discussions of interrogation tactics, including tactics which he considered “completely inappropriate” with two of Fisher’s fellow deputies in the political leadership of the Criminal Division.

There are unanswered questions in determining Fisher’s precise relationship to the interrogations, but she had at least some involvement in receiving information and at least some contemporaneous knowledge of the approved interrogation tactics. She also was part of a small working group within the leadership of the Criminal Division, which included other members identified as having detailed knowledge of the interrogation tactics employed. At a minimum, Fisher should be questioned on her knowledge of interrogation tactics and who ordered any criminal acts. Her status as a material witness serves as an adequate basis for finding that a conflict of interest exists.

In addition, the past head of the Criminal Division, Michael Chertoff, had a significant role in the development of the torture program. During his confirmation hearing for the position of Secretary of Homeland Security, Chertoff testified that, while Assistant Attorney General for the Criminal Division, he counseled “intelligence officials” on applying the Anti-Torture Act and the August 1, 2002, Office of Legal Counsel torture memorandum. He testified that he provided advice on possible criminal liability under the Anti-Torture Act. In addition, a January 29, 2005, *New York Times* article details significant involvement by Chertoff and the Criminal Division in advising CIA officials on specific interrogation techniques. Citing one former and two current Administration officials, the *New York Times* reported that Chertoff was “directly involved in these discussions” as the CIA sought “to determine the legal limits of interrogation practices in case like that of Abu Zubaydah,” so that the CIA could use the tactics “without fear of prosecution.” If media reports are correct, it is impossible to see how the Justice Department does not have a conflict of interest in this matter.

iii. Justice Department Wrote Opinions Authorizing Torture

The Office of Legal Counsel of the Justice Department wrote several legal opinions interpreting the Anti-Torture Act, stating the legality of specific interrogation tactics, and interpreting recent statutory protections against torture and abuse essentially as not changing its earlier conclusions. One opinion, the August 1, 2002 memorandum interpreting the Anti-Torture Act, was eventually withdrawn and replaced. However, the status and the content of the other memoranda have not been fully disclosed. Last October 4, The *New York Times* published an article disclosing that the OLC authored two memoranda in 2005 relating to the interrogation of prisoners held by the CIA. One reportedly authorized use of combinations of psychological “enhanced” interrogation practices and the other declared that none of the CIA’s methods violated a law being considered by Congress that outlawed “cruel, inhuman and degrading” treatment. The same Justice Department that produced opinions designed to insulate government officials against criminal prosecutions cannot credibly investigate and prosecute any crimes that may have been authorized in OLC opinions.

iv. Justice Department Failed to Bring Indictments on Possible Torture Crimes

The Justice Department has prosecuted only one civilian for torture or abuse. The Department wrote to Senator Dick Durbin that it received twenty other referrals from the Defense Department and the CIA Inspector General. The *New York Times* reported on October 23, 2005, that at least two of these referrals involved deaths related to the interrogations. Nearly three and one-half years after those referrals, only one civilian has been indicted for any torture or abuse crime. Only an independent prosecutor can be trusted to fully and fairly investigate and prosecute other cases.

v. Refusal to Declare Illegality of Waterboarding Gives the Appearance of Bias

The Justice Department cannot fully and fairly investigate and prosecute any matter related to the torture and abuse of detainees, as long as its head remains unwilling to state what acts constitute torture or abuse. Any investigation or eventual prosecution will be affected by whether the Justice Department believes that the destroyed videotapes depicted legal conduct or criminal conduct. Destruction of videotapes depicting criminal conduct is a far more serious matter than destruction of videotapes depicting legal conduct. Your failure to take one of several opportunities to affirm the illegality of torture gives the appearance of an unwillingness to implicate those who may have authorized or ordered torture. An array of reports, including media interviews by a former member of a CIA interrogation team, state that waterboarding was used on detainees. Your refusal to characterize the legality or illegality of the underlying conduct demands appointment of an independent prosecutor.

c. Public Interest Demands Appointment of Outside Special Counsel

More than three and one-half years after the horrors of Abu Ghraib were exposed, America is hardly any closer to holding the torture perpetrators accountable than on the day the photos were first shown. Despite several congressional oversight hearings,

requests from members of Congress, numerous governmental inquiries, including the 9/11 Commission, and litigation under the Freedom of Information Act, the public still does not have the complete picture on the causes and scope of the abuse.

No one with the authority to prosecute civilians for violations of federal criminal laws prohibiting the torture or abuse of prisoners has investigated, or been willing to prosecute if warranted, the full scope of potential criminal acts by civilians. The military has begun the process of investigating and prosecuting service members, but the military cannot prosecute civilians. The House and Senate Judiciary Committees have not fully used their subpoena powers. Leaders of the House and Senate Intelligence Committees can do no more than secretly document their disagreement with the use of torture. Internal agency investigations do not cross into other departments or agencies, and none of the investigators have prosecutorial powers.

There is an obvious public interest in investigating and prosecuting not only those who destroyed the videotapes of CIA interrogations, but also all persons who committed torture or abuse or conspired to commit those crimes against detainees held or questioned by the United States. Responsibility and potential criminal liability for the wrongdoing extends higher up the military chain of command and to civilians. A small number of enlisted men and women and a few military officers should not be the only persons prosecuted for crimes, if civilians also engaged in criminal wrongdoing.

Given the increasing evidence of deliberate and widespread use of torture and abuse, and that such conduct was the predictable result of policy changes made at the highest levels of government, an independent prosecutor is clearly in the public interest. The American public deserves to have these outstanding matters addressed, and have the assurance that torture will stop and never happen again. An independent prosecutor is the only sure way to achieve these goals.

For these reasons, we urge you in the strongest terms to restore faith that the Department of Justice will act impartially in accordance with the rule of law by appointing an independent Special Counsel who will expand the scope of the current investigation beyond the destruction of the tapes to include the underlying torture and abuse depicted on them. We look forward to your favorable action on our recommendations.

Sincerely,

A handwritten signature in black ink, appearing to be 'Anthony D. Romero', written over the word 'Sincerely,'.

Anthony D. Romero
Executive Director