ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

March 17, 2009

The Honorable Eric Holder
Department of Justice
Robert F. Kennedy Building
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Re: First Official Request of the New Administration for Appointment of an Independent Prosecutor for the Investigation and Prosecution of Any Violations of Federal Criminal Laws Related to the Interrogation of Detainees

Dear Attorney General Holder:

The American Civil Liberties Union respectfully but unequivocally calls upon you to appoint an independent prosecutor, designated as a "special counsel" under Department of Justice regulations, for the investigation and prosecution of violations of federal criminal laws related to the interrogation of detainees held by, or being questioned by, the United States. The fact that such crimes have been committed can no longer be doubted or debated, nor can the need for an independent prosecutor be ignored by a new Justice Department committed to restoring the rule of law. More than six years after the first reported use of torture or abuse in interrogation and detention and nearly five years after the exposure of torture at Abu Ghraib, it is time for full and fair enforcement of federal criminal laws prohibiting the use of torture and abuse. The ACLU made similar requests for an independent prosecutor to your two immediate predecessors beginning more than four years ago, but this is our first official and public request for the appointment of an independent prosecutor of your Justice Department, and we eagerly await your official and public response in coming weeks.

The disclosure on Sunday of substantial excerpts from the confidential report of the International Committee of the Red Cross on its interviews with detainees held at Guantánamo provides further and incontrovertible documentation of the use of torture and abuse by the United States against its detainees. In its report, the ICRC concluded:

> The allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA

program, either singly or in combination, constituted torture. In addition, many other elements of the ill-treatment, either singly or in combination, constituted cruel, inhuman or degrading treatment.

Of course, torture is a federal crime under the federal Anti-Torture Act and War Crimes Act, and also violates general federal criminal statutes barring assault and similar crimes.

The disclosure of portions of the ICRC report follows two other important recent developments. First, Susan Crawford, who is the convening authority for military commissions for the Department of Defense, stated to the *Washington Post* on January 14, 2009, that "[w]e tortured [Mohammed al-] Qahtani," and that "[h]is treatment met the legal definition of torture." With that determination, the top Defense Department official overseeing prosecutions at Guantánamo stated that she would not prosecute the detainee. Second, during your own confirmation hearing, you testified that waterboarding—which is one of the interrogation tactics described as used on multiple detainees in the ICRC report and was also acknowledged by the CIA as being used on multiple detainees—is torture, and also made a clear statement that "no one is above the law." It is impossible to see how there would not be credible evidence to warrant opening a criminal investigation into torture crimes.

I would like to address several specific concerns:

Credible Evidence of Torture Crimes: The excerpts from the ICRC report include reports of waterboarding, beatings, deprivation of adequate food and water, induced hypothermia, sensory deprivation, sleep deprivation, stress positions and prolonged shackling, confinement in a mock coffin, prolonged nudity, and forced shaving. Each of these practices would be criminal on its own, but when combined as discussed in the report, the cumulative effect is greater than the sum of the practices. The report of these incidents certainly warrants a criminal investigation.

Of course, the ICRC excerpts are only the latest additions to a long trail of evidence of possible torture crimes. The Justice Department's own Inspector General, in a report last May on the FBI's role in interrogations, reported that FBI agents present at the CIA interrogation of Abu Zubaydah in spring 2002 (interrogations that were also described by the ICRC in its report) characterized the CIA interrogations as "borderline torture" and similar to Survival, Evasion, Resistance, and Escape (SERE) tactics that formed the basis of the government's torture program.

Similarly, government documents obtained by the ACLU through our Freedom of Information Act litigation and earlier reports of the ICRC 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.

But unpunished crimes go even further, to include possible homicides. An October 23, 2005 *New York Times* article documents the role of CIA agents or CIA contractors in three deaths of detainees being interrogated in Afghanistan and Iraq. Although U.S. soldiers were charged in two of those deaths, the civilians working alongside the soldiers have not been charged. There are numerous other deaths that have not resulted in charges. In fact, autopsy records obtained by the ACLU through FOIA requests document CIA involvement in torture- or abuse-related deaths of detainees.

The Justice Department, under your three immediate predecessors as attorneys general, was unable or unwilling to prosecute any civilian, other than a single contractor charged in June 2004, for any crime related to interrogation. It is time for a thorough criminal investigation.

There Is Broad Authority to Investigate and Prosecute Torture Crimes, Including Any Crimes in Ordering or Authorizing Torture: Based on prior government investigations, documents obtained by the ACLU through our FOIA litigation, and numerous media reports, there is credible evidence that acts authorized, ordered, and committed by government officials constitute violations of federal criminal statutes.[1] Although the political debate about whether acts such as waterboarding are torture has caused confusion in some press accounts, waterboarding and other forms of torture and abuse clearly 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 federal statutes that criminalize conduct such

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[1] Federal criminal law broadly defines who can be held liable for a crime as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 2. Also, the federal Anti-Torture Act specifically criminalizes conspiracy to violate the Anti-Torture Act. 18 USC § 2340A(c).

as assaults by or against U.S. nationals in overseas facilities used by the federal government.[2] There also are numerous federal criminal laws against obstructing or interfering with government investigations or court proceedings.

Any Criminal Investigation of Torture Crimes Must Include a Top-to-Bottom Review: At this point, there is too much evidence of high-level orders and authorization for the use of torture and abuse to justify criminal investigations focused solely on persons in the field. A full and fair criminal investigation must examine decisions made and carried out at the very highest levels of government.

From the very start of the torture program, the Bush White House—including the then-President and then-Vice President—had a central role in trying to shield government officials from criminal prosecution. In fact, the very decision by then-President Bush to order the government 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 January 25, 2002 draft memorandum for Bush, 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." The memorandum to Bush went on to highlight that some of the War Crimes Act provisions apply "regardless of whether the individual being detained qualifies as a POW."

The last item on the January 25, 2002 memorandum's list of "positive" reasons for finding the Geneva Conventions protections inapplicable went even further in stating the intent to avoid War Crimes Act prosecutions. Gonzales advised Bush that "it is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441 [the War Crimes Act]. Your determination [of inapplicability of the Geneva Conventions] would create a reasonable basis in law that Section 2441 does not apply, which would provide a solid defense to any

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[2] Section 804 of the PATRIOT Act greatly expanded federal jurisdiction to prosecute crimes by or against U.S. nationals committed overseas. Federal criminal jurisdiction, as of October 26, 2001, includes "offenses committed by or against a national of the United States [on or in] . . . the premises of United States diplomatic, consular, military, or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership . . . ." 18 U.S.C. § 7(9). This section was the basis for federal jurisdiction in the only indictment or conviction of a civilian, David Passaro, for the torture or abuse of a detainee. Passaro was convicted of federal assault charges.

future prosecution." In other words, Gonzales urged the then-President to find the Geneva Conventions protections inapplicable to these detainees as a way to block criminal prosecutions under the War Crimes Act. Bush subsequently ordered the Geneva Conventions inapplicable to the al Qaeda and Taliban detainees. In 2006, the Supreme Court held that Common Article 3 of the Geneva Conventions did protect these detainees.

After attempting to render the War Crimes Act inapplicable to the detainees, the Bush White House coordinated an attempt to make the federal Anti-Torture Act similarly inapplicable. As White House counsel, Gonzales asked the Office of Legal Counsel to issue at least two memoranda that attempted to redefine and restrict the prohibitions of the Anti-Torture Act, and then apply that narrow interpretation to a specific list of interrogation tactics. The result was the since-withdrawn August 1, 2002 OLC memorandum finding torture must cause pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," and a subsequent OLC memorandum that approved waterboarding and other practices.

Top Bush White House officials participated in the preparation of these memoranda. For example, a January 5, 2005 *Washington Post* article stated that one of the authors of the August 1, 2002 memorandum, then-Deputy Assistant Attorney General John Yoo, briefed then-White House counsel Gonzales several times on the August 1, 2002 memorandum during its drafting. The *Post* also reported that Yoo also briefed then-Attorney General John Ashcroft, then-Vice President Cheney's counsel David Addington, the then-general counsel for the Defense Department William Haynes, acting general counsel for the CIA John Rizzo, and Condoleeza Rice's then-advisor John Bellinger. In addition, the *Post* described a meeting that included detailed discussions of "methods that the CIA wanted to use, such as open-handed slapping, the threat of live burial and 'waterboarding' – a practice that involves strapping a detainee to a board, raising the feet above the head, and dripping water onto the head . . . [which] produce[s] an unbearable sensation of drowning."

Bush and Cheney repeatedly defended the CIA interrogation program. For example, Bush publicly defended the interrogation practices of the CIA; Cheney, during congressional consideration of both the McCain Amendment to the Detainee Treatment Act and the Military Commissions Act, personally lobbied for stronger criminal defenses for CIA personnel or exclusion of the CIA from the application of provisions against abusive interrogations, and the Administration ordered more recent OLC memoranda trying to limit the protections of the Military Commissions Act and the McCain Amendment.

Although there are no public records showing what the then-President and then-Vice President knew or ordered in interrogations, both of them have acknowledged involvement in setting interrogation policy. In fact, on April 11,

2008, Bush discussed with ABC News its report of high-level White House meetings that considered and approved abusive interrogation tactics for specific detainees, and Bush stated, "And yes, I'm aware our national security team met on this issue. And I approved." In addition, in a document obtained through the ACLU FOIA litigation, former Major General Michael Dunlavey, who asked the Pentagon to approve more aggressive interrogation methods for use at Guantánamo, claimed to have received "marching orders" from Bush. On May 12, 2004, the *Baltimore Sun* quoted then-Secretary of State Colin Powell, who reportedly had fought internally for the government to comply with the Geneva Conventions, describing his informing Bush directly on reports of abuse, long before at least some of those reports became public. Whether anyone in the Bush White House violated any criminal laws would be a question for an independent prosecutor.

There is Only a Little More than a Year Left in the Statute of Limitations Period for Certain Alleged Crimes of Torture: The federal statutes of limitation are a potential problem in investigating and prosecuting certain torture crimes. Although the general federal statute of limitation for most federal crimes is five years, there is no limitations period when death resulted from the crime, and there is an eight-year period for violations of the federal Anti-Torture Act. The ICRC report and the Justice Department Inspector General report on the FBI's role in interrogations both provide substantial details on the torture and abuse of Abu Zubaydah in the spring and summer of 2002, prior to the issuance of the August 1, 2002 OLC opinions. The eight-year statute of limitation period for Anti-Torture Act charges related to crimes allegedly committed in spring 2002 will expire in spring 2010. As a result, a prosecutor has only a little more than a year from today to bring charges for some important and well-documented alleged torture or abuse incidents.

Even with a Change in Administration, an Outside Special Counsel to Direct an Investigation is Warranted: 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 Attorneys' 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.* § 600.3, who would have the authority to secure necessary resources for the investigation and prosecution and have full investigatory and prosecutorial powers, *id.* §§ 600.3-600.6.

Although the "conflict" that would trigger appointment of an outside special counsel is not as clear after the change in Administration, a conflict remains for three reasons. First, although political appointees at the Justice Department had the most visible roles in the development and implementation of the torture and detention policies, career Justice Department attorneys and FBI personnel also had roles, including numerous career personnel in the FBI, the Criminal Division, U.S. Attorney's offices, and other career personnel specifically identified in reports, such as the Justice Department Inspector General's May 2008 report on the FBI's role in interrogations. Second, the Justice Department has a role now—and may eventually have an even greater role—in the prosecution of detainees, some of whom have claimed that they were subject to torture or abuse. There certainly could be conflicts in having the Justice Department prosecute terrorism suspects who claim that evidence was obtained through torture or abuse, while also being charged with prosecuting persons who ordered or carried out that torture or abuse. The interest in obtaining convictions of detainees alleging that they were tortured, including an interest in preserving the admissibility of evidence, could compromise the ability to prosecute persons involved in the alleged torture. Third, the Justice Department has a significant institutional interest in maintaining strong deference to OLC opinions generally, which could affect how it weighs a potential defendant's reliance on OLC opinions in making prosecutorial decisions. All of these conflicts or potential conflicts weigh in favor of appointing an outside special counsel to lead a criminal investigation and any resulting prosecutions.

There is a Clear Public Interest in the Appointment of an Independent Prosecutor for any Torture or Abuse Crimes: There is an obvious public interest in investigating and prosecuting all persons committing torture or abuse or conspiring to commit those crimes against detainees being held or questioned by the United States. Responsibility 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, appointment of an independent prosecutor is clearly in the public interest. The country deserves to have these outstanding matters addressed, and have the assurance that torture will stop and never happen again. Appointment of an independent prosecutor is the only sure way to achieve these goals.

OLC Opinions Could Be Part of a Defense to Certain Criminal Charges, But Do Not Provide Immunity: There has been a tremendous misunderstanding in the press, in Congress, and among some members of the Executive Branch on whether the OLC opinions provide immunity against prosecutions for torture or

abuse. They do not. At most, the statutory defense included in the Detainee Treatment Act and Military Commissions Act could result in the OLC opinions being part of a defense to certain criminal charges. But the OLC opinions are not a so-called "golden shield," do not provide immunity, will likely not be an effective defense for many potential defendants, and should not bar any criminal investigation.

The statute on reliance on the advice of counsel is clear and limited. The relevant provision of the federal code on reliance on legal counsel by government employees committing crimes related to the interrogation or detention of aliens suspected of terrorism states that "*good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.*" Under this statute, evidence related to OLC and other legal opinions would go to the reasonableness of whether a defendant thought his or her actions were unlawful, but the existence of, or even the reliance upon, legal opinions would not be an absolute defense or necessarily dispositive.

The application of the "advice of counsel" statutory defense depends on the facts of any possible charge against a particular defendant. While the OLC opinions and the statutory defense may be an effective defense for some potential defendants, the OLC opinions and the statutory defense will be less effective, or completely ineffective, for other potential defendants. In particular, persons who might not be covered by the "advice of counsel" defense include: persons who engaged in torture or abuse prior to the issuance of the OLC opinions; persons who did not rely on the OLC opinions; persons who knew the OLC opinions did not accurately reflect the law; persons who are lawyers or were trained as interrogators on applicable law; persons who acted outside the scope of the OLC opinions; or any persons who ordered the OLC opinions drafted specifically for the purpose of providing a defense. The determination of the likely effect of the statutory defense would depend on the facts of a particular instance of alleged torture and abuse. There is no immunity, and certainly nothing that should cut off a criminal investigation before it even starts.

Ongoing Investigations on the Commission of Torture and Abuse are Simply Anemic and Do Not Address the Full Extent of the Torture and Abuse That Were Committed by Government Officials: Two ongoing government investigations —one conducted by the Department's Office of Professional Responsibility on whether OLC lawyers were in breach of their ethical responsibilities as lawyers in authoring the OLC memos, and another inquiry, led by Justice Department attorney John Durham, investigating whether the destruction of the CIA tapes constituted a violation of law – do not address the heart of the matter as to the commission and explicit policy decision to torture and abuse individuals in U.S. custody in clear violation of our domestic and international legal obligations. It is simply preposterous that the CIA tape

destruction investigation is solely looking at whether the destruction of the tapes was a crime – rather than whether the subject matter captured on those tapes was proof of crimes committed, which then led to the tapes' destruction and cover up. Former Attorney General Michael Mukasey told the House Judiciary Committee last year that he specifically limited the investigation to any crimes related to the destruction of the tapes, but barred any investigation of crimes related to their content.

It is as if the police investigating the mafia for murder were determining whether digging a ditch on public land was a crime, while overlooking the corpse that had been deposited in that ditch.

To date, over 600 individuals have been accused with having abused prisoners, yet only about 10 of them have received prison terms of more than one year. Even more troubling, the highest-ranking officer prosecuted for the abuse of prisoners was a Lieutenant Colonel, Steven Jordan, was court-martialed in 2006 for his role in the Abu Ghraib scandal, but acquitted in 2007. Only one government contractor has been charged for any crime related to interrogation, and that indictment was in June 2004.

Most on point to Sunday's revelations of torture and abuse as documented in the ICRC report, no government official has been charged in relation to the CIA's torture program. The vast majority of the prosecutions that have occurred were in response to the atrocities at Abu Ghraib, but with respect to the torture of prisoners in CIA custody – torture that was plainly the result of decisions made by the Bush administration's most senior officials – no one at all has been held to account. Ongoing investigations and previous inquiries conducted by the government have obfuscated the real search for truth, and despite government officials' best efforts, this issue has not gone away. Nor will it ever, General Holder, until a full criminal investigation is conducted.

Finally, General Holder, let me respectfully submit for your considered reflection that the decision of whether or not to investigate crimes and violations of the law – with increasingly incontrovertible evidence – is not a discretionary matter to be determined by political agendas or the White House's desire to avoid seemingly partisan squabbles. As the country's top-ranking law enforcement official, you took an oath of office to uphold the Constitution and defend the rule of law. You alone are charged with making the determination of whether and how to investigate crimes that have occurred. As you know better than I, our finest Attorneys General made independent decisions that were not approved or even appreciated by the White House.

We have every confidence that you will make the right decision in appointing an independent prosecutor to investigate crimes that increasingly no one in America – or the world for that matter – believes did not occur. And we

look forward to providing any information or assistance to an independent prosecutor that may prove fruitful in restoring the rule of law and rendering justice for crimes that have occurred.

Thank you for your attention to this matter, and please do not hesitate to call me if you have any questions regarding this matter.

Sincerely,

Anthony D. Romero

AMERICAN CIVIL
LIBERTIES UNION

Cc: Aaron Lewis