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December 22, 2014

The Honorable Eric Holder
Attorney General
Department of Justice
Robert F. Kennedy Building
Tenth Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Re: Request for Appointment of a Special Prosecutor for Torture

Dear Attorney General Holder:

We write to urge you to conduct a full investigation of violations of federal criminal laws relating to the rendition, detention, and interrogation (“RDI”) of prisoners held or questioned by the Central Intelligence Agency (CIA) since the September 11, 2001 attacks. While the Department of Justice has conducted an investigation into some aspects of this matter already, the recently released summary of the Senate Select Committee on Intelligence (“SSCI”) Study of the CIA’s Detention and Interrogation Program (“Senate torture report”) includes significant new information relating to the commission of serious federal crimes, including torture, homicide, conspiracy, and sexual assault. In light of the disclosure of this information, we ask that you ensure the investigation’s independence, and the appearance of independence, by appointing a special prosecutor; provide the prosecutor with files from the investigation completed by John Durham and his investigators, as well as the full 6,700-page version of the Senate torture report; and ask the prosecutor to conduct a comprehensive criminal investigation of the conduct described in the report, including all acts authorizing or ordering that conduct.

In 2009 we welcomed your decision to expand the scope of the investigation then being led by Mr. Durham into the CIA’s destruction of the “waterboarding videotapes” to include certain acts of torture and abuse described in a report by the CIA Inspector General. We do not know the precise scope of Mr. Durham’s mandate, though statements by the Justice Department indicate it was likely limited to offenses that exceeded the scope of legal guidance given by the

Office of Legal Counsel.¹ The request we make today is based on the assumption that Mr. Durham pursued a broad mandate with the same independence that United States attorneys ordinarily have in criminal matters within their jurisdiction.

Even with this assumption, however, we believe the appointment of a special prosecutor is now warranted. First, the Senate torture report reveals significant new information about the nature of the abuse inflicted on the CIA's prisoners; the number of prisoners who were subjected to that abuse; and the decisions that led to the infliction of that abuse. Even if Mr. Durham had access to all of the material to which the SSCI had access, as a White House spokesperson recently indicated, the SSCI has now synthesized a huge volume of information into a narrative that clarifies the extent and seriousness of criminal conduct. There is a qualitative difference between having access to more than six million pages of documents and conducting a criminal investigation based on a 6,700-page report that pieces together those documents into a narrative indicating a vast criminal conspiracy, under color of law, to commit torture and other serious crimes.

Second, even if Mr. Durham's mandate was broad, we have been unable to find any evidence that Mr. Durham or his investigators interviewed any prisoner who was subjected to the RDI program. Our organizations represent, or have interviewed, several persons who were subjected to torture or rendition through the RDI program, and none of them were interviewed during the earlier criminal investigation. During the review in November of the United States before the United Nations Committee against Torture in Geneva, the committee raised concerns, based on letters and accounts from torture victims or their attorneys, over whether Mr. Durham had interviewed any detainee. The United States stated it had interviewed 96 persons as part of the investigation, but it did not indicate whether any of the prisoners who were subjected to abuse and torture were among those interviewed. Given both the prevalence and granularity of the facts described in the Senate torture report, the absence or paucity of victim interviews, particularly when many of the victims remain in U.S. custody, undercuts the credibility of the decision not to indict anyone for torture-related crimes.

Third, Mr. Durham's determination that the "admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt" was made at a time when many of the relevant facts were classified. While we do not know why Mr. Durham reached the conclusion he did, it seems possible that he was influenced by the threat of "graymail"—the threat that defendants would disclose state secrets. With so much information about the CIA's program now in the public domain, presumably the calculation as to what would be admissible without disclosure of state secrets would be different now.

¹ One such statement indicates that the Durham investigation "examined primarily whether any unauthorized interrogation techniques were used by CIA interrogators," and excluded "anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees." Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees, Department of Justice, Office of Public Affairs, August 30, 2012, <http://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees>.

Fourth, insofar as Mr. Durham's investigation excluded potential crimes committed by those who operated within the guidance of the Office of Legal Counsel, and by those who sought to secure that guidance, a new investigation is warranted to address those crimes. The Senate torture report includes evidence that senior CIA officials did not rely on OLC guidance "in good faith," but rather they knew that the conduct amounted to illegal torture before they ever sought the guidance and went looking for legal cover. They sought a guarantee from the Justice Department's Criminal Division that these acts would not be prosecuted, and only when the Criminal Division declined did they seek a ruling by the OLC, which produced the now-repudiated "torture memos." As a result, the argument of good faith reliance on counsel appears inapplicable to some of the officials who were involved in conceptualizing, ordering, and executing these crimes. We believe that officials who provided legal advice meant to authorize torture should also not benefit from any presumption that they were fulfilling their responsibilities in good faith.

Finally, the necessity of investigating issues of criminal liability is made more urgent by the fact that many of the individuals who authorized the conduct documented in the Senate torture report are publicly defending the necessity, effectiveness, and legality of that conduct. Against this background, we believe the failure to conduct a comprehensive criminal investigation would contribute to the notion that torture remains a permissible policy option for future administrations; undermine the ability of the United States to advocate for human rights abroad; and compromise Americans' faith in the rule of law at home. As you know, the United States has an obligation under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to effectively, independently, and impartially investigate all cases of unlawful killing, torture or other ill-treatment, arbitrary detention or enforced disappearance; and to appropriately prosecute and sanction the perpetrators, including persons in positions of command.

We are sure that you shared our sadness and disgust in reading the summary of the Senate torture report. Even though our organizations have dedicated tens of thousands of staff hours to researching, litigating, and advocating on concerns related to torture and other ill-treatment in the RDI program, the depravity of the tactics and immensity of the enterprise still astound us. There is no need to repeat the details in this letter to you, but we believe it is fair to say that many of these crimes would be horrific even if committed by an individual acting alone; but when done as part of a deliberate, coordinated government program, the crimes are more shocking and far more corrosive to U.S. democracy.

With the Senate torture report now final and in the Justice Department's possession, we strongly urge you to appoint a career prosecutor as a special prosecutor to review it, along with the files from the Durham investigation, to ensure that there is a comprehensive criminal investigation into the conduct documented by the Senate torture report, as well as the authorization for that conduct. Moreover, we urge that, in appointing a special prosecutor, you ensure independence and the appearance of independence by following the precedent set by then-Deputy Attorney General James Comey, acting as attorney general, who appointed Patrick Fitzgerald to investigate the Plame matter. In that case, Mr. Comey invoked sections 509, 510 and 515 of Title 28 to provide Mr. Fitzgerald with the plenary authority of the attorney general to

conduct the investigation and make prosecutorial decisions. An appointment with the plenary powers of the attorney general transferred to the prosecutor would help ensure continuity and objectivity.

We thank you again for your attention to this matter. While we recognize that we are making this request during your last weeks in office, we respectfully submit that the need for the appointment of a special prosecutor is sufficiently urgent that it should not be delayed until the confirmation of a new Attorney General.

Please do not hesitate to contact us to discuss this request.

Sincerely,



Anthony D. Romero
Executive Director
American Civil Liberties Union



Kenneth Roth
Executive Director
Human Rights Watch