WITNESS AGAINST TORTURE
a campaign to shut down Guantánamo
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Ms. Portia Roberson
Director of the Office of Public Liaison
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

June 10, 2010

Dear Director Roberson,

We appreciate the discussions with your office over the last months, as well as your agreeing to meet with us on June 15. Under the Obama administration, the Justice Department has appeared more open to dialogue than previously, and we value this change.

In advance of the meeting, we would like to outline our concerns and the steps we urge the Department of Justice to take.

Who we are:

We represent some among the countless Americans sick at heart at U.S detention policies who are determined to see them change. We have worked at the grassroots level for the closure of the detention camp at Guantánamo, the release and resettlement of men detained in error, an end to U.S torture, and accountability for those who designed and carried out torture policies.

We have assiduously followed intricate policy and legal debates. We have learned the stories of men detained so as to plead their cases publicly. We have advocated for justice in the face of official hostility and public fear. And we have supported those in government who have sought to end extra-legal detention, immunity for state crimes, and the cruel and degrading treatment of others. Our guiding belief is that lawful and moral detention policies are essential both to U.S. security and to being a good and just society, worthy of its ideals.

Our Concerns:

Encouraged by his campaign, we shared the hope that the election of Barack Obama would mean restored respect for the rule of law and human rights. So also we envisioned a Justice Department no longer captive to the partisan agenda of the Executive. We were therefore heartened when, on day one of his administration, President Obama signed executive orders mandating the closure of the detention facility at Guantánamo in a year and banning the torture practices labeled "enhanced interrogation techniques." These measures, along with a rhetoric promising transparency and accountability, augured well for a decisive break with Bush-era policies.

Yet, in the last eighteen months, our hope for change has been almost entirely drained. The achievement of what should be modest goals, such as the closure of Guantánamo, now lies in grave doubt. The Obama administration and the Holder Justice Department have sustained many of the most objectionable of the Bush policies. The administration has consistently acted to accommodate the fear mongering and belligerence of the rightwing, rather than to fulfill its

mandate to restore fairness and justice. Our country now stands at a crossroads. Its current path risks entrenching policies inimical to the Constitution and American values. We are reaching out to you in hope that it is not too late to turn in the direction President Obama first promised.

Below we outline areas of our greatest concern, highlighting how the Obama administration and DoJ have worked against their stated intentions and proper charge.

Guantánamo The detention facility remains open long after the deadline for its closure. Men cleared for release continue to languish there, as do some who have had federal judges rule that there are no valid grounds for their detention. This is unacceptable. If Guantánamo was, on day one, a foreign policy liability and a stain on the rule of law, it remains so eighteen months later.

We appreciate the difficulties in closing the camp. The Republican leadership and right-wing media consistently distort key facts and stoke public fear, making rational discussion about the camp's fate difficult. Still, this is no excuse for the failure to close it. As habeas petitioners continue to win their hearings, as a fuller picture of the detention of innocent men emerges, and as evidence of the role of Guantánamo, Abu Ghraib, and other ills in radicalizing America's enemies mount, the rationale for closing the prison only grows stronger.

Moreover, the Obama administration and the Department themselves have had a hand in the current morass. We make note here of the Department's tragic decision to challenge Justice Ricardo Urbina's ruling in October 2008 that 17 Uighurs at Guantánamo be released immediately into the United States. Had the DoJ let that ruling stand, allowing the Uighurs to peacefully settle here, foreign governments may have been more willing to take in men from Guantánamo. Further, their resettlement would have pre-empted the baseless argument sweeping through Congress that bringing men from Guantánamo into the United States in all cases represents an intolerable security threat.

In addition, the administration continues to erect obstacles to forestall the repatriation even of men allied to governments who have done everything the United States has asked to guarantee that they pose no security risk. Documenting such delays with respect to his Kuwaiti client, Lt. Col. Barry Wingard recently concluded that "the US's ever-increasing demands have now entered the realm of the absurd."

We should add that the DoJ's invocation of qualified immunity, political question doctrines and state secrets privilege to block lawsuits concerning extraordinary rendition and torture (as in Arar v. Ashcroft, et. al.) has not only denied the plaintiffs a chance at restitution, but prevented an accounting of how some of those detained — far from "evildoers" — are themselves victims of American incompetence and cruelty.

Finally, the administration has never publicly refuted the Pentagon's grossly exaggerated tally of detainees "returning to the battlefield" upon release from Guantánamo. As Professor Mark Denbeaux has shown, the Pentagon's numbers are based in flawed methods, such as counting speech acts critical of US policy as evidence of "recidivism." Quoting these baseless numbers, pundits and politicians perpetuate the myth of a "revolving door" from Guantánamo to terrorism. In general, the Obama administration has let stand the big lie regarding Guantánamo: that it always housed, and continues to house, the "worst of the worst." With the entire prison population stigmatized this way, the principled resolution of the fate of the men imprisoned there remains remote.

Bagram and Habeas Corpus The problem with Guantánamo is not the physical existence of the prison, but the effort to contrive areas outside the boundaries of US and international law. To

maintain "legal black holes" elsewhere perpetuates the Guantánamo problem. The prison at Bagram Air Force Base in Afghanistan is one example. We have learned, by virtue of a FOIA request, the names of men detained at Bagram. However we do not know their nationalities, the circumstances of their capture, or what evidence, if any, warrants their detention (leaked Stone report indicates 400 of 600 should never have been detained and should be immediately released). Nor do Bagram prisoners have proper legal counsel. It may be that many of those prisoners, like those at Guantánamo, were detained on flimsy bases. But without more information about them, as well as a system for assessing the validity of their detention, we will never know. Further, Bagram has been the subject of allegations of gross physical abuse — including the fatal beating of captives — beyond what is alleged to have taken place at Guantánamo.

The recent ruling holding that men captured away from the Afghan battlefield but brought to Bagram have no habeas rights is distressing; we are appalled that the Department of Justice would even contest the lower court judgment. The new ruling substantially undoes the victory for the rule of law that the 2008 Boumediene decision represents, reviving Bush-era conceits of executive power. We understand that prisoners captured in war have not historically enjoyed habeas rights. But all such prisoners are entitled, according to the Geneva Conventions, to an expeditious and competent hearing to determine the validity of their detention. This is a right that the Bush administration systematically denied. The Combat Status Review Tribunals fell far below minimum standards of due process, and were rightly rejected by the Supreme Court in favor of habeas hearings. The sprit of Boumediene is the proposition that "war on terror" suspects should have a legitimate chance to argue the wrongfulness of their detention, and that this opportunity should exist for all suspects, regardless of where they are imprisoned. Given the frequent imprisonment of innocent men, nothing inspires confidence that one could dispense with the habeas process.

The Obama administration has taken the dangerous position that foreign nationals can be captured nearly anywhere in the world, brought into an active war zone, and denied the ability to plead their innocence. This position validates the reckless view that the United States is less safe if it takes prudent steps to ensure that it does not detain innocent men.

Indefinite Detention As outlined in President Obama's May 2009 address, the administration plans to detain some Guantánamo prisoners indefinitely, without charge or trial. This measure would apply to those against whom insufficient evidence exists for prosecution or from whom "evidence" was extracted through torture. The administration thus proposes a system of the pre-emptive incarceration based on the alleged probability of future crime, and not verifiable past conduct. This is as a frightful plan, which grants the US executive near-tyrannical powers. Such a scheme must be rejected out of hand given its blatant inconsistency with the constitutional requirement of due process.

Accountability Despite its promise of a new era of accountability and respect for the rule of law, the Obama administration has repeatedly acted to ensure immunity for nearly all those under the Bush administration who committed and authorized torture. In simplest terms, the administration has failed to enforce the law.

The President has declared that waterboarding is torture, and has suggested that other "enhanced interrogation" techniques are as well. We are bound by the Convention Against Torture to investigate and prosecute those who ordered or committed such acts. The DoJ,

however, has declined any comprehensive criminal inquiry, limiting its investigation to those who allegedly committed acts beyond what "enhanced interrogation" protocols authorized. In this decision, it has endorsed the Bush administration claim that the law is whatever the administration says it is.

Even if one accepts the limited culpability of those who acted in accordance with what they thought was lawful, one might expect meaningful sanction for those who distorted the law. We therefore applauded the judgment of the Office of Professional Responsibility that John Yoo and Jay Bybee not only adopted tenuous legal opinions but also engaged in lawyering that fell well outside established professional norms. Its findings were to trigger potentially severe professional sanctions. Yet DoJ's David Margolis, on spurious grounds, over-rode OPRs findings, issuing a tame reprimand of Yoo and Bybee that largely vindicates them. We thus find ourselves in the shameful circumstance in which torture was committed but no one is held accountable.

Some have suggested that to conduct a comprehensive inquiry into torture would be to politicize already sensitive issues. We disagree. The rule of law should be blind to politics. To decline mandatory prosecution is itself to politicize the law. President Obama has defended the grant of immunity as an effort to have the country "move forward" rather than "look back." But the best — and perhaps only — way to prevent future torture is to hold accountable those guilty of torture in the past.

Recommended Steps

The above reflections all speak to our core demands: that Guantánamo be closed immediately, with its inmates released or charged and tried in civilian courts; that there be no system of indefinite detention anywhere; that habeas rights be granted to all detainees held by the US; and that the Justice Department conduct a comprehensive investigation of alleged torture under the Bush administration. Short of these broad measures, we have articulated smaller steps the Justice Department, in combination with other offices, should take.

Grant family visits: The United States should immediately grant the families of all detainees the right to visit them. Family visits are commonly granted to prisoners of all kinds, and those at Guantánamo and Bagram should be no exception.

Human rights assessment: The history of abuses at US detentions facilities has been extensive. The United States should therefore consent to a comprehensive, public assessment by a credible human rights organization to verify that conditions at the prison are consistent with the Geneva Conventions. Such an inquiry should feature access to the detainees and look seriously at such controversial measures as extended solitary confinement and the force-feeding of those refusing food. We likewise propose such an assessment of Bagram prison.

Expand investigation and prosecution: The Justice Department should expand the investigative mandate of prosecutor John Durham to include former senior officials possibly complicit in authorizing torture policies.

Investigate obstruction of justice: Colonel Lawrence B. Wilkerson, Chief of Staff to U.S. Secretary of State Colin Powell, recently signed a declaration for a court case indicating firsthand

knowledge that in August 2002 Vice-President Cheney and other senior administration officials knew that many of those at Guantánamo were detained in error. However, according to Col. Wilkerson, the Bush administration did not want to 'look bad' and so suppressed knowledge of this fact. Wilkerson's statement should be the basis for a DoJ obstruction of justice inquiry focusing on the possible suppression of evidence of the innocence of captives at Guantánamo.

Investigate human experimentation: The Justice Department, especially in light of the newly released report by Physicians for Human Rights, should investigate the authorization and commission of potentially illegal human experimentation in the application and monitoring of "enhanced interrogations."

Address "recidivism" claims: DoJ and other relevant agencies should issue a credible report assessing the frequency of men released from Guantánamo who then engage in criminal activities against the United States. Such a report should be based in sound, transparent methods, not based on flawed or self-interest reports, reviewed by extra-governmental bodies, and include a detailed work-up of all known or suspected cases of former detainees' involvement in terrorism.

We thank you for your time and consideration, and look forward to a productive meeting.

Sincerely,

Witness Against Torture
Bill of Rights Defense Committee
Center for Constitutional Rights
Defending Dissent Foundation
No More Guantanámos
Torture Abolition and Survivors Support Coalition International
Voices for Creative Non-Violence