



November 11, 2010

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

Dear Attorney General Holder:

AMERICAN CIVIL
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TREASURER

The American Civil Liberties Union respectfully urges you to refer to Assistant U.S. Attorney John Durham the question of whether former president George W. Bush's conduct related to the interrogation of detainees by the United States violated the anti-torture statute. *See* 18 U.S.C. § 2340A.

In his recently published memoirs, President Bush discusses his authorization of the waterboarding of Khalid Sheik Mohammed and Abu Zubaydah. He states, for example, that he "approved the use of the [enhanced] interrogation techniques," including waterboarding, on Abu Zubaydah, and that he responded to a request to waterboard Khalid Sheik Mohammed by stating: "Damn right." George W. Bush, *Decision Points* 169-70 (2010).

The Department of Justice has made clear that waterboarding is torture and, as such, a crime under the federal anti-torture statute. 18 U.S.C. § 2340A(c). The United States has historically prosecuted waterboarding as a crime. In light of the admission by the former President, and the legally correct determination by the Department of Justice that waterboarding is a crime, you should ensure that Mr. Durham's current investigation into detainee interrogations encompasses the conduct and decisions of former President Bush.

The ACLU acknowledges the significance of this request, but it bears emphasis that the former President's acknowledgement that he authorized torture is absolutely without parallel in American history. The admission cannot be ignored. In our system, no one is above the law or beyond its reach, not even a former president. That founding principle of our democracy would mean little if it were ignored with respect to those in whom the public most invests its trust. It would also be profoundly unfair for Mr. Durham to focus his inquiry on low-level officials charged with implementing official policy but to ignore the role of those who authorized or ordered the use of torture.

Failure to fully investigate the role of the former President in the use of torture would also severely compromise our ability to advocate for human rights in other countries. The United States has been a champion of that cause for over half a century. Recently, while in Indonesia, President Obama urged that country to acknowledge the human rights abuses of the Suharto regime. He stated unequivocally that “[w]e can’t go forward without looking backwards.” Without suggesting that our own experience is equivalent, it is clear that the United States’s authority to push for such accountability in other countries, and the willingness of those countries to follow our advice, would quickly unravel if we failed even to investigate abuses authorized by our own officials.

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The ACLU understands the gravity of this matter and appreciates the difficulty of the Department of Justice’s task. A nation committed to the rule of law, however, cannot simply ignore evidence that its most senior leaders authorized torture.

Thank you for your attention to this matter. For your convenience, I am attaching the ACLU’s letter of March 17, 2009, in which we asked you to appoint an independent prosecutor to investigate crimes relating to the abuse of detainees.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Romero". The signature is written in a cursive style with a horizontal line underneath the name.

Anthony D. Romero

Encl.