Congress of the United States
Washington, DC 20515

May 12, 2005

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

We are writing to request that you appoint a special counsel to investigate whether high-ranking officials within the Bush Administration violated the War Crimes Act, 18 U.S.C. 2441, or the Anti-Torture Act, 18 U.S.C. 2340 by allowing the use of torture techniques banned by domestic and international law at recognized and secret detention sites in Iraq, Afghanistan Guantanamo Bay and elsewhere.

One year and 10 investigations after we first learned about the atrocities committed at Abu Ghraib, there has yet to be a comprehensive, neutral and objective investigation with prosecutorial authority of who is ultimately responsible for the abuses there and elsewhere. While more than 130 low-ranking officers and enlisted soldiers have been disciplined or face courts-martial for the abuses that occurred, there have been no criminal charges against high-ranking officials. Yet the pattern of abuse across several countries did not result from the acts of individual soldiers who broke the rules. It resulted from decisions made by senior U.S. officials to bend, ignore, or cast rules aside. If the United States is to wipe away the stain of Abu Ghraib, it needs to investigate those at the top who ordered or condoned torture. As a result, it is in our interest to finally show the world that we are taking these matters seriously and resolving them free of political taint.

Some of us previously asked Attorney General Ashcroft to appoint a special counsel to investigate these abuses on May 20, 2004. Unfortunately, we received no answer to our request. The need for a special counsel is now more important than ever as the Administration and military have repeatedly exonerated high-ranking officials, or declined to even investigate their actions, even as other official investigations linked the policy decisions by these officials to the crimes that occurred at Abu Ghraib. The Administration's haphazard and disjointed approach to these investigations appears to have insulated those in command and prevented a full account of the actions and abuses from being determined.

As you know, under Department of Justice regulations, the Attorney General must appoint a special counsel when (1) a "criminal investigation of a person or matter is warranted," (2) the investigation "by a United States Attorney Office or litigating Division of the Department of Justice would present a conflict of interest for the Department," and (3) "it would be in the

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public interest to appoint an outside Special Counsel to assume responsibility for the matter."[1] In the present case, all three requirements have been met.

First, federal criminal laws are clearly implicated. The Anti-Torture Act criminalizes acts of torture — including attempts to commit torture and conspiracy to commit an act of torture — occurring outside the United States' territorial jurisdiction regardless of the citizenship of the perpetrator or victim.[2] The Geneva Conventions generally prohibit "violence to life and persons," "outrages upon personal dignity," and "humiliating and degrading treatment."[3] Violations of the Geneva Conventions also constitute a violation of U.S. federal criminal law under the War Crimes Act.[4] The Administration has acknowledged on several occasions that the United States is bound by the Geneva Conventions with respect to Iraqi[5] and Taliban prisoners,[6] and that a violation of the Conventions would invite prosecution under the War Crimes Act.[7] Numerous investigations have uncovered such violations. The Taguba report found instances of "sadistic, blatant and wanton criminal abuses" of prisoners.[8] The Army's Inspector General's report found 94 incidents of detainee abuse at detention sites in Afghanistan and Iraq.[9] And, the Schlesinger report confirmed five instances in which detainees died as a result of abuse by U.S. personnel during interrogations.[10] The repudiation of the August 2002 memorandum you wrote as White House Counsel in December of 2004 suggests even the Administration realizes its policies contributed to actions which violated federal criminal law.[11]

Therefore, given the Administration's concession that the Geneva Conventions apply to Iraqi and Taliban prisoners, given its concession in the Gonzalez memo that a violation of the

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[1] 28 C.F.R. 600.1. 2002.
[2] 18 U.S.C. § 2340 A (a).
[3] Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention III), Article 3.
[4] The War Crimes Act provides that "[w]hoever...commits a war crime...shall be fined under this title or imprisoned for life for any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death." 18 U.S.C. 2441(a). A "war crime" is defined as, among other things, a "grave breach" of the Geneva Conventions. 18 U.S.C. 2441(c).
[5] Press Gaggle by Scott McClellan Aboard Air Force One En Route Topeka, Kansas, May 17, 2004. http://www.whitehouse.gov/new/releases/2004/05/20040517-7.html.
[6] Statement by the Press Secretary on the Geneva Convention by Ari Fleischer, May 7, 2003. http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html.
[7] Memorandum from Alberto R. Gonzales, White House Consel, to the President of the United States, "Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban," January 25, 2002.
[8] Major General Antonio Taguba, "Article 15-6 Investigation of the 800th Military Police Brigade," April 4, 2004, p. 16.
[9] Report of the Army Inspector General Inspection Report on Detainee Operations, July 23, 2004, Lt. Gen. Paul Mikolashek.
[10] Final Report of the Independent Panel to Review DoD Detention Operations, August 2004, p. 13.
[11] Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, "Re: Legal Standards Applicable Under 18 U.S.C. 2340-2340A

Conventions would also constitute a violation of federal criminal law, and given the flagrant violations of the Conventions in Iraq, Afghanistan, and Guantanamo Bay which have been confirmed by official investigations, it is clear that a prima facie violation of federal criminal law exists. It is also evident that high-ranking Administration officials, including the Defense Secretary, as well as high-ranking military officials, may have authorized these actions and are potentially subject to criminal prosecution as well.

Second, there is an obvious conflict of interest. A special counsel is necessary not only because high-ranking Administration officials, including Cabinet members, are implicated, but also because you personally, and the Department of Justice generally, may have participated in this conspiracy to violate the War Crimes Act. It has been confirmed that the Department of Justice's Office of Legal Counsel, and you yourself as White House Counsel, encouraged the president to withhold Geneva Convention protections from Afghanistan and Guantanamo Bay detainees. If the conflict of interest provisions in your regulations mean anything, it is that when the Attorney General may have contributed to the abuses that were committed, the Department of Justice has no business conducting the investigation and should instead turn to a special counsel.

Finally, there can be no doubt that the public interest will be served by a broad and independent investigation into both the allegations of abuse at U.S. detention sites as well as the role of high-ranking officials in authorizing and allowing these abuses. To date, a number of investigations into allegations of abuse at United States detention sites have been conducted, including ten official investigations. These investigations concluded that the leadership failure of officers such as Lt. Gen. Ricardo Sanchez, formerly the senior commander in Iraq, contributed to the prisoner abuse.

For example, the Army Inspector General and former Defense Secretary James Schlesinger found in separate reports that the policies issued by Lt. Gen. Sanchez and his subsequent actions once the abuses at Abu Ghraib were known contributed to the perpetration of these abuses. The Schlesinger investigation also found that other top military officials were responsible, concluding, "There is both institutional and personal responsibility at higher levels."[12] Similarly, the Kern-Fay-Jones report concluded that the actions of Sanchez and his most senior deputies, such as Maj. Gen. Walter Wojdakowski, "did indirectly contribute" to some abuses.[13] However, these inquiries were not empowered to impose punishments on those it found culpable, and they were not empowered to examine the role of high-ranking officials, including members of the Administration, in the perpetuation of these abuses.[14] And, in spite of these findings, many of the reports refused to hold these high-ranking officials culpable. In fact,

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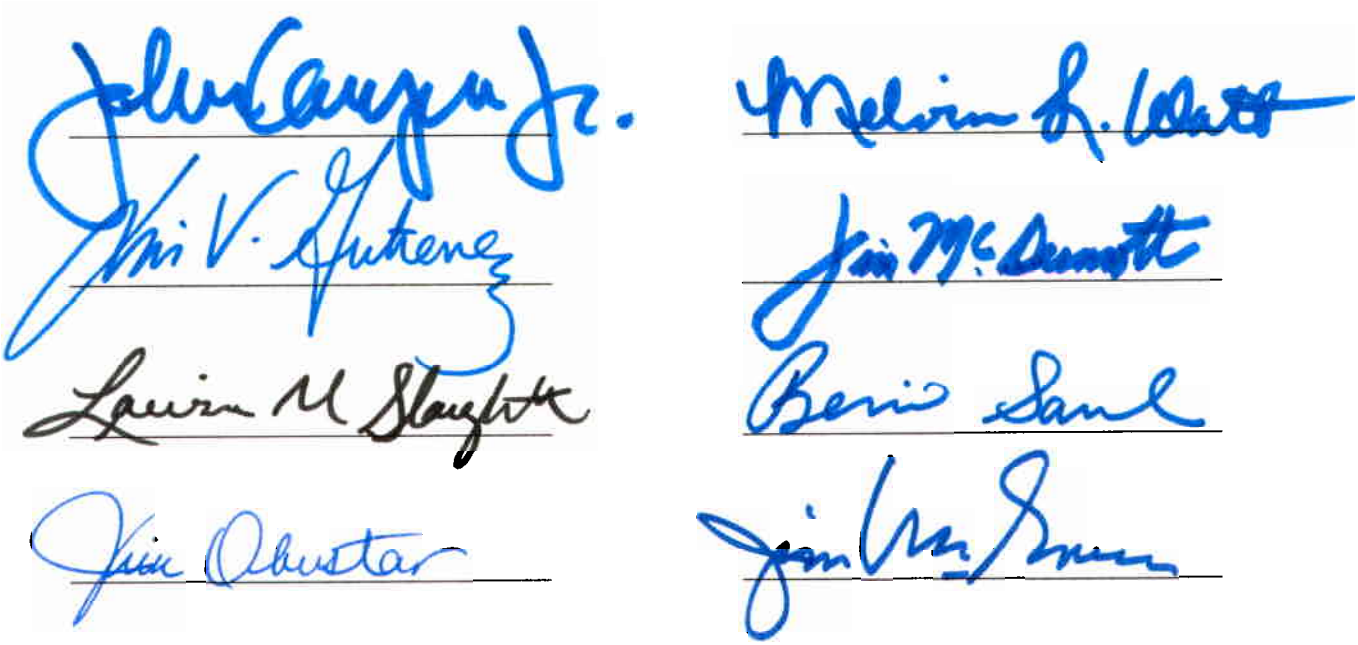
[12] *Id.*, at p. 5.
[13] Kern-Fay-Jones report, from the section entitled "AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th MI Brigade," (LTG Anthony R. Jones), p. 23.
[14] *See e.g.*, Human Rights Watch, "Getting Away With Torture? Command Responsibility for the U.S. Abuse of Detainees," April 2005.

we recently learned the Army absolved four top officers, including Lt. Gen. Sanchez, of wrongdoing. To date, only one high-ranking military officer has been punished as a result of these inquiries, and many view her punishment as a mere slap on the wrist. As a result, it is not yet clear to the world that the United States is taking these abuses seriously.

The public interest demands we determine who is ultimately responsible for these abuses. While Private Lynndie England and other low-ranking officers have pled guilty, those who ordered and authorized their actions appear to have been protected by the military and this Administration. Because so many high level officials, including you, have been implicated in these events, the only way to ensure impartiality is through the appointment of a Special Counsel. Indeed, our nation's integrity is at stake. We must reassure the world that we will fairly and independently pursue legal violations wherever they occur.

We await your response on this important matter. At no point during this Administration has a Special Counsel been appointed.[15] Please contact us through Perry Apelbaum or Ted Kalo of the Judiciary Staff at 2142 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-6504; fax: 202-225-4423) if you have any questions about this request.

Sincerely,



[15] Judiciary Democrats asked for a Special Counsel to investigate the Halliburton Iraqi Oil Contracts in June of 2004, and one was not appointed; Judiciary Democrats asked for a Special Counsel to investigate the CIA name leak in September of 2003, and one was not appointed; and Judiciary Democrats asked for a Special Counsel to investigate Enron in January of 2002, and one was not appointed.

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