May 31, 2022

The Honorable Lloyd J. Austin III
United States Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

The Honorable Merrick B. Garland
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

The Honorable Antony J. Blinken
United States Secretary of State
2201 C St NW
Washington, DC 20520

Dear Secretary Austin, Attorney General Garland, and Secretary Blinken:

We are appalled that, thirteen years after the CIA's post-9/11 torture program formally ended, the executive branch *still* refuses to close the door on using evidence that was procured – directly or indirectly – from torture, in prosecutions against individuals that the United States tortured.

President Biden himself has categorically committed to upholding the prohibition on torture, and "pledge[d] the full efforts of the United States to eradicate torture in all its forms"—an objective that the Convention against Torture's exclusionary rule was intended to serve. In its September 2021 report to the Committee against Torture, the State Department affirmed that "[t]he absolute prohibition of torture is of fundamental importance to the United States," and that "[t]he United States has long recognized that the prohibition of torture is a peremptory norm of international law, from which no derogation is permitted." The report noted specifically that "[e]vidence obtained through torture is inadmissible in civilian courts by longstanding precedent…"

The Department of Defense (DOD) and the Department of Justice (DOJ) must make equally unequivocal commitments, adhere to them in practice, and hold accountable any government official who fails to do so, because at present both Departments are muddying the waters on an issue that demands absolutism.

In March 2021, prosecutors in the Guantanamo military commissions attempted to introduce statements that defendant Abd-al-Rahim al-Nashiri made while being tortured. Over the objections of Mr. al-Nashiri's counsel, the judge allowed these statements to be introduced. When Mr. al-Nashiri challenged the use of that evidence in federal court, DOJ correctly reversed course, assuring the court that "the government will not seek admission, at any stage of the proceedings, of any of petitioner's statements while he was in CIA custody." Prosecutors construed that rebuke as narrowly as possible and shortly thereafter claimed authority to use *a witness's* (as opposed to the defendant's) statements obtained through torture. DOJ again stepped in and repudiated that claim, too. Most recently, in both the military commissions and at the United States Court of Appeals for the D.C. Circuit, a question arose around the administration's position on using "derivative evidence"—that is, evidence the government discovered as a result of torture, as opposed to the torture victim's original statements themselves. When addressing that questions, both DOD and DOJ hedged:

"To the extent that [statements commission prosecutors made in a recent hearing] could be interpreted to support an interpretation that derivative evidence is categorically not [prohibited by the Military Commissions Act], those statements are not reflective of the government's view."

In other words, DOD and DOJ appear to believe that the government may use torture-derived evidence in certain circumstances, despite both law and policy prohibiting it.
If that is not DOD and DOJ's position, both departments must make clear, public statements to that effect, and act accordingly. Any such statements that focus on what law the military commission judge has ruled is applicable in Mr. al-Nashiri's case, or whether a particular dispute is now before the courts, or any other narrow or nuanced legal issue, will not suffice. This is about something much more fundamental: whether all executive branch departments and agencies will uphold the prohibition on torture, and – as the President promised – do everything in their power to eradicate torture in all its forms.

DOD and DOJ must explicitly affirm that the United States will not use *any* evidence obtained directly or indirectly through torture, in *any* proceeding for *any* purpose. Against the above-described backdrop, anything less would send a clear signal that the United States government is preserving wiggle room to profit from torture. To that end, answering "yes" to the two questions that Senators Dick Durbin and Patrick Leahy asked in their May 13 letter would be a good start.
Thank you for your prompt attention to this critically important matter.

Sincerely,

American Civil Liberties Union
Amnesty International USA
Bridges Faith Initiative
Center for Constitutional Rights
Center for Victims of Torture
Defending Rights and Dissent
Demand Progress
Government Information Watch
MPower Change
National Religious Campaign Against Torture
Reprieve US
September 11th Families for Peaceful Tomorrows

CC: Caroline Krass, General Counsel, Department of Defense
Lisa Monaco, Deputy Attorney General, Department of Justice
Richard Visek, Acting Legal Advisor, Department of State