U.S. Department of Justice

Criminal Division
Office of International Affairs

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Ms. Paula Mongé Royo
Subdirectora General de Cooperación Jurídica Internacional
C/ San Barnardo 62
28071 Madrid, Spain

Re: Request for Assistance from Spain in the Matter of Addington, David; Bybee, Jay; Feith, Douglas; Haynes, William; Yoo, John; and Gonzalez, Alberto; Spanish Reference Number: 0002342/2009-CAP

Dear Ms. Mongé:

We write in response to the July 22, 2009, letter from the Ministry of Justice enclosing the request of Judge Eloy Velasco Nuñez, signed May 6, 2009, relating to his inquiries into allegations of crimes against protected persons during an armed conflict. We understand from Judge Velasco's request that a criminal complaint has been made by the Association for the Dignity of Spanish Prisoners, claiming that the United States, as part of a strategy in its conflict with the Taliban and Al Qaeda and its affiliates, sanctioned a series of executive orders supported by legal memoranda drawn up by the above-listed persons and their legal counsel and advisors, authorizing interrogation techniques in violation of international conventions in force. We have also been advised that the complaint further alleges that U.S. government personnel used the memoranda as a legal basis to conduct interrogations using these illegal techniques upon persons suspected of acting in concert with Al Qaeda and the Taliban. In the request, Judge Velasco seeks information indicating whether any U.S. authority has instituted investigations or proceedings in connection with the facts described in the above-referenced complaint, and, if so, the specific authority (administrative or judicial) that has dealt or is dealing with such matters The request further notes that if the facts are currently being investigated by U.S. authorities, that the referenced complaint will be sent to the United States in order that the facts reported therein may be investigated by the United States.

This submission seeks to provide information responsive to Judge Velasco's request, as well as clarification regarding certain statements made in the request. In summary, the government of the United States, in various fora, has undertaken numerous actions relating both to 1) the alleged mistreatment of detainees at issue in the complaint; and 2) legal advice provided in relation to the treatment of detainees. These actions are described with greater specificity

below. In light of these investigations by the United States into matters that are the subject of the above-referenced complaint, and the United States' clear jurisdiction over any such allegations, the United States requests that the complaint be sent to the United States for further review and investigation, as appropriate, by United States authorities.

A. Providing legal advice for use in detainee interrogations

Jay Bybee and John Yoo both served in the Department of Justice's Office of Legal Counsel (OLC) during the Administration of President Bush. The Office of Professional Responsibility (OPR) of the U.S. Department of Justice, which is responsible for investigating allegations of misconduct involving Department of Justice attorneys relating to the exercise of their authority, including their authority to provide legal advice, conducted an extensive investigation into Messrs. Bybee and Yoo's preparation of legal memoranda relating to the interrogation of detainees. OPR issued a detailed report of its findings. Thereafter, in a 69-page decision issued on January 5, 2010, Associate Deputy Attorney General David Margolis found that, although Bybee and Yoo may have exercised poor judgment, they engaged in no misconduct in violation of applicable ethical or legal norms, and thus a referral by the Department of Justice for appropriate disciplinary action by attorney licensing authorities was not warranted. A copy of the Margolis memorandum (as well as the recommendation of OPR and other related documents) released by the Department of Justice to the United States House of Representatives can be found at http://judiciary.house.gov/issues/issues_OPRReport.html. In light of this conclusion, there exists no basis for criminal prosecution of Yoo or Bybee. In addition, the Department of Justice has concluded that it is not appropriate to bring criminal cases with respect to any other executive branch officials, including those named in the complaint, who acted in reliance on these and related OLC memoranda during the course of their involvement with the policies and procedures for detention and interrogation. See Attachment D below.

B. Allegations of mistreatment of detainees

With regard to allegations of mistreatment of detainees at issue in the complaint , the Department of Justice has successfully prosecuted two such instances of detainee abuse in federal civilian court, and Department of Justice prosecutors are currently examining other allegations of abuse in various pending investigations and inquiries, as addressed below. However, the bulk of the investigation and prosecution of allegations of mistreatment of detainees held in connection with counterterrorism operations, including administrative and criminal inquiries and proceedings, have been carried out by the Department of Defense and other U.S. government components that have jurisdiction to carry out such actions.

In view of the breadth of investigative actions that have been taken to date with respect to such allegations, and the fact that investigative and administrative actions of this type are often treated, of necessity and in accordance with U.S. law and regulation, in a confidential manner, it is not possible in this letter to describe comprehensively each and every investigative action that has been undertaken by the United States. However, the following paragraphs seek to provide an

overview of a number of U.S. judicial actions that have been taken in detainee abuse cases. The cases, which do not relate to the aforementioned advice given on interrogation matters, show that there are effective judicial processes under U.S. law for addressing violations.

1. Completed federal criminal prosecutions

In two cases, U.S. federal prosecutors have determined that criminal prosecutions were warranted for detainee related mistreatment and obtained convictions.

(i) *The prosecution of David Passaro*

In 2003, the U.S. Department of Justice brought criminal charges against Passaro, a CIA contractor accused of brutally assaulting a detainee in Afghanistan in 2003. The CIA described his conduct as "unlawful, reprehensible, and neither authorized nor condoned by the Agency." The then Attorney General stated that "the United States will not tolerate criminal acts of brutality and violence against detainees...." And the U.S. Attorney noted that the extraterritorial jurisdiction exercised by the United States is "[n]ot only vital to investigating and prosecuting terrorists, but also it is instrumental in protecting the civil liberties of those on U.S. military installations and diplomatic missions overseas, regardless of their nationality." See press release at http://www.justice.gov/opa/pr/2004/June/04_crm_414.htm, a copy of which is annexed as Attachment A hereto. Following a jury trial, Passaro was convicted of felony assault. On August 10, 2009, the United States Court of Appeals for the Fourth Circuit upheld the conviction, holding that a U.S. federal court has jurisdiction over the trial of an American citizen for committing assaults on the premises of U.S. military missions abroad. The full opinion of the court is annexed as Attachment B hereto. In February 2010, the U.S. Supreme Court refused to hear an appeal by Passaro. Passaro was sentenced to 8 years and 4 months in prison.

(ii) *The prosecution of Don Ayala*

Charges also have been brought against Don Ayala. On February 3, 2009, Don Ayala, a U.S. contractor in Afghanistan, was convicted in U.S. federal court of voluntary manslaughter in the death of an individual whom he and U.S. soldiers had detained. See U.S. Attorney's Office Press Release at http://www.justice.gov/usao/vae/Pressreleases/02-FebruaryPDFArchive/09/20090203ayalanr.html, a copy of which is annexed as Attachment C hereto.

2. Pending federal investigations by the United States Attorneys' Office for the Eastern District of Virginia

The United States Attorney's Office for the Eastern District of Virginia is investigating various allegations of abuse of detainees. Due to their pending status and legal restrictions on

the disclosure of investigative information, including rules of grand jury secrecy,[1] our ability to provide details of these matters is constrained by U.S. law.

3. Ongoing review of previously declined prosecutions by the United States Attorney's Office for the District of Connecticut

On August 24, 2009, Attorney General Eric Holder announced that the Department of Justice would conduct "a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations." See the August 24, 2009, Statement, at http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html, a copy of which is annexed as Attachment D hereto. As Attorney General Holder further explained, "[t]he Department [of Justice] regularly uses preliminary reviews to gather information to determine whether there is sufficient predication to warrant a full investigation of a matter." *Id.* Attorney General Holder assigned this review to Assistant United States Attorney John Durham, a career prosecutor with the Department of Justice. The Attorney General stated that Mr. Durham, "who has assembled a strong investigative team of experienced professionals, will recommend to me whether there is sufficient predication for a full investigation into whether the law was violated in connection with the interrogation of certain detainees." *Id.*

The assignment of the detainee abuse-related inquiry to Assistant U.S. Attorney Durham represented an expansion of Mr. Durham's authority. Assistant U.S. Attorney Durham was appointed in January 2008 by then-Attorney General Michael Mukasey to investigate the destruction of Central Intelligence Agency (CIA) videotapes of certain detainee interrogations. Mr. Durham led a team of prosecutors and agents from the Federal Bureau of Investigation (FBI) in conducting an exhaustive investigation of the matter, and in November 2010 determined that it was not appropriate to bring criminal charges with regard to the actual destruction of the tapes. Assistant U.S. Attorney Durham and his team continue to review whether federal laws were violated in connection with the interrogation of specific detainees. This review is ongoing, and its details remain confidential.

4. Investigations and proceedings carried out by other U.S. government components

(i) *Actions by the Department of Defense and other executive branch agencies*

[1] A grand jury is composed of persons whom the U.S. district court selects at random from the residents of its district. The grand jury is an independent body that is empanelled and supervised by the judicial branch of government. After independently reviewing evidence presented to it by the government, each member of the grand jury must determine if there is probable cause to believe that a crime has been committed and that the particular person or persons accused committed the crime. If the grand jury affirmatively votes that there is probable cause to believe that the person or persons accused committed the crime or crimes, the grand jury returns an indictment. Pursuant to Rule 6 of the Federal Rules of Criminal Procedure, matters before a grand jury are subject to strict secrecy rules.

As noted above, the bulk of detainees at issue in the complaint fall within the jurisdiction of the Department of Defense. First, the Department of Defense's longstanding policy is to comply not only with the law of war during all armed conflicts, however such conflicts are characterized, but in all other military operations. To that end, it is the Department of Defense's policy that any possible, suspected, or alleged violation of the law of war, for which there is credible information, committed by or against U.S. personnel, enemy persons, or any other individual is reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.

This policy applies to allegations of mistreatment of detainees held in connection with counterterrorism operations. See Department of Defense Directive 2310.01E, *The Department of Defense Detainee Program*, September 5, 2006, available at http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf, a copy of which is annexed as Attachment E hereto. The Department of Defense has required that all its detention operations meet a high standard of humane care and custody, and its policy is to seek continually to exceed, when possible, international standards for conditions of detention. The Department of Defense does not tolerate the abuse of detainees, and credible allegations are thoroughly investigated, and appropriate disciplinary action taken if allegations are substantiated. There have been well documented instances in the past where Department of Defense policy was not followed, and service members have been held accountable for their actions in those cases. The Department of Defense has initiated hundreds of investigations and proceedings against personnel alleged to have abused detainees, including more than 100 prosecutions under the Uniform Code of Military Justice, as well as administrative proceedings resulting in unfavorable discharges, forfeiture of pay, and other punitive actions. *See* Review of DoD-Directed Investigations of Detainee Abuse at http://www.dodig.mil/fo/Foia/DetaineeAbuse.html. See also, for example, *U.S. v. Graner*, 69 M.J. 104 (CAAF 2010) (upholding conviction of U.S. Army soldier for conspiring to commit maltreatment, dereliction of duty for failing to protect detainees under his charge from abuse, maltreating detainees, assault with a means likely to produce death or grievous bodily harm, and assault consummated by battery for actions committed during Iraq detention operations); *U.S. v. Maynulet*, 68 M.J. 374 (CAAF 2010) (upholding conviction of U.S. Army Captain for assault with intent to commit voluntary manslaughter for shooting unarmed, injured Iraqi civilian); *U.S. v. Clagett*, 2009 WL 6843560 (ACCA 2009) (upholding conviction of U.S. Army soldier for two specifications of premeditated murder, one specification of attempted premeditated murder, and merged specifications of obstruction of justice and conspiracy to commit murder for shooting Iraqi detainees), copies of which are annexed as Attachment F hereto.

The Central Intelligence Agency has also undertaken internal reviews relating to detainee treatment; the results of such reviews are generally nonpublic. Where those reviews indicated potential violations of U.S. criminal laws, it has referred those matters to the Department of Justice, such as in the Passaro case referred to above.

(ii) *Actions by the United States Congress*

Inquiries into the handling of such matters are not limited to the U.S. executive branch. The Congress of the United States also has conducted extensive investigations into the treatment of detainees. See, e.g., the 2008 Report of the Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody, which can be found at http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf, a copy of which is annexed as Attachment G hereto. More recently, on October 6, 2009, the Assistant Attorney General of the Criminal Division of the Department of Justice addressed the U.S. Senate, Committee on the Judiciary, Subcommittee on Human Rights and the Law, in a hearing entitled "No Safe Haven: Accountability for Human Rights Violators, Part II." The Assistant Attorney General discussed the 2009 prosecution and conviction of a former U.S. Army soldier for serious crimes committed in Iraq, as well as the prosecution and conviction of David Passaro, referenced above. The Assistant Attorney General stated: "The prosecutions that the Department of Justice, in cooperation with its law enforcement partners, mounts against perpetrators of human rights and law of war violations represent a foundational aspect of the Department's unwavering commitment to the pursuit of justice." The statement can be found at http://www.justice.gov/criminal/icitap/pr/2009/10-06-09breuer-testimony.pdf, a copy of which is annexed as Attachment H hereto.

C. Conclusion

In concluding, we would like to provide clarification of an issue raised on the second page of Judge Velasco's request, in which he gives his interpretation of U.S. Supreme Court jurisprudence relating to U.S. detention operations. Initially, we note that the authority of the U.S. government to detain individuals who are part of al-Qaeda or Taliban forces is based on the 2001 Authorization for Use of Military Force, passed by the U.S. Congress, as informed by the law of war. See Public Law 107-40, September 18, 2001.

In June 2006, the U.S. Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), determined that Common Article 3 of the Geneva Conventions applies to the armed conflict with al-Qaeda. In 2006, Congress created a system of military commissions by statute, and that system was revised by Congress in 2009 to provide additional rights to detainees. The 2006 system was designed to be responsive to the *Hamdan* decision, including by addressing the application of Common Article 3. The procedures governing the military commissions can be found at http://www.defense.gov/news/ 2010_Manual_for_Military_Commissions.pdf.

Furthermore, with respect to treatment of detainees, after the Hamdan decision, the U.S. Department of Defense directed a review by all its Components to ensure complete compliance by all Department of Defense personnel with Common Article 3 with respect to all persons under Department control and custody worldwide in connection with the ongoing armed conflict. A copy of that memorandum is annexed as Attachment I hereto. The results were that compliance

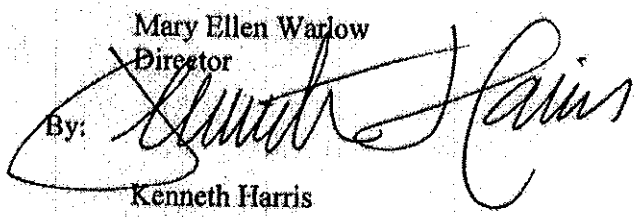
with Common Article 3 was confirmed by all Department of Defense components. Moreover, immediately after taking office, pursuant to U.S. Executive Order 13492 of January 22, 2009, President Obama directed a further independent review of treatment of detainees at Guantanamo Bay, and that review concluded that conditions of confinement at Guantanamo Bay conformed to the requirements of Common Article 3 and, in many respects, exceeded them. See http://www.defense.gov/pubs/pdfs/review_of_department_compliance_with_presidents_executive_order_on_detainee_conditions_of_confinementa.pdf, a copy of which is annexed as Attachment J hereto.

In short, the United States makes the humane treatment of detainees a priority, takes allegations of abuse by its personnel against detainees seriously, investigates such allegations thoroughly, and holds violators accountable as appropriate under U.S. law and regulation. A broad variety of components of the U.S. Government have undertaken thorough investigations into the treatment and detention of detainees, and into the formulation of the policies governing such treatment. Our courts have jurisdiction over matters in which detainees have been abused while in U.S. custody, even where the abuse has occurred overseas, and have exercised such jurisdiction whenever appropriate. Such U.S. investigations have resulted in prosecutions, convictions, and sentences. Likewise, when an investigation has revealed that facts were not sufficient to warrant a conclusion that misconduct had taken place, no prosecution or disciplinary action was undertaken. In addition, investigations into a wide range of detainee-related abuse allegations remain open, as described above, and investigations of unknown past misconduct and possible future misconduct will continue to be undertaken whenever such conduct is suspected or otherwise brought to light. The United States will continue to address allegations of abuse by its personnel, at home and abroad, and therefore believes it is appropriate for the Spanish courts to refer complaints related to such matters to the United States for appropriate review and action.

We hope that the foregoing information and the attachments to this letter provide the information sought in Judge Velasco's mutual legal assistance request. Please do not hesitate to contact me if we can be of further assistance.

Sincerely,

Mary Ellen Warlow
Director

By: 

Kenneth Harris
Associate Director
Europe

Enclosures