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March 6, 2010

The Honorable Barack Obama
President of the United States
White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear President Obama:

On behalf of the American Civil Liberties Union and our half-million members, I urge you to uphold the decision of Attorney General Eric Holder and the Department of Justice to charge and try in federal criminal court those Guantanamo detainees alleged to have had a role in the attacks of September 11, 2001. I believe that you will face few, if any, greater challenges to who we are as a nation and to our commitment to the rule of law than this question of sustaining the Attorney General's principled decision to use federal criminal courts for these trials.

The trials of the defendants alleged to have had roles in the September 11 attacks are the most important terrorism trials – and arguably the most important *criminal* trials – in the entire history of the nation. It would be a colossal mistake to reverse the administration's decision to try these defendants in federal criminal court and again relegate these landmark trials to irretrievably defective military commissions.

The Attorney General made the right decision when he announced in November that five Guantanamo detainees alleged to have had a role in the September 11 attacks would be charged and tried in federal criminal court, and not before military commissions. It was a decision that expressed a commitment to the rule of law, made a clean break with the lawlessness of your predecessor's administration, and showed a determination to use the most effective and sure courts for efficiently trying terrorism defendants to verdict. It was based on a careful review of available facts and evidence, and a candid assessment of the record in the military commissions.

It is a fact repeated many times by your administration over the past few months that, since September 11, 2001, more than 300 defendants have been convicted and sentenced in federal criminal courts for terrorism-related offenses, while only 3 defendants have been convicted and sentenced by military commissions. When looking at the track record, there should be no reason to prefer military commissions, except in response to political pressure or to obtain convictions based on evidence that would be inadmissible in federal criminal courts. Neither reason would justify reversing the decision of your own administration.

The problems with the military commissions stem from fundamental substantive and practical deficiencies. Although the Military Commissions Act of 2009 corrected some deficiencies, it could not repair an irreparably broken and deficient system.

Most of the attention on the legal problems with the military commissions has focused on the looser evidentiary statute, particularly the admissibility of coerced evidence and hearsay evidence that would be barred from every federal or state criminal trial or court martial in the United States, but there are also fundamental constitutional questions that could jeopardize the use of military commissions and could result in the reversal of any conviction. I believe these challenges are significant enough that the risk of such challenges succeeding should alone be sufficient reason to reject military commissions, particularly for defendants alleged to have had a role in the September 11 attacks.

There already is a serious challenge to the military commissions based on the statutory provision limiting jurisdiction solely to aliens. No United States citizens are triable before military commissions. Devising a separate criminal system for aliens violates both the Constitution and international law. It also is extraordinarily unlikely that Congress will fix this problem because of a strong unwillingness to subject United States citizens to tribunals that are plainly defective and reserved solely for citizens of the rest of the world.

In addition, there is a cloud of uncertainty over the constitutionality of the capital sentencing provision as well. Given this constitutional concern and the ambiguity in the Act, a military judge himself wondered whether the death penalty could attach in a case where a guilty plea was entered. Ironically, the use of military commissions may prohibit the ability to secure a capital conviction that your Attorney General seeks.

Moreover, if, as reported, the proposal before you would include enactment of a statutory bar on the use of federal criminal courts for trial of any of the alleged 9/11 defendants, there would be a possible additional constitutional challenge against the restriction as violating the Constitution's bill of attainder prohibition. Specifically, Congress cannot target one specific group of detainees for a diminution of due process protections by being statutorily relegated to military commissions. For example, S. 2977, the legislation introduced by Senator Lindsey Graham (R-SC) to bar federal funds for the trial in federal criminal court of the alleged 9/11 defendants would likely be found by courts to be an unconstitutional bill of attainder, if enacted.

Aside from the substantive legal problems with the military commissions, there are fundamental practical problems. I assume these problems were central to the Attorney General's determination that federal criminal courts are the better choice for these trials.

There is a reason why, after eight years, two statutes, and four different sets of commission rules, only three Guantanamo detainees have been convicted by military commissions. Those three convictions include one based on a plea bargain that included the government promising to let the defendant serve the last months of his sentence in Australia—essentially it was a guilty plea as a way *to get out of* Guantanamo.

The long litany of practical problems with the military commissions, includes the following:

- There are no rules applying the Military Commissions Act of 2009 because the Department of Defense failed to meet the statutory 90-day deadline for promulgating rules.
- The military judges are from the Judge Advocate General Corps of various service branches, but have never tried international terrorism or other complex criminal cases (the JAG Corps almost exclusively prosecutes and defends American service members for crimes that would generally be considered ordinary street crimes in state criminal courts).
- The military defense counsel assigned to defendants have no experience defending international terrorism or other complex criminal cases, and all of the military defense counsel lack the capital defense experience that would be required by every federal or state court as requisite to appointment as defense counsel in a capital case.
- Although the military prosecutors also have little experience with international terrorism or other complex criminal cases, the prosecutions would likely be conducted primarily by Department of Justice prosecutors with extensive experience in capital and national security trials.
- Unlike many federal judges, particularly in jurisdictions such as the Southern District of New York, the Eastern District of Virginia, and the District of Columbia, military judges have no experience applying the Classified Information Procedures Act, which was incorporated into the Military Commissions Act of 2009, thus creating both a risk to national security and a risk of unconstitutional error in providing access to evidence.

The problems are best summarized by the military judge in a military commission hearing in the September 11 case, who said that the proceedings against the September 11 defendants were "a learning experience." It is nothing short of nonsensical to entrust the most important terrorism case in American history to such a defective tribunal.

This also is an issue where no one can blame Congress if you reverse your administration's position. An amendment offered by Senator Graham in November to bar federal funds for the trial of the alleged September 11 defendants in federal criminal court failed by a vote of 45-54 (Senator Robert Byrd (D-WV) was absent, but would likely have voted against the Graham amendment, thus making it 45-55). Despite claims by Senator Graham of growing support, he has added only one Republican, Senator Scott Brown (R-MA), and one Democrat, Senator Ben Nelson (D-NE), to the 45 votes he had last fall—and one of his prior supporters, Senator Maria Cantwell (D-WA) has had her staff publicly state that she is no longer supporting the measure and is instead reviewing her position. A coalition of human rights, religious groups, civil liberties groups, and bar associations has been meeting with senators and their key staff and have found no more movement toward the Graham proposal. In addition, after intense lobbying by your administration, including a letter from the Secretary of Defense and the Attorney General

just one week ago, there appears to be a majority in the House of Representatives supporting your administration's decision to use federal criminal courts. A Republican motion to recommit in the House that was widely expected to address the trial issue was never offered, strongly suggesting the lack of a majority for the Graham position. I believe you would be successful in sustaining in Congress your administration's decision to use federal criminal courts.

In fact, the only significant concern among some senators and staff who supported the administration in the November vote to defeat the Graham legislation is that having the administration flip sides on this issue could create political difficulties for them. My staff has told me that they repeatedly have heard concerns that senators went out on a limb to support the correct decision of the administration in the fall, and they do not want the President to saw off the limb behind them.

Moreover, although there is a need for more support, and collaboration with state and local officials, to bolster the decision to use the Southern District of New York, the courthouse in Manhattan should not be foreclosed and alternative sites in the Southern District of New York should be considered. As a lifelong New Yorker, I can assure you that New Yorkers are tough enough to coexist with a trial of such historic importance. Initial local pushback should not cause the administration to change position.

I also want to emphasize two additional points that raise concerns for the future. A reversal of the Attorney General's decision could harm your administration's heroic efforts to restore integrity and independence at the Justice Department. In addition, changing positions under partisan political pressure on such a critical and visible national security issue will make it far more difficult for you to sustain your position on a host of other difficult decisions, particularly in the areas of national security and foreign affairs.

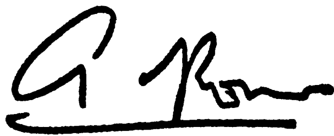
The Attorney General has done a remarkable job of rebuilding an independent Justice Department. Even where we may disagree with a decision by the Attorney General, the country has confidence that he has been able to reach it largely free of political influence. You also deserve tremendous gratitude for exercising restraint and allowing the Attorney General to exercise independence. It is a sea change from the prior administration's intense politicization of the Justice Department, which itself endangered the rule of law. But reversing the Attorney General on such an extraordinarily important and visible case, and thereby putting politics above independent prosecutorial discretion would tarnish the claim of noninterference in Justice Department decisions, and would undermine the credibility of the Justice Department at a time when the nation most needs a depoliticized prosecutor.

Finally, I would be remiss if I did not express the concern raised by many others, both on Capitol Hill and from within your administration, that if Senator Graham and other opponents of using federal criminal courts for these prosecutions can force you to reverse your position on such an important and visible national security decision here, it will be open season on many other decisions that you and your administration will make on a range of many difficult issues. It would be a mistake and a misread of the political

landscape to think that flipping sides on this fundamental principle will somehow break the fever that many partisans have on terrorism-related issues. Instead, a reversal will only give them more encouragement to try to switch your position on these and other policies. Just this week, the ranking member of the Senate Armed Services Committee, Senator John McCain (R-AZ), introduced legislation to put in place a new statute on indefinite detention without charge or trial, despite your administration's statement last fall that it would not support indefinite detention legislation. In addition, the ranking member of the House Armed Services Committee, Representative Buck McKeon (R-CA), introduced legislation to bar military commissions from being held at any military base in the United States or its territories. These are but two examples of what could be a flood of legislation. If you do not hold the line here, you will have far more difficulty holding the line everywhere else.

I would be very interested in speaking with you and your staff about these concerns before you make a decision. Thank you so much.

Sincerely,



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