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April 4, 2011

Robert Hinchman, Senior Counsel  
U.S. Department of Justice  
Office of Legal Policy  
950 Pennsylvania Avenue N.W., Room 4252  
Washington, DC 20530

RE: Docket No. OAG-131; AG Order No. 3244-2011  
National Standards to Prevent, Detect, and Respond to Prison Rape

Dear Attorney General Holder,

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I urge the Department of Justice to support and adopt national standards to prevent, detect, and respond to prison rape. These national standards are a milestone in the effort to end prisoner rape. The standards also represent a compromise, heeding the fiscal and security interests of corrections administrators while better protecting the basic right of all people, including inmates, to be free from sexual abuse. NACDL urges swift adoption of the standards, which will save thousands of men, women, and children from sexual abuse behind bars.

NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 10,000-plus direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

The Department of Justice has estimated that 216,600 detainees were sexually abused in U.S. facilities in 2008 alone. As criminal defense lawyers, NACDL cares about the safety of our clients, regardless of what they are incarcerated for, and NACDL has a particular concern related to sexual abuse in detention facilities for our most vulnerable clients, including but not limited to non-citizens, juveniles, and those with intellectual disabilities.

NACDL endorses the comments submitted by Just Detention International, but sends this letter to highlight some key concerns. Many of the standards proposed by the Department will be effective tools in preventing abuse and ensuring that inmates who have been victimized have access to the appropriate care and services. In particular, we applaud the Department's proposed requirements that all victims have access to forensic examinations when medically or evidentiarily appropriate, that housing decisions for transgender inmates include considerations of whether they would be safest in a facility aligned with their gender identity, and that staff receive training on the dynamics of sexual abuse and professional boundaries. However, other standards in the Department's draft are too weak.

As a preliminary matter, all detention facilities must be required to institute these commonsense measures, which will result in safer facilities for both staff and inmates. The Department's exclusion of non-citizen detention from its proposed standards is inexcusable. The men, women, and children held by the Department of Homeland Security and the Office of Refugee Resettlement are among the most vulnerable to abuse and are often exceptionally isolated. The standards should apply to non-citizen detention facilities, and supplemental standards for facilities housing non-citizen detainees should be restored.

Officials must take care not to treat victimized or vulnerable inmates like perpetrators. The Department's proposed standards allow for prison and jail officials to rely on involuntary protective custody to house victimized and vulnerable inmates for at least 90 days. Protective custody is essentially punitive as it typically results in a loss of services and programs, can brand an inmate as a victim and/or a snitch, and isolates survivors of sexual abuse with little access to outside support. Officials should not be allowed to rely on this form of isolation to protect likely victims.

Sufficiently limiting cross-gender supervision is also critically important to preventing staff sexual misconduct. According to the Department's own research, most staff-on-inmate sexual abuse is cross-gender – female staff abusing male inmates or male staff abusing female inmates. However, the standards allow for staff to conduct cross-gender pat searches, as well as view inmates and juvenile residents of the opposite sex as they use the toilet or shower. Such practices encourage a sexualized and abusive environment, and should be limited to emergency situations only.

When officials fail to protect and respond to sexual abuse, they need to be held accountable. Current unrealistic and complicated grievance systems throughout the U.S. prevent countless prisoner rape survivors from ever having a judge review their cases. By developing an exhaustion standard that mirrors the Bureau of Prisons' grievance policy, the Department retains some of the most egregious barriers to judicial review, including short filing deadlines, requirements that survivors file the grievance with a specific entity, and the prospect of survivors being punished even for good faith complaints of an emergency. The Department should remove

these restrictions and establish a straightforward standard, ensuring that all complaints of sexual abuse are addressed on their merits, and that no one is punished for filing a complaint in good faith, even if they claim it is an emergency and officials disagree.

Monitoring compliance with the standards is vital to ensuring that they are taken seriously. Every facility should be visited by an outside monitor at least once during the triennial audit period. At the very least, the Department should require that every facility has its policies, data, and other documents assessed for compliance with the standards. The Department should also ensure that inmates are able to communicate with such outside monitors confidentially, and that monitors visit a select number of facilities – chosen for cause and randomly. These reviews and visits must be performed by an entity that is structurally external to the corrections agency being audited, and by individuals who have no recent relationship with the agency. The auditing team must also have a victim-centered approach with expertise in both corrections and sexual violence.

Finally, the Department must prohibit the housing of youth in adult prisons and jails. Research shows that youth in adult facilities are among those at the highest risk of sexual abuse. Currently, adult corrections facilities must either house juveniles in the general adult population where they are at substantial risk of sexual abuse, or in segregated settings that can cause or worsen mental health problems. Neither option is safe or appropriate for youth. Regardless of their offense or status, inmates under the age of 18 belong in a juvenile facility.

Every person has the right to be free from sexual abuse, regardless of their custody status, criminal history, and citizenship. Modifying the Department's proposed standards in accordance with the recommendations discussed above, and ratifying such standards soon, will result in a powerful tool in upholding a zero tolerance approach to sexual abuse in detention.

Thank you for your consideration in this matter, and please contact NACDL should you require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim E. Lavine". The signature is fluid and cursive, with a large initial "J" and "L".

Jim E. Lavine  
President