

GETTING TO THE TRUTH THROUGH A
NONPARTISAN COMMISSION OF INQUIRY

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin	5
prepared statement	72
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	1
prepared statement	122
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania	3

WITNESSES

Farmer, John J., Jr., Partner, Arsenault, Whipple, Farmer, Fassett and Azzarello, LLP, Chatham, New Jersey	12
Gunn, Leet F., Vice Admiral, U.S. Navy (ret.), and President, The American Security Project, Washington, D.C.	10
Pickering, Ambassador Thomas, Vice Chairman, Hills & Company, International Consultants, Washington, D.C.	7
Rabkin, Jeremy A., Professor of Law, George Mason, University School of Law, Arlington, Virginia	19
Rivkin, David B., Baker & Hostetler, LLP, Washington, D.C.	16
Schwarz, Frederick A.O., Jr., Chief Counsel, Brennan Center for Justice, New York University School of Law, New York, New York	14

SUBMISSIONS FOR THE RECORD

Atlanta Journal-Constituion, February 13, 2009, article	36
AVAAZ.org, 70,000 support the U.S. Senate	38
Buffalo News, March, 9, 2009, article	50
RussBaker.com, March 11, 2009, article	51
Bush, George, Houston, Texas, letter	53
Capitol News Company, LLC, March, 3, 2009, article	54
Commoncause.org, Washington, D.C., statement	57
Constitution Project, Washington, D.C., statement	62
Davis Group, Austin, Texas, statement	64
Farmer, John J., Jr., Partner, Arsenault, Whipple, Farmer, Fassett and Azzarello, LLP, Chatham, New Jersey, statement	68
Fidell, Eugene R., President, National Institute of Military Justice, Washington, D.C., statement	74
Fletch, Laurel E., Director, International Human Rights Law Clinic, University of California, and Eric Stover, Faculty Director, Human Rights Center, University of California, Berkeley, California, statement	78
Fredrickson, Caroline, Director, American Civil Liberties Union, Washington, D.C., statement	90
Globe and Mail, a division of CTV globemedia Publishing Inc., March 4, 2009, article	98
Gunn, Leet F., Vice Admiral, U.S. Navy (ret.), and President, The American Security Project, Washington, D.C., statement	100
Human Events.com, February 25, 2009, article	106
Human Rights Watch, March 4, 2009, statement	110
Investor's Business Daily, February 11, 2009, article	115
Killmer, Revern Richard L., Executive Director, National Religious Commpaign Against Torture, statement	117
Las Vegas Review-Journal, February 12, 2009, article	120
Lucas, Margaret M., Washington, D.C., statement	124

IV

	Page
Magarrell, Lisa, U.S. Accountably Project Director, International Center or Transition on Justice, New York, New York, statement	125
Massimino, Elisa, Chief Executive Officer and Executive Director of Human Rights First, Washington, D.C., statement	130
Miami Herald, February 23, 2009, article	136
National Religious Campaign Against Torture, Washington, DC: U.S.-Sponsored Torture: A call for a Commission of Inquiry, joint state- ment	138
Religious Leaders call for torture Commission, joint, statement	140
New York Times, March 4, 2009, article	143
Patten, Wendy, Senior Policy Analyst, Open Society Institute, Washington, D.C., statement	147
Physicians for Human Rights, A. Frank Donaghue, Chief Executive Officer, Washington, D.C., statement	149
Pickering, Ambassador Thomas, Vice Chairman, Hills & Company, Inter- national Consultants, Washington, D.C., statement	153
Rabkin, Jeremy A., Professor of Law, George Mason, University School of Law, Arlington, Virginia, statement	157
Rivkin, David B., Baker & Hostetler, LLP, Washington, D.C., statement	162
Schwarz, Frederick A.O., Jr., Chief Counsel, Brennan Center for Justice, New York University School of Law, New York, New York, statement	169
Scripps Howard News Service, February 19, 2009, articles	211
Sessions, William S., former Chief of Government Operations Section, Depart- ment of Justice, Washington, D.C., statement	213
U.S. Intelligence Community, R. James Woolsey, Michael Hayden, James Schlesinger, William Webster, and John Deutch, are all former Director of Central Intelligence, Washington, D.C., joint letter	215
USA Today, February 17, 2009, article	217
Walsh, Joan, March 5, 2009, article	219
Washington Post: February 17, 2009, article	229
November 26, 2008, article	232
Washington Times, March 3, 2009, articles	234

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WEDNESDAY, MARCH 4, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feingold, Whitehouse, Kaufman, Specter, and Cornyn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Thank you all for being here, and a very distinguished panel.

I could not help but think, in the wake of the tragic attacks on September 11th, we all came together as Americans. Party labels meant nothing. Being Americans meant everything. We need to do so again in these difficult economic times. Regrettably, too many seem mesmerized by the siren call of talk radio personalities and extreme special interest groups. And far from grasping the bipartisan hand that President Obama has extended, many want to play out the conservative play book to "obstruct and delay."

This is a time when conservatives, liberals, Republicans, and Democrats should be setting aside party labels to come together, first and foremost, as Americans.

We saw nothing more to damage America's place in the world than the revelation that our great Nation stretched the law and the bounds of executive power to authorize torture and cruel treatment. When the last administration chose this course, it tried to keep its policies and actions secret. I think they did that because they knew they could not withstand the scrutiny of an open public airing. How many times did President Bush go before the world and say that we did not torture and that we acted in accordance with law?

Now, there are some who resist any effort to look back at all; others are fixated only on prosecution, even if it takes all of the next 8 years, or more, and divides this country.

Over the last month, I have suggested a middle ground to get to the truth of what went on during the last several years in a way that invites cooperation. I believe that that might best be accomplished though a nonpartisan commission of inquiry. I would like to see this done in a manner that removes it from partisan politics.

Such a commission of inquiry would shed light on what mistakes were made so that we can learn from these errors and not repeat them, whether in this administration or the next administration.

Today's hearing is to explore that possibility. I am encouraged that many have already embraced this idea, including several of the distinguished witnesses who will testify today. These are witnesses who speak from experience about the need to uncover the truth and shed light on our policies for the good of our Nation, to ensure that we have strong national security policies and to ensure that we do not make repeat mistakes. I look forward to that discussion.

As Supreme Court Justice Anthony Kennedy said in the recent Supreme Court decision restoring the our great writ of habeas corpus, the Constitution is not something that any administration is able "to switch on or off at will." We should not be afraid to look at what we have done or to hold ourselves accountable as we do other nations when they make mistakes. We have to understand that national security means protecting our country by advancing our laws and values and not by discarding them.

This idea for a commission of inquiry is not something to be imposed. Its potential is lost if we do not join together. Today is another opportunity to come forward to find the facts and join, all of us, Republicans and Democrats, in developing a process to reach a mutual understanding of what went wrong and then to learn from it. If one party remains absent or resistant, the opportunity can be lost, and calls for accountability through more traditional means will then become more insistent and compelling.

I held early hearings exploring how our detention policies and practices, from Guantanamo to Abu Ghraib, have seriously eroded fundamental American principles of the rule of law. I think that we are less safe as a result of the mistakes of the last administration's national security policies. I also believe that, in order to restore our moral leadership, we must acknowledge what was done in our name. We cannot turn the page unless we first read the page. I do not want to see us in a case where we are lectured for mistakes we made by countries who themselves have some of the worst and oppressive policies.

President Obama, Attorney General Holder, and others in the new administration are already hard at work on detainee and interrogation policies to determine the best way to form effective and lawful national security policies. I think a commission of inquiry would address the rest of the picture. With a targeted mandate, it could focus on the issues of national security and executive power in the Government's counterterrorism efforts, including the issues of cruel interrogation, extraordinary rendition, and executive override of laws. We have had successful oversight in some areas, but on others we have remained too much in the dark.

People with firsthand knowledge would be invited to come forward and share their experiences and insight, not for the purposes of criminal indictments but to gather the facts. Such a process could involve subpoena powers, and even authority to obtain immunity to secure information, in order to get to the whole truth. Of course, as in any such inquiry, it would be done in consultation

with the Justice Department, and no such inquiry rules out prosecution for perjury.

Vice President Dick Cheney and others from the Bush administration continue to assert that their tactics, including torture, were appropriate and effective. I do not think we should let only one side define history on such important questions. It is important for an independent body to hear these assertions, but also from others, if we are going to make an objective and independent judgment about what happened, and whether it did make our Nation safer or less safe.

Just this week, the Department of Justice released more alarming documents from the Office of Legal Counsel demonstrating the last administration's pinched view of constitutionally protected rights. The memos disregarded the Fourth and First Amendments, justifying warrantless searches, the suppression of free speech, surveillance without warrants, and transferring people to countries known to conduct interrogations that violate human rights. How can anyone suggest that such policies do not deserve a thorough, objective review?

I am encouraged that the Obama administration is moving forward. I am encouraged that a number of the issues we have been stonewalled on before are now becoming public. But how did we get to a point where we were holding a legal U.S. resident for more than 5 years in a military brig without ever bringing charges against him? How did we get to a point where Abu Ghraib happened? How did we get to a point where the U.S. Government tried to make Guantanamo Bay a law-free zone in order to try to deny accountability for our actions? How did we get to a point where our premier intelligence agency, the CIA, destroyed nearly 100 videotapes with evidence of how detainees were being interrogated? How did we get to a point where the White House could say, "If we tell you to do it, even if it breaks the law, it is all right because we are above the law"? How do we make sure it never happens again?

Senator Specter?

**STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM
THE STATE OF PENNSYLVANIA**

Senator SPECTER. Thank you, Mr. Chairman.

I have repeatedly said on the Senate floor that the period from 9/11/2001 to the end of the Bush administration has seen the greatest expansion of executive power in the history of our country. And as Chairman and later Ranking on this Committee and on the Senate floor, I have taken very positive steps to try to deal with that, for example: pressing for judicial review of the Terrorist Surveillance Program; pressing the Sixth Circuit and later the Supreme Court of the United States to review the decision of the Detroit Federal court declaring the Terrorist Surveillance Program unconstitutional; offered amendments on the Senate floor for votes to reinstate habeas corpus in the wake of action to deny habeas corpus; led the fight to eliminate the impact of signing statements to try to provide some balance with the need for the fight against terrorism, which I supported; managing the PATRIOT Act to try to provide some balance.

When this idea of the so-called truth commission first surfaced, I said it was unnecessary because you had a change in administration. You could walk in the front door, ask for directions to the relevant filing cabinet, go in and open the drawer, and find out anything you wanted to know. Well, that has been done, and it is being done to a greater extent.

You have had some rather startling disclosures with the publicity in recent days about unusual, to put it mildly, legal opinions which were issued to justify executive action; very curious use of the doctrine of self-defense. That is a doctrine for justifiable homicide. And it is then stretched to say for defense against potential terrorist attack, the whole range of activities could be undertaken.

Well, they are all being exposed now. They are, in fact, being exposed. According to the New York Times this morning, they are going further than just the exposes, but they are starting to tread on what may disclose criminal conduct. But the Times reports this: "The Office of Professional Responsibility at the Justice Department is examining whether certain political appointees in the Department knowingly signed off on an unreasonable interpretation of the law to provide legal cover for a program sought by...White House officials."

Well, if they did that knowingly, there is mens rea. I would have to search the criminal code. But it sounds to me like it may fall within criminal conduct.

What we do in our society is we undertake those investigations where we lawyers use the word "predicate"—that is, some reason to proceed. We do not go off helter-skelter on a term which has been frequently used—I do not care much for the term, but it articulates a "fishing expedition" as to what we are going to do.

So it seems to me that we really ought to follow regular order here. You have a Department of Justice which is fully capable of doing an investigation. They are not going to pull any punches on the prior administration.

I would ask unanimous consent—I do not often insert things into the record, and this is my first time inserting an article from Politico. But there is one from yesterday's edition which is by a former Justice Department official, Hans A. von Spakovsky, who raises it and succinctly stated that "we have never seriously indulged in criminalizing our political differences"—the point being that the current administration will have a successor; all administrations have successors. I would ask, Mr. Chairman, also to put in this elegant picture of the Chairman, if that can be—

Chairman LEAHY. I could care less about the picture, but, of course, the article will be put in the record. And insofar as it is full of not only ad hominem attacks but more straw men than you would have in a hayloft, I will then put a response to it in the record.

Senator SPECTER. Well, I have seen a lot of pictures of Senator Leahy, few as good as this.

[Laughter.]

Senator SPECTER. Many that I have seen with him, I am in the picture, too, obstructing his handsome profile. But the substance here is, I think, worth noting. We have had the statements by President Obama wanting to look forward and not backward. I

think that is really the generalization, although I would not mind looking backward if there is a reason to do so. There is a predicate if we have evidence of torture. Torture is a violation of our law. Go after them. If there is reason to believe that these Justice Department officials have knowingly given the President's cover for things they know not to be right and sound, go after them.

I think it underscores another issue, if I may say this parenthetically. The Office of Legal Counsel is a powerful office, and some of the opinions that are now disclosed are more than startling. They are shocking. When we look back at prior Presidents, most of them have not been lawyers. President Eisenhower, President Kennedy, President Johnson, President Nixon was—although he did questionable legal things. President Carter was not. President Ford was. Neither President Bush was, and President Clinton was. So you have Presidents taking advice from lawyers where they do not have legal training themselves.

We are considering Office of Legal Counsel today, a very, very important position, and I think what we have seen Office of Legal Counsel do in the past ought to give us pause to do a little better job perhaps in this Committee on whom we confirm.

I regret that I have other commitments. I am going to have to excuse myself, but I hope to return to participate in the questioning.

Thank you, Mr. Chairman.

Chairman LEAHY. I have noticed that Ambassador Pickering also has to leave early because of a commitment out of the area.

Senator Feingold is the Chairman of the Constitution Subcommittee, which has jurisdiction over this matter, and I yield for a brief statement.

Senator Kaufman, why don't you move on down here with us, please?

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Mr. Chairman. I really do regret not being able to stay. I am going to see the British Prime Minister at a joint meeting. But this is a terribly important hearing.

Mr. Chairman, I commend you for having this hearing and for your proposal to establish an independent commission of inquiry. Long before the election, it was clear to me that one of the most important tasks for the new President was going to be restoring the rule of law in this country. I chaired a hearing on this topic in September, and nearly 40 law professors, historians, advocates, and experts testified or submitted testimony, including one of our witnesses today—Mr. Schwarz. The record of that hearing is the most detailed collection of analysis and recommendations on what needs to be done to reverse the most damaging decisions and actions of the last administration.

The Obama administration has already taken several enormously important steps in the right direction, among them ordering the closing of the Guantanamo Bay detention center in a year; requiring adherence to the Army Field Manual's guidance on interrogation techniques; reinstating the presumption in favor of disclosure under the Freedom of Information Act; ending the very possibly il-

legal detention of Ali al-Marri by indicting him in a criminal court; and just last week, releasing nine Office of Legal Counsel memos that the Bush administration had insisted on withholding from Congress and the American people.

So I am pleased and gratified that President Obama and his advisers recognized the need to take these actions and actually took them quickly. It gives me great hope for the future.

A crucial part of restoring the rule of law, in addition, is a detailed accounting of exactly what happened in the last 8 years and how the outgoing administration came to reject or ignore so many of the principles on which this Nation was founded. I regularly hear from my constituents back home about this, and they are absolutely right. There can be no doubt that we must fully understand the mistakes of the past in order to learn from them, address them, and, of course, prevent them from recurring.

At the same time, there should not be a focus on retribution or payback, and such an effort should not be used for partisan purposes. That is why your proposal, Mr. Chairman, is so important. Your proposal is aimed at finding the truth, not settling scores.

On the question of immunity, I think we should tread carefully. There are cases that may require prosecution, and I would not want a commission of inquiry to preclude that. Those who clearly violated the law and can be prosecuted should be prosecuted. On the other hand, the country will really benefit from having as complete a telling of this story as possible. So the ability of the commission to seek immunity for low-level participants certainly needs to be considered. How to do this is one of the complex questions that I hope will be explored in this hearing.

I do support the idea of an independent fact-finding commission as opposed to relying solely on the regular Committee structure. I am on two of the relevant Committees, and the Members of Congress who serve on them are very hard-working. There is much important investigative work that can be done in Committee, but there are also significant time, staffing, and jurisdictional constraints. I think a truth commission, as the Chairman has proposed, is the best way to get the comprehensive story out to the American people and the world.

One final point, Mr. Chairman. While a commission of inquiry is the best way to get the facts out, Congress, the Justice Department, and the public should decide what to do with those facts. So I would be reluctant to task the commission with coming up with detailed recommendations for action. If we focus the commission on gathering the facts, there may be less wrangling about who is going to be on it, which could move the process forward a lot more quickly. I would rather see investigative professionals on this commission than policymakers and partisans.

So I am looking forward to reviewing the testimony later, and, again, Mr. Chairman, I thank you so much for your very strong and important leadership on this issue, and I thank you for the opportunity to make a statement.

Chairman LEAHY. Thank you very much. I know you are one of the Judiciary Committee members who also serves on the Intelligence Committee, and without going publicly into some of the briefings we have all had on that, you understand the need for it.

Our first witness is Ambassador Thomas Pickering, who currently serves as Vice Chairman of Hills & Company. Ambassador Pickering has a distinguished Foreign Service career, including as Under Secretary of State for Political Affairs from 1997 to 2000. The Ambassador holds a personal rank of Career Ambassador. That is the highest in the United States Foreign Service. Prior to becoming Under Secretary, he served as an ambassador to numerous countries, as well as Ambassador to the United Nations under President George H.W. Bush. He won the Distinguished Presidential Award and the Department's Distinguished Service Award. He has received honors from numerous universities. He is a member of the International Institute of Strategic Studies, the Council on Foreign Relations; has a Bachelor's degree cum laude from Bowdoin, a member of Phi Beta Kappa, a Fulbright Scholarship to the University of Melbourne, where he received a second Master's degree.

On a personal basis, I have been briefed in various countries and at the U.N. by Ambassador Pickering, and I hold that as an example to new Ambassadors. When we come there, we actually want to have briefings in depth and in substance. He fulfilled that. We would have public briefings, and then occasionally briefings when we would go into a secure place, one of the bubbles, go into even more depth. In every single instance, he answered every question that was asked by both Republicans and Democrats. He told us what was going right and what was going wrong.

Ambassador, I just want to state publicly how much I have appreciated those briefings over the years. Please, go ahead.

STATEMENT OF THOMAS PICKERING, VICE CHAIRMAN, HILLS & COMPANY, INTERNATIONAL CONSULTANTS, WASHINGTON, D.C.

Ambassador PICKERING. Thank you, Mr. Chairman, very much and thank you for your very kind introduction, and thank you, members of the Committee, for having us here and affording the opportunity to testify on this extremely important subject. I am honored to appear before you today and to join and be a member of this very distinguished panel.

I believe that the question of how we, as Americans, should come to grips with our handling of detainees in recent years is critically important for our country. It is essential to have a full understanding of what happened, why, and the consequences of those actions in order to chart the right course for the future.

I come before you today to urge you to support the establishment of a commission to examine the detention, treatment, and transfer of post-9/11 detainees. In calling on the President to create such a commission, I have joined with a number of others, including a former U.S. Army general, a former FBI Director, the President of the United Church of Christ, and an internationally respected lawyer and scholar, and others who are experts on commissions of this nature. My convinced support for the commission stems from my over 45 years of service to this country in the military, in diplomacy overseas, and as a senior official at the Department of State. I believe that a commission on the handling of detainees is vital to our country's future—to its security, to its standing in the world,

and to our collective commitment as a people to honor, respect, and remain committed to our founding ideals in all that we do. Let me be clear as well that I am not a lawyer and am not qualified to address technical legal questions involving the advice of trained counsel.

I would like to speak first very briefly on the purposes of the commission and then talk about some of its principal features.

A commission of the kind we are proposing is needed in order to arrive at an in-depth, unbiased, and impartial understanding of what happened, how it happened, and the consequences of those actions. By gathering carefully all of the facts, the commission can tell the whole story and not just of each individual agency, studied in isolation, but of how all parts of the U.S. Government interacted in the handling of detainees. Indeed, the interagency aspect is crucial, as is how the various agencies related to the most senior officials in Government. On the basis of this full and comprehensive review, the commission can then make recommendations which will help guide us in the future. This process is fundamentally about understanding where we have been in order to determine the best way forward.

Some might argue that such a commission is not needed. After all, President Obama has issued a series of Executive orders that chart a new course on detention and interrogation policy. As important as these orders are, I believe that something more is needed. It is not enough to say that America is discontinuing the policies and practices of the recent past. We must, as a country, take stock of where we have been and determine what was and is not acceptable, what should not have been done, and what we will never do again. It is my sincere hope that the commission will confront and reject the notion, still powerful in our midst, that these policies were and are a proper choice and that they could be implemented again in the future.

Such a commission will strengthen our credibility in promoting and defending our values and advancing a better and safer world. As the 9/11 Commission found, the United States must engage in the struggle of ideas around the world in order to combat extremism and ultimately to prevail against terrorism. To do that effectively, Mr. Chairman, the Commission found that the U.S. Government—and I am referring to the 9/11 Commission—“should offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors.”

It is far better for American foreign policy if we acknowledge willingly what went right and what went wrong than to address by bits and pieces of the story as they emerge over time this particular question. It is far better for our country and our standing in the world if we examine critically our own record and take account of what happened. To the extent that the Guantanamo detention camp, Abu Ghraib, secret detention sites, and torture and abuse enhance the efforts of our adversaries to recruit others to join their ranks and to make a case against us, we simply cannot quietly turn over the page. We must engage in a genuine effort to take stock of these policies and actions. We ought to acknowledge

mistakes that were made, but we also ought to commit not to do them again.

It is a crucial step in neutralizing our adversaries' narrative about the U.S. abuse of detainees. Only in doing so can we say to ourselves and to the world that we have not just turned the page on the past, but we have confronted it, learned from it, and strengthened our resolve to remain true to our principles. Only great countries, Mr. Chairman, confident in themselves, are prepared to look at their most serious mistakes, to learn from them, and to lead on forward. The United States has been and still is today, I believe, that kind of country.

Let me conclude briefly by just reviewing a few principle features of the commission.

On the question of what a commission should look like, its most important attribute is that it should stand above politics. It should report to and answer to the American people. To achieve this vital purpose, the commission ought to be comprised of persons whose duty is to truth and to our Nation's founding principles.

Second, the commission should operate in public to the maximum extent possible. Public proceedings and reports should be the norm.

Third, the commission should be a separate and distinct process from any investigation or prosecution of unlawful conduct. The establishment of a commission would not, in my view, in any way preclude the possibility of criminal investigation or prosecution, but the purposes of the commission would not be prosecution. That is the job of our national criminal justice system.

Fourth, the commission should have the subpoena power in order to gather and tell the full story of what transpired. I would hope that the President would ensure as well that all Government documents are made readily available to such a commission.

Fifth, and finally, there is the difficult issue of whether the commission should have the power to grant immunity which has engendered and I know will engender a great deal of debate. I am not an expert on this technical legal issue, but I would hope that policymakers would consider it very carefully. Persons who are called upon to testify, I am informed, can invoke their Fifth Amendment rights against self-incrimination. In my view, the commission should not have the power to grant blanket immunity, meaning immunity to all who testify truthfully or full immunity—in effect immunity for what may have been done rather than just for what is being said in the testimony being given. Rather, the commission should grant immunity to witnesses only in very limited circumstances.

Mr. Chairman, I thank you again very much for this opportunity to testify regarding a commission, and I look forward to your questions.

[The prepared statement of Ambassador Pickering appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Ambassador.

Our next witness is Retired Vice Admiral Lee Gunn. Admiral Gunn is now President of the American Security Project, served in the U.S. Navy for 35 years, served as the Inspector General of the Department of the Navy for the last 3 years. His awards include the Distinguished Service Medal, the Defense Superior Service

Medal, six Legions of Merit, two Meritorious Service Medals, the Navy Commendation Medal, Combat Action Ribbon, and, of course, numerous theater and service awards. Admiral Gunn holds a Bachelor's degree from the University of California, Los Angeles, and a Master of Science degree in Operations Research from the Naval Postgraduate School.

Admiral, it is good to have you here. Please go ahead, sir.

STATEMENT OF LEE F. GUNN, VICE ADMIRAL, UNITED STATES NAVY (RET.), AND PRESIDENT, THE AMERICAN SECURITY PROJECT, WASHINGTON, D.C.

Admiral GUNN. Mr. Chairman, thank you very much. It is a pleasure to be a part of this esteemed panel and to have an opportunity to talk about this important issue.

In addition to the other things you mentioned that I am involved in, I have been a member for the last 3-plus years of a group of 49 retired flag and general officers who have spoken extensively on the issue of detainee treatment and its importance both to the men and women in the military and for the men and women in the execution of their duties. I would like to talk a little bit about that and, in doing that, elaborate on the written testimony that I have submitted.

I would like to say at the outset that my views are those of a sailor conveying concerns about the serious problems created for service men and women by choices made in Washington over the last 7 years. So what are those problems?

Strained alliances comes first in my list, and in this day and age, the American military operates by itself almost never in the world. And the importance of being able to work with our allies and our friends cannot be overstressed.

Confusion about detainee treatment, number two on my list, means to me that we have provided unclear guidance—that is, choices made in Washington have resulted in guidance that was not clear, that was in many cases ambiguous, and in some cases was flat wrong about the requirement to treatment detainees humanely and in accordance with international conventions, and the Geneva Convention in particular, and also with American law.

Third on my list is exposure to greater risk of abuse if those soldiers, sailors, airmen, marines, coast guardsmen are captured. No one is going to—we are not kidding ourselves that our opponents, our enemy, will be inclined to treat our people humanely if they fall into enemy hands. On the other hand, it is important that we be able to mobilize international opinion in support of people taken by our enemy and the treatment of them in a humane way.

We have, as Ambassador Pickering mentioned, furnished extremists with recruiting materials extensively, and that is a consequence that we should have envisioned when we made many of the choices about how we were going to act and how we were going to talk about how we acted.

And, finally, in the problems list is that we further damage the reputations of Americans who are working in this new realm of winning hearts and minds and trying to convince people that America has ideals and ideas to which they should subscribe, and we have disadvantaged our military people who have been involved

in that. And I would argue that we have similarly disadvantaged the other members of the American administration, other public servants in that regard as well.

We are not done, and that is why I think that we need a serious inquiry into the way we have behaved for the last 7 years and the kind of orders we have given and decisions we have made. The enemy is still the enemy. The stress on our people, in uniform and out, who are charged with dealing with this enemy will continue. The pressure on our country and on our leaders will remain. And we need to understand the circumstances under which choices were made by leaders in the past in order that we can anticipate those same circumstances or others in the future and avoid making what we consider to be mistakes.

So the question is to me: What has happened to us? What did we do wrong? What did we do right? And I would like to mention that the military examines itself often and in depth. We do that with after-action reviews and hot wash-ups following exercises and operations. We do it with in-depth studies when those are called for. We conduct Uniform Code of Military Justice investigations, as I know you are well aware, Mr. Chairman. And we conduct aviation safety investigations and examinations as well.

The last one is kind of an interesting case in which the testimony seeking the truth and having lives depend on finding the truth in which the testimony is generally firewalled completely from legal proceedings that may eventuate from these investigations.

But whatever the appropriate names, the services together have to find out what happened and be in a better position in the future to provide the kind of clear, unambiguous guidance that is necessary on the pressure-filled front line and in the detainee treatment arena.

The outcome is that soldiers, sailors, marines, airmen, coast guardsmen deserve and require that kind of guidance and those orders. Structure is essential to you when you are under pressure, particularly in combat, and also in the elevated tension of taking care of detainees.

American values have to be our test with regard to the application of those orders and that guidance. We have failed American service men and women over the last 7 years, and we have to stop doing that. We need to do better, and we need to get on with it.

Thank you very much, Mr. Chairman.

[The prepared statement of Admiral Gunn appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Admiral.

The next witness is John Farmer. He is a partner at Arsenault, Whipple, Farmer, Fasset and Azzarello, and former Attorney General of New Jersey. He created the Office of Inspector General and served as a Federal prosecutor; adjunct professor of national security law at Rutgers. He has written extensively on terrorism issues. He previously served as Special Adviser to General Jones regarding Middle East issues. He was senior counsel and team leader for the 9/11 Commission and really led the team in investigating the Government's response to the 9/11 attacks. That included evaluating the response by the various agencies of the executive branch, including the offices of the President and Vice President of the

United States and the Department of Defense. Then he served in a variety of other investigatory commissions. Mr. Farmer received his law degree from Georgetown University Law Center, as did I, and his B.A. from Georgetown University.

Mr. Farmer, glad to have you here.

STATEMENT OF JOHN J. FARMER, JR., PARTNER, ARSENAULT, WHIPPLE, FARMER, FASSET AND AZZARELLO, LLP, CHATHAM, NEW JERSEY

Mr. FARMER. Thank you, Mr. Chairman, and let me echo my colleagues in thanking you and the Committee for the invitation to appear today. Like my colleagues, I have submitted more formal testimony, and my purpose in speaking now is simply to summarize in a more abbreviated fashion what is set forth at length in my formal testimony.

The obvious threshold question facing this Committee is whether an investigation should be conducted of the practices and policies that have been employed concerning detention since 9/11 in our country's struggle against transnational terrorism.

I want to emphasize at the outset that I have a lot of empathy for those who, like President Obama, have expressed a desire to move forward rather than look back. When I was Attorney General in New Jersey, I expressed similar sentiments when my department was under investigation by our State Senate Judiciary Committee. And make no mistake about it. The time devoted to preparation for testimony and responding to such an investigation can be diverting and for a time can disrupt normal operations.

I have come to see, however, that there are some issues that touch so directly upon our identity as a people, that touch so directly upon the values we profess, that no amount of internal bureaucratic review will suffice to allay public concern about the way its Government has been conducting itself. In the absence of public fact finding, people will be left to believe the worst, and the lack of public trust will ultimately undermine any effort to move forward. I have come to believe that our Government's handling of detentions since 9/11 is such an issue. Why? The turning point for me was the convening authority's decision recently that Mohammed al-Qahtani, the alleged 20th hijacker—whom Mohammed Atta had driven to meet at the airport in Orlando Florida, on August 4, 2001, but who was turned away, only to be captured in December 2001 in Afghanistan—could not be tried because of the way he had been treated. She concluded that he had been tortured.

Think about that for a moment. We have now reached a point where the tactics we have adopted in the struggle against terrorism have compromised our ability to respond to the 9/11 conspiracy itself. In my view, that fact calls into question exactly what we have done, to whom, why, when, and on what basis. There are many other alleged examples, but for me the dismissal of charges against al-Qahtani elevates detention to one of those issues that touch so directly upon our identity as Americans that a public accounting of what occurred is necessary.

Assuming that there is eventual agreement on the need for an investigation of detention practices, the next question is what form that investigation should take. One obvious option is a criminal in-

vestigation, either by the Justice Department or by a special prosecutor. This option has limited appeal in this context, in my opinion, for three reasons:

First, prosecutions are necessarily narrowly focused on proving the elements of crimes in specific cases; whatever broader context they provide is incidental to that primary purpose.

Second, in the absence of generally accepted, neutral fact finding, criminal prosecutions by a successive administration may appear to be politically motivated.

And, third, it is not clear that criminal prosecutions will be efficacious in this context; potential targets may well be able to invoke a viable advice-of-counsel defense.

Another option would be congressional hearings. Certainly, Congress is capable of conducting thorough, bipartisan investigations as part of its oversight responsibility of the executive branch. In my view, however, the highly charged politics of congressional hearings on this subject would frustrate any fact-finding effort.

In my view, these considerations argue in favor of establishing an independent body to conduct fact finding with regard to detentions. Such fact finding need not foreclose prosecution in appropriate cases; indeed, it may even serve to identify those cases.

Structuring an investigation into detention policies and practices involves, in my view, four interrelated considerations: composition, scope, powers, and product.

With respect to composition, the commission should be independent and nonpartisan in composition. Bipartisan commissions can reach nonpartisan results; the 9/11 Commission, under the leadership of Governor Kean and Congressman Hamilton, succeeded in that respect. The enabling statute for a commission on detentions should spell out specific professional qualifications that will ensure a nonpartisan composition. The commission should also have a professional staff, a definite timetable for completion of its work, and a budget adequate to its mandate.

Perhaps the most difficult aspect of structuring such an investigation is determining its scope. If the mission is defined too broadly, it may not be achievable, and the breadth of the mission will also drive the potential cost of the project. In the context of detentions, I believe a focus strictly on Guantanamo Bay would be too narrow, while an open-ended mandate to investigate all tactics employed in the war on terror would be much too broad. One limiting principle the Committee might consider would be to link the investigation to the facts and circumstances surrounding detentions carried out pursuant to Congress' resolution of September 2001 authorizing the use of force to respond to the 9/11 attacks.

The scope of the inquiry, once it is determined, will determine what powers the commission will need to employ in conducting its work. Essential to any investigation, in my view, will be the ability of the commission to compel cooperation. Compulsory process is essential; it was vital to the success of the 9/11 Commission, and its lack can be a real handicap. So at a minimum the commission should be given subpoena power.

A trickier problem is whether the commission should be allowed to confer immunity in order to obtain testimony from witnesses who might otherwise assert their Fifth Amendment privilege

against self-incrimination. Given the extremely fact-sensitive nature of this inquiry, where individual exposure may be an issue in every case of alleged abuse, some form of limited immunity may be essential. The issue must be handled with care, however, as the grant of even limited testimonial immunity may jeopardize a current or future prosecution. That is a potential tradeoff that must be considered by the Committee in forming the commission.

Finally, with respect to the product, the enabling legislation should also set forth the expected end product of the investigation. The 9/11 Commission was given a broad charge to investigate the facts and circumstances surrounding the attacks, but also to formulate recommendations based on those findings. In my view, such a broad mandate would be appropriate to the detention context we are talking about. I believe that the commission should be charged simply with writing a report setting forth the facts and circumstances surrounding the practices and policies relating to detentions carried out in the war on terror. Although the commission would be completely separate from any criminal investigation, it should have the power to refer appropriate cases, if it finds them, to the Justice Department for potential prosecution. To the extent possible, the report should be a strictly fact-based narrative, and the report should state the evidentiary bases for the factual conclusions it reaches to the extent consistent with national security interests.

Once the facts are known, legislators and policymakers can debate the broader implications of these facts and move forward with a clear understanding of where we have been and what we have done.

I look forward to answering any questions you may have and to working with you to address these difficult issues in the future. Thank you.

[The prepared statement of Mr. Farmer appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Farmer.

Frederick Schwarz, Professor Schwarz, is Chief Counsel at the Brennan Center for Justice at the New York University Law School. In his legal career, he has combined a high level of private practice at Cravath, Swaine & Moore, with a series of critically important public service assignments. Mr. Schwarz served as Chief Counsel of the Church Committee. That is about the time when I came to the Senate and, I think, when we first met. He has also served as Chief Counsel to the Senate Select Committee on Intelligence. He chairs the board of the Vera Institute of Justice, recently received the Gold Medal Award for Distinguished Service in the Law from the New York State Bar Association. He received an A.B. magna cum laude from Harvard University, his law degree from Harvard Law School, where he was editor of the Law Review.

Professor Schwarz, it is always good to see you here. Please go ahead, sir.

STATEMENT OF FREDERICK A. O. SCHWARZ, JR., CHIEF COUNSEL, BRENNAN CENTER FOR JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. SCHWARZ. That was quite a few years ago when we first met.

Chairman LEAHY. It was. I actually had hair back then, and it was a little bit darker.

[Laughter.]

Mr. SCHWARZ. And I had solid black hair back then, too. Thank you for convening this hearing. Thank you for your proposal for the commission, which I support.

How wisely to handle counterterrorism is an ongoing issue for our Nation's future. How to handle counterterrorism is too important to sweep the past under the rug. The public, and not merely insiders, need to understand what has happened. Those who do not understand errors of the past are condemned to repeat them, and surely will.

We all want to move forward wisely, but it is not possible wisely to move forward unless we fully understand what we have done.

The first step must be to know all the facts. Beyond basic facts, we need to know: how were decisions made; who was consulted and who was not consulted. We also need to know beyond the basic facts what were the consequences of our actions. And we need to know beyond the basic facts what are the root causes of having gone down a path that was inconsistent with our values and seems to have broken the law. I would put excessive governmental secrecy and limited oversight as among the most important root causes.

I personally believe and have testified before that our descent into tactics like torture abandoned the rule of law and undermined American values and that doing so made us less safe. That thesis needs to be tested, for if it is true, it is surely important to our country and its public, as we consider what to do when there is another terrorist attack in this country, as there surely will be—hopefully not as horrible as the one before. But we surely will get it, and we have to make sure that the next time we do not make mistakes of the sort that seem to have been made in the prior years.

Now, the benefits of a nonpartisan commission of inquiry which you have proposed go far beyond understanding the facts. Such a commission can help bring all Americans together, because, after all, issues like belief in the rule of law, issues like understanding and appreciating the basic American values do not divide the parties in this country. So a commission that proceeds fairly and is nonpartisan actually can help to bring our country together.

And, second, a commission that investigates the facts, puts forward a report that tells the country and tells the world what has happened, admits to mistakes when we have made mistakes, praises things that we did well when we did them well, that commission and its hearing and its report can help restore America's reputation in the world and, thus, increase our strength and, thus, make us more safe.

The bottom line is we owe it to ourselves and to our country to learn the facts about our Government's counterterrorism policies. We know that abuses may have occurred and that the perception of these abuses has undermined our standing in the world and our fight for the hearts and minds of those who could be persuaded to do us harm. We must not flinch from learning the truth. That is the only way to stay true to our principles, to correct our course, and to restore our moral standing in the eyes of the world. That in turn will make us safer and stronger. For as has been true

throughout our more than 200 years of history, America is at its best when we confront our mistakes and resolve not to repeat them. If we do not confront our mistakes, we will decline. But if we do—as this commission can help us do—our future will be worthy of the best of our past.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Schwarz appears as a submission for the record.]

Chairman LEAHY. Thank you very, very much, Mr. Schwarz.

Our next witness is David Rivkin. He is a partner at Baker & Hostetler. Mr. Rivkin served in the Department of Justice and the White House during the Reagan and George H.W. Bush administrations. He has practiced in the area of public and international law. He is experienced in international arbitration, policy advocacy, and a wide range of issues. He has testified before this Committee before. He is a member of the Council on Foreign Relations. He has published numerous papers and articles on a variety of legal, foreign policy, and other issues. He received his law degree from Columbia University School of Law, his M.A. in Soviet Affairs from Georgetown University. He has written op-ed pieces saying why my idea is terrible.

So, Mr. Rivkin, welcome.

[Laughter.]

**STATEMENT OF DAVID B. RIVKIN, JR., BAKER & HOSTETLER,
LLP, WASHINGTON, D.C.**

Mr. RIVKIN. Mr. Chairman, members of the Committee, thank you very much. I would not use the word “terrible,” of course. I would be much more judicious. But I am pleased to appear before you and testify as part of a distinguished panel. I do believe, however, that a commission of whatever variety to investigate the Bush administration activities and its officials is a profoundly bad idea, a dangerous idea, both for policy but, even more importantly to me as a lawyer, for legal and constitutional reasons.

Now, there is nothing wrong, of course, with creating “blue ribbon” commissions, provided they exercise constitutionally-appropriate responsibilities. And on its face, the proposed commission to investigate the Bush administration appears advisory and geared toward policy review. In my view, however, many of its advocates express much more.

In this regard, I am somewhat discouraged by the ongoing discourse about the intent and purpose of this commission. Far from seeking to establish a body to make recommendations on policy, as was the case, for example, with the 9/11 Commission, most commission supporters clearly want to establish a body that would engage in what would in essence be the criminal investigation of the former Bush administration. Their desire to target a relatively small number of the former Bush administration’s most senior lawyers and policymakers is not concealed. The fact that the subject matter areas which the commission would investigate—among them are the interrogation and handling of captured enemy combatants and some people all suggest the gathering of electronic intelligence—are heavily regulated by comprehensive Federal criminal statutes ensures that the commission’s activities would inevi-

tably involve areas that are traditionally the responsibility of the Department of Justice. Congress, of course, can also constitutionally properly delve into these matters as a part of its oversight and legislative activities. The proposed commission, I submit to you, cannot.

Let's recall that the power to investigate and bring criminal charges against individuals is the Government's most formidable domestic power. As such, it is heavily circumscribed by the Constitution and Federal statutes. In my view, any effort to outsource any aspects of this power to entities operating outside of the structure of Government established by our Constitution is extremely troubling and must be strongly resisted by all who are concerned with protecting the Constitution's fabric.

The very decision to initiate what amounts to a criminal investigation, whether or not it is formally designated as such, is too weighty to be outsourced to commissions operating outside of the constitutionally prescribed tripartite framework of our National Government. In this regard, I would like to remind the Committee of the strident criticism which attended the alleged loosening, by the FBI during the Bush administration, of the threshold determinations that had to be made before national security investigations were commenced. I also vividly recall the indignation which attended the claims that the Bush administration's Justice Department may have been seeking to investigate Democrat-leaning groups and elected Democrat officials at the Federal and State level for election fraud and other alleged election offenses. In all candor, I fail to see why having Congress task a group of private citizens to investigate former Bush administration officials does not implicate exactly the same, if not far greater, civil liberty concerns. The fact that a number of people targeted for investigation is quite small potentially makes the commission's threat to civil liberties all the more acute.

Let's also reflect briefly on how the proposed commission might operate. In order to compel people to testify, such a commission would have to possess subpoena power, which it, presumably, would have to go to court to enforce in particular cases. Given the vague nature of the commission's responsibilities, as well as its blending of law enforcement and policy investigations, I find it difficult to imagine how the Federal judiciary would meaningfully police such subpoena requests.

There is also the question of how to balance the constitutionally protected interests of the commission's targets, for example, their Fifth Amendment protection against self-incrimination, with its desire to get information. I am not clear, by the way, how an entity that is neither executive nor legislative could grant immunity all on its own such that it would be respected in the future by Federal and even State law enforcement officials.

To the extent that grants of immunity, including the specific parameters of the immunized testimony, would have to be approved by the executive branch, here again I am troubled by the difficulty of coming up with a mechanism for meaningful review, as distinct from a rubber stamp.

And then there is the question of how the commission would protect the privacy interests of its targets. The commission would go

about quite publicly what are essentially law enforcement investigatory functions, which are typically held (despite some inevitable and unfortunate leaks) confidential by the Department of Justice, in a non-public manner.

Now, even setting aside the constitutional concerns—and there are several more—raised by charging a commission with the discharge of what are really law enforcement responsibilities, there is another large problem that looms, in my view. It is important to recognize that the commission's most deleterious and dangerous impact would be to greatly increase the likelihood of former senior U.S. Government officials being tried overseas, whether in courts of foreign nations or before international tribunals. And the reason for it is because the matters to be investigated by the commission implicate not only U.S. criminal statutes but also international law, and which are arguably subject to claims of "universal jurisdiction" by foreign states. I have no doubt that foreign prosecutors would eagerly seize upon a supposedly "advisory" determination that criminal conduct occurred, especially if it is the only "authoritative" statement on the subject by an official U.S. body as a pretext to commence investigations and bring charges against former Government officials. If they were clever—and most of them are—they would argue that the mere fact that the commission was established vividly demonstrates that grave crimes must have occurred and interpret the U.S.' non-prosecution of the individuals concerned through formal prosecutorial channels as a mere technicality to be repaired by their own broad assertions of jurisdiction.

Indeed, in my view, all of these circumstances appear to be tailor-made to support the invocation of universal jurisdiction by foreign judicial bodies as the basis to launch prosecutions of Bush administration officials.

Let me close by pointing out a great and perhaps unintended irony. Much of the anger about the Bush administration's war on terror policies has been focused on its treatment of captured alien enemy combatants and especially its rendition policy. It would be rather sad, in my view, that in an effort to "investigate" these matters, the proponents of a commission pay no heed to the civil liberties of Americans and are perfectly happy to outsource law enforcement functions to private entities, and are even willing to practice a soft form of rendition, and virtually inviting foreign courts to go after American citizens. I would respectfully suggest that this is a very bad way to proceed.

Thank you.

[The prepared statement of Mr. Rivkin appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Rivkin.

Jeremy Rabkin is a professor of law at George Mason University School of Law. Prior to that, he was a professor at Cornell. He is an international law scholar. He was recently confirmed as a member of the Board of Directors for the United States Institute of Peace. Professor Rabkin has written numerous chapters and book articles in academic journals and essays. Professor Rabkin teaches courses on both constitutional and international law as a Ph.D. from the Department of Government at Harvard. He graduated summa cum laude from Cornell University.

Mr. Rabkin, Professor Rabkin, welcome, and go ahead. Press that little red button. There you go.

**STATEMENT OF JEREMY A. RABKIN, PROFESSOR OF LAW,
GEORGE MASON UNIVERSITY SCHOOL OF LAW, ARLINGTON,
VIRGINIA**

Mr. RABKIN. Thank you. I also will try to avoid simply repeating what was in my written statement and take advantage of being the last speaker here.

Chairman LEAHY. The whole statement will be made part of the record, of course, and also the transcript will stay open after the hearing is over, and if you see things you wish to add to it, we are not playing "gotcha" here. We want to learn from this, and it will be kept open for that.

Mr. RABKIN. Thank you.

I want to start by talking about the context of this which I think nobody has mentioned and it is rather important. Last summer, the first time I met Mr. Schwarz, there was a hearing of the House Judiciary Committee which was called a "pre-impeachment hearing," and there were a lot of serious people, including some Members of Congress, who said even in the last months of the Bush administration, "even though Bush will be leaving office soon anyway, we have to have an impeachment because what the Bush administration did was not just regrettable, deplorable, mistaken, but high crimes and misdemeanors." A lot of people are still revved up with indignation. Just go on the Internet. We can find this in published columns, too. People say the Bush administration was "guilty of war crimes," they are in the same category as "notorious war criminals of foreign countries."

Now, I think that is just wildly exaggerated and really inappropriate, but a lot of people feel that way. If you say we are going to have a truth commission, people immediately think, "Oh, yes, that is what is done with war criminals when you cannot prosecute them." So that is the first point I want to get everyone to focus on.

I do not think it is sufficient for Senator Leahy or Senator Feingold to say, "Well, I view it in a more moderate way." I think this will be taken as ratifying the backroom view that, yes, these were extraordinary crimes—

Chairman LEAHY. Without disagreeing with you, I have had something like 65,000 e-mails. I have yet to have one single e-mail suggest that we are doing this as a war criminal thing. I am not suggesting you are putting up a straw man here, but please feel free to—

Mr. RABKIN. Could I just say we seem to have different e-mail lists? When I said at that hearing last summer, "Come on now, let's not be crazy," I got not 60,000 but hundreds of people saying, "I saw you on C-SPAN, and I am not crazy, and he is a war criminal and he should be tried." A lot of people feel very vehemently about this.

If you say "truth commission," people immediately think about these famous—the Truth and Reconciliation Commission in South Africa, the Commission on Truth and Reconciliation in Chile. We are not in remotely that situation. In those countries, they had to have these commissions because they could not have prosecutions,

and they could not have prosecutions because the countries were so deeply divided and they had made promises in order to secure a peaceful transition. Peace was really in doubt in those countries, so they had to back off of prosecution and say, "Well, we will have a truth commission instead." We are not in that situation. If people think that there should be prosecutions, well, then, there can be prosecutions.

I want also to just focus attention on this. The experience of those truth commissions in other countries, they had some success—I think they had considerable success in focusing on narrow factual questions. One of the really important achievements of the Chilean truth commission was just to get an accounting. A lot of people had disappeared. What happened to them? And they were able to come up with a list. And they were also able to establish a number which got to be generally accepted, about 2,000 victims of political killings. That was very helpful to come up with a number, names, some information about them.

I do not think that is at all what we are talking about here. I heard Mr. Schwarz say—and I am talking about Mr. Schwarz because I think he is very thoughtful. Mr. Schwarz said it is not enough to get the facts. We also have to know the root causes, and we also have to test the theory that this has made us less safe. We should all think about what that involves.

To say that we have been made less safe is to make an assessment which we are going to put out through the country as authoritative that, let's say, "The world reacted to our torture and that made us less safe, and that is not offset by information which we gained." How could a commission determine this? And why would people accept that because the commissioners said it, it was true? And if you can do it for debates about Bush policy in regard to detention, why not for every act of every Presidential administration?

Secretary Clinton is now going to talk to Iranian representatives, is what I hear, and she is talking to people in the Government of Syria. Is that making us safer or less safe? Maybe it is making us less safe because it is implying weakness. Why don't we have an independent commission to assess that? I do not think that is silly, but I think it is really a bad idea, and I think we are going down this road now of saying if there is enough controversy and it is sufficiently intense controversy, we have an outside commission which purports to tell us authoritatively what it all means and what were the causes and what were the consequences. And we cannot do that. That is not a substitute for people making political arguments which can be responded to politically.

I want to say just briefly in conclusion, I share many of the concerns of my colleague and friend here, David Rivkin. If we go into this with the notion that this is a substitute for criminal trials, you are authorizing this commission to paint particular individuals in the Government as if they had somehow done something analogous to war crimes, something which undermines our values as Americans, something which threatens our identity as Americans, as was said.

This is a pretty serious charge. Do these people get to defend themselves? I mean, I am sure they get to show up, but none of this would be tested before an ordinary criminal process. You will

have some people, maybe well-meaning people, write a report saying, "I think what John Yoo did has undermined our safety." And I just think we should not be authorizing people to make categorical judgments like that on behalf of the American people where you are naming names and shaming people, and they do not get a chance to defend themselves before a jury. That is not, I do not think, a category that we should bring into our country. That is something they had to do in totally traumatized countries which could not have criminal process, and we are not in that situation.

Thank you.

[The prepared statement of Mr. Rabkin appears as a submission for the record.]

Chairman LEAHY. Thank you. I appreciate your testimony, but I must say, as I have said before—and you will have plenty of time to respond—that most haylofts I have been to in Vermont could not make the number of straw men that you and Mr. Rivkin have brought up. But we will—I know Senator Cornyn wants to ask you questions, and what I am going to do is begin, and you will be given plenty of time to respond to that. But I hear your talking about hearings that apparently you were at, I was not at, and they were not the hearings we are holding here.

Ambassador Pickering is going to have to leave. I wanted to ask him first: During your tenure—and I will make absolutely sure, Mr. Rabkin, you have plenty of time to respond on that.

Ambassador Pickering, 45 years as Foreign Service officer, all over the world, you have negotiated with other countries. You have worked to implement American foreign policy. What impact do you think the Bush administration detainee policies had on our foreign policy and on our national security?

Ambassador PICKERING. Thank you, Mr. Chairman. I have thought a lot about it. As you can see in my prepared testimony, I listed a number of results of that. I think it is hard to contest the view that public opinion about the United States, not just in the Muslim and Islamic world but around the world, has fallen to a new low. I do not have the polling data in front of me, but I think we are all familiar with the polling data. And it is not just one poll; it is numerous polls.

I think the second point to make and drive home is that this, in my view, provided a sense of ire, a sense of disturbance, a sense of deep concern among many people who began by not liking the United States, and so it heightened that. Whether that resulted in recruitment of new people to al Qaeda, to the Taliban, to other organizations that are in arms against the United States is hard for me to tell in a specific sense, but I think it is not totally irrelevant to that point; that, indeed, individuals who were—and we have seen many anecdotal histories of this. Parts of the Abu Ghraib tape and pictures were, I think, deeply offensive-offended because of the cultural insensitivity, offended because of the use of force, offended because of all aspects of the treatment.

So it is, in my view, a serious and real and major point that this certainly contributed to extreme anti-Americanism and probably was one of those things that helped recruit people to take up arms and to act violently against the United States.

Chairman LEAHY. If the United States is seen as doing an open and honest review of what happened, setting up policies if we find that we did not follow our own laws and our own policies, to make it very clear mistakes would not be made in the future, does that help or hurt us around the world?

Ambassador PICKERING. I do not know that we are going to convince the most extreme people oriented against us merely because we have done this. But I think a lot of people who are sitting on the fence who have admired the United States over the years, who were deeply disturbed by what they saw the United States was doing, which was so seemingly out of character with our background, our past leadership, and our principles, would certainly be, I think, moved.

As I said in my statement, great countries do not often go into deep introspection about their problems and the difficulties and, indeed, then move to cure them. But, in my view, that is the essence of rational action, and it is the essence, Mr. Chairman, I think, of what Admiral Gunn said about how the Navy behaves under difficult circumstances. I spent some time in the Navy as well. I admire people who are prepared to look carefully at their mistakes and to rectify them, and I suspect that that is a widely held belief around the world, and I suspect that people expect nothing less of the United States.

Chairman LEAHY. We actually saw something interesting in the news this morning about a tragic plane crash out on the West Coast of marines and the review that was made of the mistakes that occurred there.

Mr. Farmer, I get the impression from your testimony, when you spoke of al-Qahtani, the man who has been referred to as "the 20th hijacker" and the fact that he could not be prosecuted because of the national security policies of the last administration, I got the impression that that was the turning point for you. If so, what do you believe would be the benefit of a review such as what I have suggested in this inquiry?

Mr. FARMER. Well, as I said in my testimony, the fact that the tactics that we have employed are now making it difficult to deal with the 9/11 conspiracy itself to me simply raises the question of, you know, how did we get here; what was done specifically by whom, to whom, on what justification. And as I said, as a former head of a major State department, I appreciate the need to move forward and the disruption that investigation may cause. But, in my judgment, a serious compromise of our ability to deal with the 9/11 conspiracy itself elevates the detention issue to the point that an independent investigation is warranted.

Chairman LEAHY. Thank you. My time is up. I will come back with further questions.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Mr. Chairman, I would ask unanimous consent to introduce several op-eds and letters in opposition into the record. The authors are James Woolsey, William Webster, Michael Hayden, John Deutsch, James Schlesinger—all former Directors of the CIA.

Chairman LEAHY. Thank you, and I will also introduce—actually, we will keep the record open for this because, of course, there are

equally impressive people who take an opposite view, and those letters will also be placed in the record. But both pro and con, the record will stay open for 24 hours for any such letters.

Senator CORNYN. Mr. Chairman, I thank you for having this hearing. I am on record as saying that the idea of creating an independent—and I am not sure how independent it would actually be—unaccountable truth commission is a bad idea, with all due respect. And the suggestion that this subject can be delved into somehow in a nonpartisan fashion to me asks us to suspend our power of disbelief, those who have worked here over the last 6 years, in my case, and ignore the fact that we have already had 150 oversight hearings on these subjects, we have logged more than 320 hours of witness testimony in unclassified settings, transcribed more than 3,200 pages of witness testimony, and printed more than 17,000 pages of unclassified, publicly available reports. And to me the idea that this so-called truth commission would somehow resolve the good-faith disagreements that I think many of us have had and that have divided the country over this subject is, I think, just asking us to believe in the tooth fairy, that somehow this is going to settle the score.

Let me just give you one example. In a statement accompanying the Senate Armed Services Committee's release of the December 2008 report on terrorist detainee treatment, the Levin report, Chairman Levin noted that, "In the course of its more than 18-month-long investigation, the Committee reviewed hundreds of thousands of documents and conducted extensive interviews with more than 70 individuals." The unclassified Executive Summary of the Levin report totals 19 pages and includes the same number of conclusions.

I disagree with those conclusions, but I certainly do not believe a truth commission is necessary to somehow arbitrate the differences between me and the Levin report.

So I think, with all due respect, again, I think seeking this commission is, in fact, an indictment of congressional oversight responsibilities—not that I think Congress has failed, because we have, as I indicated, extensively inquired into these matters. Congress has legislated, with the Detainee Act, with the Military Commissions Act, in response to Supreme Court opinions and otherwise. And so I am just not willing to join in the acknowledgment of failure of Congress performing its vigorous oversight responsibilities, which I think creation of such a commission would amount to.

Mr. Schwarz, I recently re-read Jack Goldsmith's book, "The Terror Presidency," and in there he said that the Church and Pike investigations of the 1970s and the Iran-contra scandal in the 1980s taught the intelligence community to worry about what the 1996 Council on Foreign Relations study decried as "retroactive discipline," the idea that no matter how much political and legal support an intelligence operative gets before engaging in aggressive actions that he or she will be punished after the fact by a different set of rules created in a different political environment.

Are you concerned about the possibility of this retroactive discipline and the unfairness of changing the rules of the road after the fact and its impact on our intelligence officials who may be per-

sualed that maybe more passivity is to be embraced as opposed to aggressive gathering of actual intelligence?

Mr. SCHWARZ. I do not personally believe that CIA operatives ought to be accused or brought before a criminal court. I think they acted in good faith because they had legal opinions which said what they were doing was OK, and because their bosses high up in the Government told them to do what they did.

Now, turning to the actual record of the Church Committee, the Director of the CIA said that what we had done by bringing the intelligence services into the realm of the law, instead of being outside of the realm of the law, helped the intelligence services, and the General Counsel of the CIA, the famous General Counsel Lawrence Houston, said that the conduct of Congress before the Church Committee in turning a blind eye to what was going on actually harmed the intelligence services.

Moreover, the Church Committee in its recommendations way back in 1976 said this country should start paying more attention to terrorism. Way ahead of its time.

So the people who said the Senate investigation had anything to do with injuring as opposed to strengthening our intelligence services were flat wrong.

Senator CORNYN. Well, you disagree with them.

Mr. SCHWARZ. No. They were wrong. I mean, the—I will give you one—

Senator CORNYN. Well, do not—excuse me, Mr. Schwarz. So you disagree with Mr. Goldsmith's statement that the Church and Pike investigations resulted in what the Council on Foreign Relations study in 1996 called "retroactive discipline." You disagree with that.

Mr. SCHWARZ. The Pike investigation was not handled as well as the Church investigation, and the—

Senator CORNYN. Well, would you answer my question? Do you disagree—

Mr. SCHWARZ. Of course, I disagree with that.

Senator CORNYN. Okay. I appreciate that you disagree, but—

Chairman LEAHY. Senator Cornyn—

Senator CORNYN.—to say that it was flat wrong is a statement of your opinion and not necessarily fact.

Chairman LEAHY. Senator Cornyn, I do not mean to cut you off, but I kept to the 5 minutes myself. I let you go over time. But just simply because we want to finish so Ambassador Pickering can leave, and I wanted to have Senator Whitehouse, who has been here through the whole hearing, have a chance. Certainly I will go back to you if you have further questions.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

First of all, let me thank you for your leadership in holding this hearing. There are very, very important questions that have been raised and discussed here today, and you have assembled an extremely distinguished panel of witnesses here to help us consider them. I appreciate it very much.

As the son and grandson of Foreign Service officers, I have some idea of what a Career Ambassador is, and so, Ambassador Pickering, first let me thank you for your extremely distinguished service to our Nation over many years, both in the military and in our

Foreign Service. I would like to ask you first, because I know you have obligations elsewhere—and anybody else can chime in if they wish—the following question.

We do not know yet what was done, and there has been considerable sentiment expressed by several of the witnesses here that it is in our interest for a whole variety of reasons—because it helps define who we are as a Nation, because it rebuilds our credibility and our relationships abroad, because it is a return to the rule of law, and so forth; that it is distinctly in the public interest for this information to come out.

Let me ask you if you think there is a point where the conduct in question was so abhorrent to decent and civilized people in America and around the world that at that point the public interest that you have described reverses itself. And at some point if it is awful enough, does it become in our public interest as a Nation to try to keep this swept under the rug or, to use Mr. Schwarz's phrase that "we must not flinch," must we not flinch irrespective of how painful this view will be for our country? Ambassador Pickering?

Ambassador PICKERING. Thank you, Senator Whitehouse. Thank you for your kind comments, and I had the privilege and honor of working with your father.

My answer to your question is a very simple no. I do not believe that any degree of abhorrence, any degree of violation of values, principles, trust, laws, should be swept under the rug because it is so devastating for the reputation of the United States that it must be kept secret. In fact, the laws on secrecy do not provide for that in the first place.

Second, it does not, in my view, hold water to believe that anything quite so notorious will ever remain secret in this town or in this country or in this world.

And, third, if indeed it took place and was of such character as to put it into that category, then it is the duty and, indeed, the requirement of all branches of the U.S. Government to do everything in their power to make sure that it never happens again, which is the major purpose for the commission that I support and the major purpose for my being here to try to support that type of commission.

Senator WHITEHOUSE. Thank you, Ambassador Pickering.

Attorney General Farmer, you and I were Attorneys General together. I am delighted to see you here with us, and I appreciate very much your distinguished career of public service.

The issue that a commission is going to face, as a former prosecutor—and the Chairman is a former prosecutor, Senator Cornyn was Attorney General with all of us also. It is sort of a little reunion here today. There are obviously some hindrances to a prosecution based on this conduct. Reliance on the legal opinions of the OLC is one. Some sort of theory of equitable estoppel might be another. What reliance did to intent might be another. But in each of those areas, they are of limited protection.

For instance, a mobster cannot paper over a racketeering conspiracy with his mob lawyer saying this is a legitimate business and make the risk of prosecution go away. The doctrine of equitable estoppel is disfavored against the Federal Government, al-

most never applied, "rigid and sparing" I think is the phrase used about when its application is permitted. And intent obviously, as we all know, is a question of fact, which is determined by the ultimate fact finder. So immunity is going to become a significant question, I think, in this.

Should we try to build into—assuming that the commission should have some immunity—and I think most of the witnesses agree, if they think there should be such a one, that it should have power to grant immunity. How should the relationship between the commission and prosecutors be described in any legislation that might establish such a committee? Should they be required to coordinate with the Department of Justice? Should they be required to obtain the sign-off from the Attorney General before they grant immunity?

You wanted to kind of steer clear of an active prosecution, not just on the question of immunity but on the question of not trampling the prosecutive strategy of the Department of Justice. How would you work that?

Mr. FARMER. I think the issue of immunity is one that will be driven by the previous issue, which is what is the scope of the investigation going to be. And I think that is really, I think, the toughest issue that the Committee has to address. If the mission is drawn too broadly—and I would argue if it is drawn so broadly that it captures issues such as did these tactics make us less safe, as opposed to simply finding what the facts are, I think the commission will lose credibility because you will end up having to prove a negative.

But assuming that the mission and the scope of the mission as defined by the Committee does have the commission focusing on individual cases, it seems to me that immunity is going to be an issue that has to be dealt with, and my suggestion would be that some form of coordination with the Justice Department would be appropriate. What the specifics of that coordination would be would depend, again, on how the scope of the commission's job is defined.

Chairman LEAHY. Thank you.

Ambassador Pickering, I want to keep to our commitment and please feel free to leave, sir.

Ambassador PICKERING. Thank you.

Chairman LEAHY. On the immunity, Mr. Schwarz, to follow up a little bit on the question you were asked before, you noted in your testimony the Church Committee had the authority to grant immunity, but uncovered a great deal of illegal activity without ever exercising that authority. Am I sort of stating your testimony correctly?

Mr. SCHWARZ. Yes, you are. We had hundreds of witnesses. Many of them admitted to acts that could have led to prosecution. Nobody asked for immunity. We had one witness who would only testify with a bag over his face because he had been an informer and did not want to—

Chairman LEAHY. I remember that one.

Mr. SCHWARZ. Yes. But nobody asked for immunity, and I do not know quite why. I think high-level people do not want to, and low-level people, I think they understand they are not going to be prosecuted. And, frankly, I think it might be in the public interest for

the Justice Department pretty quickly to come to a conclusion now about low-level people.

I personally—again, I want to say what I said to Senator Cornyn. I do not think we should think about prosecuting CIA agents. I think that is going to turn out to be inappropriate, and if it were taken off the table early, that would be a good thing, too.

Chairman LEAHY. What I have found in some of the investigations that have taken place in the past, boy, we are going to get those corporals and sergeants, but we do not go above. And I really am always worried that in such an investigation there is an effort to go after what are really the minor players. And I think the Justice Department—I know they are working on just the issue you raise. And I am more concerned about those who made the decisions or the policies to basically say if the White House gives a directive to break the law, you are not breaking the law. From a prosecutor's point of view, it is awfully hard to say how you go after the person who then broke the law. But I would like to know why we had people who felt that somehow a President could be above the law.

We saw what happened when a former President years ago, prior to my being in the Senate, said if the President does it, it is not breaking the law, and the reaction of this country by both Republicans and Democrats against such a thing, and the statement of any of us, including the three of us on the other side of this table, know, having been prosecutors, we do not have any provisions in our Constitution that puts some people, elected or otherwise, above the law. None of us are.

Admiral GUNN, I discussed the damage to America's laws and values and to this country's image abroad. You have expressed similar sentiments, but you have a different perspective. You are a long-time military officer. You commanded ships. You were in the field. You were in combat. You led large numbers of military men and women. But you were also the Inspector General, so you have kind of seen it from all angles in the military.

Based on your experience and expertise, what do you believe has been the effect of the past administration's justification of torture and other abusive treatment on this country's strategic and national security interests?

Admiral GUNN. I would have to refrain from spreading my experience too broadly in my answer to this, but—

Chairman LEAHY. Well, let's put it this way: on the military morale and the safety of our military men and women. That stays well within your frame of reference. What about there?

Admiral GUNN. Yes, sir, and I think the effect there has been profound. We have depended over the years on important alliances, military relationships, for decades. In my personal experience, members of the United States military have invested their own time and credibility and building relationships around the world with the militaries of other countries. I was thinking, as you were asking the question, about the relationship that I established while I was on active duty as a consequence of having certain jobs with the naval attaches who represent countries around the world of great importance to the United States, allies and friends. And when those attaches return to their home countries, there are no

more solid advocates of American military positions and there are no better fans of American values and how those are translated into the way we do business than those people are who go back to responsible positions in their governments.

I cannot think of a one with whom I have stayed in contact who has not told me over the last 6 or 7 years how difficult it is in his or her country to be a friend of America. And that, I think, sows the seeds of a serious problem that has to be overcome.

In terms of the effect on the people at the point of capture, when detainees are taken, the folks who are charged in the high-pressure cauldron of dealing with detainees once they are within the custody of the United States, those kinds of high-pressure environments in which we ask young Americans to do their duty require, in my view—and I think in the view of most military officers—that there be this clear, unambiguous set of guidelines.

What is more, young Americans do not join the military with the idea that they are going to be asked to violate their own principles and the principles of their country. And my personal view is that the things they were asked to do or allowed to do, whether they were in uniform, whether they were military people or who were in the CIA, violated their own principles in a way that has added dramatically to their stress and caused them to suffer many of the same kinds of consequences personally that people who have been involved in street combat have suffered under.

Chairman LEAHY. My youngest son is a former marine, and we have talked about this at great length. And without putting him on the spot, he said exactly the same thing. It was drilled into him—a lot of things were drilled into him in his basic training, but that was one of the things—and, again, when he was preparing to be deployed for Desert Storm.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Mr. Rivkin, Admiral Gunn suggests that when it comes to the product of a truth commission, that such a truth commission, its byproduct will actually improve cooperation between us and our allies when it comes to gathering and sharing intelligence and defeating a common enemy when it comes to Islamic extremism. Do you agree that such a commission would improve intelligence cooperation among allies? Or do you think it is more likely to make our foreign allies more skittish when it comes to these matters?

Mr. RIVKIN. I think it is the latter. I do not see how going through another self-referential and self-absorbed exercise that would not lead to any kind of national consensus but basically would dwell at great length on our alleged sins would improve our relations with our allies and, by the way, we are all entitled to our opinions, but I fundamentally disagree with the narrative that has been portrayed here of the Bush administration's alleged misdeeds. Yes, mistakes were made. Yes, some bad things happened. But compared with the historical baseline of past wars, the conduct of the United States in the last 8 years, Senator Cornyn, has been exemplary measured by any objective indicia of misdeeds, eg abuse of detainees per thousand captured, excessive use of force per thousand troops in the field, etc. So I do not see that at all.

But, again, to me—and I am taking the liberty of going beyond your question—it does not matter how you assess the projected policy benefits of a commission. If we take the Constitution seriously, if we take our political culture seriously, just like critics argue that there are some things you should not do in terms of torturing people, no matter what utilitarian benefits it may have, you do not outsource law enforcement; you do not warp the constitutional fabric. That is not the right thing to do. That is a fundamentally wrong thing to do. So to me, even if all sorts of huge policy benefits are going to flow from this truth commission, this is just not what we are supposed to do as a country.

Senator CORNYN. Admiral Gunn, to give you a chance to respond, since I referred to your testimony, you said it is the responsibility of the Commander in Chief and of Congress to ensure and demand that the behavior of Americans toward those in custody complies with the Geneva Conventions and with the highest standards dictated by international conventions on detainee treatment. I hope you would agree with me that Congress has at least played some role in trying to deal with these subjects. For example, I mentioned the Detainee Treatment Act, which we passed and was signed by the President in 2005 in the wake of the Supreme Court's decision in *Hamdan v. Rumsfeld*. Of course, we also passed the Military Commissions Act to create a tribunal where some of these detainees could actually be tried.

I understand that people may agree or disagree with the wisdom of those individual pieces of legislation. But wouldn't you agree with me that Congress has been very much involved in oversight into these issues? And I am just curious why it is you believe that it would now be necessary for Congress and the executive branch to, in effect, delegate our investigative function to an unaccountable so-called truth commission.

Admiral GUNN. Yes, sir. Well, there are a number of questions there, and I certainly agree that Congress has been involved and has done things that have helped to ameliorate the situation. And in some cases, Congress has tried to do things that were—where the efforts were thwarted by the President. The 2005 amendment that Senator McCain advocated, and actually was the nucleus around which our group of retired flag and general officers organized in order to support him in that effort, was successful in Congress and not successful at the White House.

Do not get me wrong when I talk about what I think the Government as a unit, both executive and the legislative branch, owe to the people in the field. The collective effect of what is done here must be that the people in the field understand their duty and their obligations entirely and do so in a context that allows them, when the utmost pressure is applied, to perform in ways that we are proud of and they are proud of. That has been missing in very important ways recently.

To the issue of whether we should have a commission of a particular form or not, I am advocating not a special form because I have no informed legal opinion on the various approaches that might be used. I am advocating that would get to the bottom of things and that at the end of the day we establish what went wrong, and what is sort of missing in the conversation is that the

same inquiry could identify what went right. I mean, that is a feature of the kinds of inquiries and investigations that I referred to in my testimony and also as I spoke before.

The military works very hard to understand what went well so that we can reinforce that, as well as what went wrong and how we can remedy that. And I suggest that maybe more emphasis on the commission's ability to identify the good things might blunt some of the criticism and concern about its solely focusing on errors.

Senator CORNYN. Thank you, Mr. Chairman. My time is up.

Chairman LEAHY. Thank you, Senator.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Mr. Rivkin, you raise a sort of gallery of horrors of the things that might go wrong with such a commission. Let me ask you just to sort of narrow the point. If you assume that the purpose of this commission is advisory and policy only, if you assume that criminal law enforcement is properly cabined then the executive branch, as it should be, if you assume that we set it up so that its coordination with law enforcement on issues like immunity is properly coordinated so that it does not intrude into that function, and if it is set up not as you suggest as a private entity but, rather, in the proper exercise of delegated congressional oversight authority, do you still oppose the commission even in the absence of the parade of horrors that you suggest?

Mr. RIVKIN. Thank you for your question, Senator Whitehouse. With respect, this assumes too much, and let me unpack it.

To me, a law enforcement function has a variety of aspects, as you well know. Having a situation where the ultimate decision to proceed with an indictment, bringing the case before a grand jury, and proceeding with a prosecution, is reserved to the Department of Justice, and I am sure that would be the case. This is still not a cure for the commission.

Senator WHITEHOUSE. Nobody is suggesting otherwise.

Mr. RIVKIN. Right, but to me that is not enough. I can give you at least several examples where other aspects of law enforcement function—namely, deciding as a threshold determination—which is why I mentioned the controversy about the alleged loosening of threshold determinations—whom to investigate, particularly if you are talking about a small group of easily—

Senator WHITEHOUSE. We do that in Congress every moment.

Mr. RIVKIN. But you have the right, with all due respect, Senator, to do that in the exercise of your legislative and oversight function. The Constitution allows—

Senator WHITEHOUSE. And we usually have a right to delegate it.

Mr. RIVKIN. No, I do not believe you do have this right.

Senator WHITEHOUSE. You do not believe that the congressional oversight function is delegable?

Mr. RIVKIN. I do not believe that the congressional oversight function is readily delegable—

Senator WHITEHOUSE. "Readily" is a big hedge. Do you believe it is delegable or not?

Mr. RIVKIN. To a private commission, I do not. You certainly can organize yourself—

Senator WHITEHOUSE. Well, now you have used another hedge word. You have said “a private commission.” That is not a word that I used. Assume that it is delegated to a public, properly appointed commission that is exercising delegated congressional authority.

Mr. RIVKIN. Appointed in accordance with the Appointments Clause? That would make a huge difference. Appointed in a sense that you and members of the minority choose people and the President appoints some people, no.

If you could configure a commission in a way that makes it an extension of an Article I branch, I would not have fundamental problems with it. I do not see how that is practicable or possible. And you can call it public, but I do not see how you can delegate your oversight responsibilities.

But consider another question. If the real intent—and, again, I hate to sound trite, but if it talks like a duck and walks like a duck, whether it is called a policy exercise or not—even today we have heard several times from my colleagues on this panel about the need to come up with criminal prosecutions. What this commission does, basically, it comes up with a bunch of files, the kind of things that a Public Integrity Section, a National Security Section, the U.S. Attorney’s Office does, on 12 or 14 people and then passes the buck to the Department of Justice in the public spotlight.

I would submit to you that this approval fundamentally subverts the most basic constitutional protections, and with respect, if this was contemplated in a different political context, every law professor I know would be screaming about it in terms of what a horrible violation of civil liberties it is. Okay?

Moreover, this commission—

Senator WHITEHOUSE. Every law professor you know would be screaming about this?

Mr. RIVKIN. Yes. If it was done in a context of a conservative—

Senator WHITEHOUSE. Oh, if. OK. I am sorry.

Mr. RIVKIN. No. If it was done in a context of a conservative administration—

Senator WHITEHOUSE. I am trying to get an unhedged phrase out of you during the course of this.

Mr. RIVKIN. I will give you an example. My colleague Professor Rabkin mentions in his prepared testimony, a hypothetical: the Bush administration, in the aftermath of the 9/11 disaster, suggesting a private commission to investigate certain organizations in this country, charitable and otherwise, to look at the nefarious influence and the extent to which they made this attack possible, with a view toward possible prosecutions through appropriate channels. Do you not think that most of the law faculties in this country would be up in arms about this? The fact that there are Bush administration officials here does not make any difference. They are Americans. They are entitled to the full panoply of constitutional rights. You do not get—and the fundamental point that I make about—

Senator WHITEHOUSE. So organized criticism of past administration officials is an offense against their civil liberties?

Mr. RIVKIN. Organized criticism in the policy context is not.

Senator WHITEHOUSE. I thought that was another thing that you signed up for when you took these jobs.

Mr. RIVKIN. Organized criticism in the context of looking at individual criminal culpability—

Senator WHITEHOUSE. No, no, no. No, no, no. There you go again. We just discussed that this would not be looking at individual culpability. My assumption at the very beginning of our discussion was that we had properly cabined the criminal law enforcement role.

Mr. RIVKIN. And I said, with respect, that that assumes too much. There is no way to cabin that.

Senator WHITEHOUSE. Of course there is.

Mr. RIVKIN. Pray tell how are you going to come up, if you are a member of this commission, with an analysis of—and I do not want to use names—how two or three members of the Bush administration allegedly violated, for example, a statute against torture, which is a criminal statute, as you very well know. How would you exactly write this up in a way that does not come to conclusions about individuals? Because if you say Mr. A committed torture—and, by the way, if you say it properly, not only in terms of the physical acts but also adequate *mens rea*—that reads like a document that an Assistant U.S. Attorney prepares to send to his boss to get a decision whether or not to prosecute. How else would you write it up?

Senator WHITEHOUSE. Well, my time has expired, but I would suggest, Mr. Rivkin, that until you know and we all know what was actually done under the Bush administration, you not be so quick to throw other generations of Americans under the bus and assume that they did worse.

Chairman LEAHY. Mr. Rabkin, I spoke to you earlier, and I said if you wanted to take a minute or so to add to anything I had to say, please feel free to do so. You were invited by the other side of the aisle, but they have all left. They have all left, and so this side of the aisle will give you a chance to say something further, if you want.

Mr. RABKIN. Just very briefly, I think one difficulty that we have had this morning is that we do not have a bill in front of us, so we are speaking about a hypothetical commission, and we do not have a very clear notion of—

Chairman LEAHY. But isn't that something, one of the reasons why you have hearings, before you write a bill?

Mr. RABKIN. Yes. I am not criticizing anyone.

Chairman LEAHY. At least that in my 36 years here seems to be the way we do it.

Mr. RABKIN. I am not criticizing anyone for this. I am just saying it is somewhat difficult to address a proposal that is at this point not well defined, and I wanted to just emphasize this before we end, which is it is one thing to try to find specific facts—What was the worst thing done to someone in American custody? I am not sure that is secret, but if that is what we are talking about, I think that is a different thing from making an assessment of what were the causes of this, what were the consequences of this. Then you are really getting into a statement about how foreign policy should

have been differently conducted or how security policy should have been differently conducted. And I think that is almost certainly asking too much of a commission.

And putting aside whether there are constitutional difficulties or civil liberties difficulties, just ask yourself: Is it reasonable to think that any group of experts could speak to the country not on the specific findings of fact but on how we should assess this? And the country nods and says, "That is right." I think we are not that kind of country.

Chairman LEAHY. So if somebody—you think that we cannot find—if somebody at the highest level—the White House, for example—directs people to break the law saying this is an exigent situation, whether it is on wiretapping, various search and seizure matters, putting people's names into databases, secret databases where their jobs are then affected, their ability to get on airplanes is affected, and so forth, and that is done in violation of specific statutes and the Constitution, you do not think we should at least ask that question, who did it and why?

Mr. RABKIN. Oh, absolutely, and if you think that there were legal violations, then I think there should be U.S. Attorneys asking those questions and possibly filing indictments. I am not quarreling with that at all.

Chairman LEAHY. Well, we have asked those questions. Of course, a lot of it was stonewalled. We are now getting the answers, and we are realizing, especially with the OLC opinion that has been released, we are beginning to see why, why we were still involved, because some of them, I think by both conservative and liberal commentators who have looked at them and said that they were completely a misstatement of the law. That is all we are asking for. Who said break the law and why? And was it broken?

I mean, the ramifications, especially in the digital age, are amazing. We have seen in just some of the things that have become more publicized when a year-old child, the parents bought their Super Saver fares to take the child with them to visit relatives, and the child cannot get on the airplane because they are on a—the child, not the parents but the child is on a terrorist watch list. They missed their plane. They have to get a passport, file for a passport, get a passport to prove this year-old child is not some 45-year-old terrorist.

The longest serving member of this Committee, Senator Edward Kennedy, half a dozen or a dozen times was told he could not board a flight he has been taking for 40 years because he is on a watch list. President Bush even called him to apologize. He said he appreciated the apology, but it was not the President's fault. He just wanted somebody to get him off the list, and they could not.

I mean, some of these things worry us if from illegal wiretaps, for example, your name gets on one of these lists, if from an illegal search and seizure your name gets on some of these lists, we ought to at least know who came up with the bright idea.

Mr. RABKIN. Could I just respond to this?

Chairman LEAHY. Of course.

Mr. RABKIN. I think what you have just been talking about almost certainly should be reviewed and reconsidered. I am not at all questioning the validity of your criticism or concern.

What I am concerned about is that you take one disputed policy or one series of mishaps or even abuses, unlawful acts from this area; you take another example from there; you take a third example from there. What you just talked about seems to me to have nothing at all in common with allegations of—

Chairman LEAHY. Well—

Mr. RABKIN. Let me just finish—allegations of torture at Guantanamo.

Chairman LEAHY. But, Mr. Rabkin, we have not even got into the torture part. I am going through a series of things that were all—

Mr. RABKIN. I understand, but if you have—

Chairman LEAHY. Let me finish. Let me finish.

Mr. RABKIN. Sure.

Chairman LEAHY. If you violate the Constitution in wiretaps and specific statutes, if you violate the law in not using the FISA Court, something set up after the Church Committee's hearings, if you violate the law on torture condoning things that we have actually prosecuted other people for doing, if you then have people come before the Congress and lie about it, they may be all individual things, but they are all part of the same mix. And what I want to do—others have said, "Let's turn the page." Fine. But read the page before you turn it. And it is a concern to me that some want to ignore that.

Now, I am well aware of hearings and investigations going on in other committees, and, of course, we will continue to ask questions in this Committee. But what only worries me is I want the American people to see something that is outside of the political arena, like the 9/11 Commission or others, to find out what is going on.

Mr. RABKIN. If you bundle all of these disparate things together and you do, as people used to say in a different context, connect the dots, you can draw a very, very disputable picture, because you are asking, "What was the root cause of all of these disparate things?" and the root cause will come down to something like "the general orientation of the Bush administration was lawless" or "they were obsessed with terrorism." And when you get to that level of generalization, I think it is bound to be extraordinarily controversial. And the idea that this will reconcile the country, this will bring us all together, this will establish a consensus, the more general it is, the more hopeless it is—

Chairman LEAHY. Mr. Rabkin, you stated what the conclusion is going to be. You have far more experience than I. I would like to ask the questions and see what the conclusion is going to be.

With that, we will—go ahead, Mr. Rivkin.

Mr. RIVKIN. Thank you for your indulgence—

Chairman LEAHY. Another one of the Republican witnesses. I am trying to be fair to you even though the Republicans who asked you to be here did not want to bother to stay and listen. But please go ahead.

Mr. RIVKIN. You are exceptionally fair, and I appreciate it. But I just wanted to say briefly that the very examples you used to me clearly attest that this commission cannot fundamentally escape passing assessments and making judgments about criminal liability of a small circle of people. And, with respect, that is what the

executive branch can do through proper channels; that is what you can do operating in the Article I oversight. That is not what a commission can do. And we can—even if we agreed on the portrayal of the problem, the genius of the Constitution is that no matter how pressing and compelling the need, you cannot proceed through constitutionally improper channels. There has never been a case in American history where a commission was set up with this heavy of a prosecutorial burden. It would be fundamentally illegitimate, no matter how strongly you believe it would have a curative effect.

Chairman LEAHY. Was the 9/11 illegitimate? Was the Watergate hearing—

Mr. RIVKIN. Of course not. The 9/11 Commission looked at—the worst thing that would have happened is some agency got slammed, their budget got cut, bureaucratic chairs got reshuffled. The 9/11 Commission had no mandate or interest in going after people. What, you were incompetent in how you analyzed intelligence? Would that lead to an indictment?

The circumstances of how this dialog has been driven inescapably make it a criminal process.

Chairman LEAHY. Mr. Rivkin, I am trying to be fair to you. As I said, the folks who invited you here did not stay to ask you the questions. I have been trying to keep it open for you. Frankly, let me—and I will have the last word, one of the advantages of being Chairman, and we will keep the record open if people want to add to it.

If criminal conduct occurred, this Senator wants to know about it. Now, I began my public career as a prosecutor. I am trying to give the ability to find out if criminal conduct occurred so it would not occur again. That does not necessarily mean there is even going to be prosecution for it. But if crimes are committed, I do not think we sweep them under the rug.

We stand in recess.

[Whereupon, at 12:05 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

On school vouchers, chief's comp time The Atlanta Journal-Constitution February 13, 2009 Friday

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BYLINE: JIM WOOTEN; Staff

BODY:

Thinking Right's weekend free-for-all. Pick a topic:

* Horror of horrors, a Clayton County parent has been placed on five years' probation, fined \$1,000 and ordered to perform 100 hours of community service for moving into her sister's home in Henry County so her son could attend classes there. The woman, Tanja Revette Hale of Rex, has also been ordered to pay \$1,200 in tuition costs to the Henry school system. When we make criminals of parents trying to do what they think best for their children's education, it is, indeed, time for vouchers. State Sen. Eric Johnson's bill will allow parents to buy services from any school or system willing to take them. No games required.

* Didn't know that people at the top got "comp time." But, yes, DeKalb Police Chief Terrell Bolton does --- 37 days of it in 2007 and 24 days over the first 10 months or so of last year. I always thought the top dog was there when needed, off when required, and that nobody ran a punch-the-clock tab.

* Believe passionately enough in anything and the evidence you see will confirm it. Some 305 species of birds are wintering over about 35 miles farther north than they did 40 years ago, according to an Audubon Society study, thus confirming global warming. Forty years is a speck in time.

* More evidence that the embittered left cannot let it go: U.S. Sen. Patrick Leahy (D-Vt.), chairman of the Senate Judiciary Committee, wants a "truth commission" to investigate claimed abuses of suspected terrorists and other decisions made during the Bush Administration. The haters won't go away until they see George W. Bush in leg irons or in the grave, with their historians writing the textbooks on his performance in office.

* If the problem's simply that business has fallen off temporarily, it's smart

management to do as executives and board members at Mueller Water Products company of Atlanta have done. The company is temporarily furloughing about 5,900 workers at 26 plants nationwide and bigwigs are taking a 20 percent pay cut. Decisions on which plants to close and for how long will be made by those closer to the factory floor. If it works, it means that when business does pick back up, a loyal, trained work force is available to ramp back up quickly. Smart, good-sense management.

* Jurors do play so many games nowadays that it's just as well that Georgia legislators give prosecutors a straight life-without-parole alternative to the death penalty. It's a slow and costly alternative, but it's the death penalty still, a meal at a time, spread out over decades.

* Clip this phrase --- "a little noticed provision of" for future use in revealing how radical and dishonest the alleged "economic stimulus" bill is. Only three Republicans in the entire Congress voted for the bill --- the three who will always be there for the Obama administration. That'd be Sens. Susan Collins and Olympia Snowe of Maine and Arlen Specter of Pennsylvania.

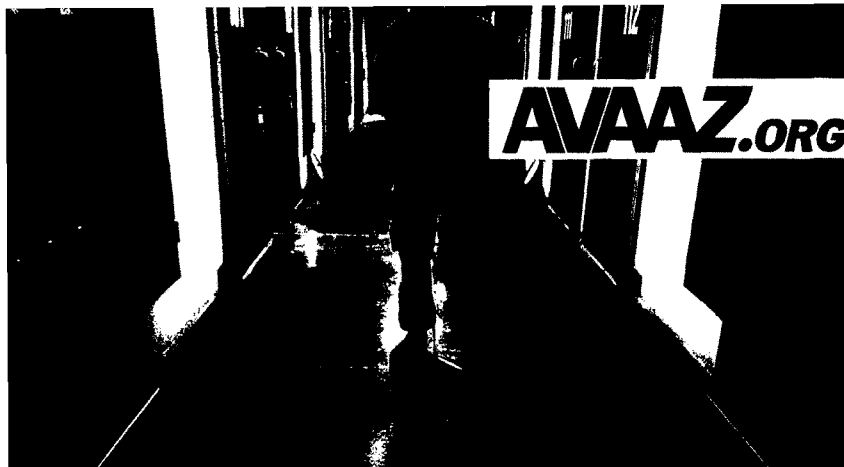
* Quote of the week, from Clayton County Commissioner Wole Ralph: "This [development around the Atlanta airport] will allow citizens to get more services by shifting the tax burden to businesses." Spoken like a true liberal --- and the formula for driving business offshore, unless, of course, you give them a monopoly and allow them to charge enough to cover all their political obligations.

* Will somebody in the state's leadership --- the governor, or at least the lieutenant governor or the Speaker --- tell the Georgia Lottery board that it is not to permit video lottery in Underground Atlanta? In about two minutes, this PR campaign to gamblize-up (it's a newly coined word) Underground that has the various politicians and interest groups lining up for a piece of the pie, can be put to a screeching halt. Lead. Be leaders. Act. The way to get something unpopular approved, whether it's a tax increase or more opportunity to feed a bad habit, is to promise all the gimme-crowd a slice of the pie.

* Here I draw the line: I refuse to join former Illinois Gov. Rod Blagojevich in declaring that public officials who are drunkards, adulterers and double-dippers who don't know how to do their jobs should be barred from office. A quorum is required for all public bodies.

* Jim Wooten is associate editorial page editor. His column appears Fridays, Tuesdays and Sundays.

jwooten@ajc.com



70,000 support the US Senate to

Petition to the US Senate Judiciary Committee:

"We welcome President Obama's announcements to begin to end the abusive tactics and policies of Bush's 'War on Terror'. We urge that an independent body is set up to fully investigate those practices, that those responsible are held accountable, and that future US anti terror practices rigorously conform with human rights principles and the rule of law. With this, a new beginning in global relations is possible."

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*We welcome President Obama's announcements to begin to end the abusive tactics and policies of Bush's 'War on Terror'. **We urge that an independent body is set up to fully investigate those practices,** that those responsible are held accountable, and that future US anti terror practices rigorously conform with human rights principles and the rule of law. With this, a new beginning in global relations is possible.*

The Buffalo News on White House probe.

March 9, 2009

Americans know all too well that mistakes were made during the Bush administration. Before leaving the White House, President Bush, who for most of his two terms adamantly refused to acknowledge reckless decision-making, even owned up to a few.

For the most part, Americans can only speculate about the severity of suspected abuses by the Bush team. This is why Sen. Patrick J. Leahy's proposal for a truth commission to investigate Bush administration policies on interrogation and detention has merit. Unchecked power, after all, opens the door for more abuses.

But truth be told, there is little chance that Leahy's proposal will go anywhere. The legitimate fear, which President Barack Obama may share since he hasn't signed on to Leahy's proposal, is that it could lead to a partisan witch hunt. With all of the problems the nation is currently facing, this isn't the time for more political mudslinging.

A far better way to address the Democratic senator's concerns is to appoint an independent investigative panel similar to the bipartisan 9/11 Commission. True, there isn't a strong record of Congress giving great credence to such a panel's findings. Many of the 9/11 Commission's worthwhile recommendations are still ignored.

But at least an exhaustive review by an independent panel of credible investigators could bring to light the extent of White House abuses. A scarred presidency could be just the deterrent needed to discourage future presidents from going too far.

Russ Baker: Truth or Reconciliation? Bush's Family of Secrets

Submitted by Anonymous on Wed, 03/11/2009 - 12:59pm. [Guest Contribution](#)

A BUZZFLASH GUEST CONTRIBUTION

by Russ Baker, author of [Family of Secrets](#)

They are really coming. Official investigations of the George W. Bush Administration are on the way. Karl Rove and Harriet Miers have just agreed to limited testimony before the House Judiciary Committee, which is looking into the seemingly politically motivated firings of seven U.S. Attorneys. Judiciary Committee Chairman John Conyers and Patrick Leahy, his Senate counterpart, have additional potential improprieties in their sights, and they are not alone. The Senate Intelligence Committee has already declared its intent to scrutinize CIA practices related to terrorism suspects. That's just for starters. We may soon become accustomed to powerful figures squirming as cameras flash, being asked about everything from war to Wall Street.

Politicians will appear heroic. The media will get a hot story they won't have to do a bit of digging for. And the rest of us? Some insight, perhaps, into the power grabbing, lies, and greed of the last eight years.

Beyond that, the historical record of official inquiries, is not, on balance, reassuring. Think of the 9/11 panel, the Iraq inquiry, the Warren Commission, and the interminable and confusing Iran-Contra hearings. Only rarely does such a probe produce useful results. More often the public is numbed by an unfathomable depth of detail and a perplexing array of claims. The best material often is withheld for one reason or another. The recommendations typically end up watered down or ignored.

Worst of all, the public gets a vague sense that the problem has been taken care of because -- well, weren't there those big hearings?

By all means, there should be hearings. For the media, commissions can too easily become a cop-out -- an excuse for sitting in the audience and serving as stenographer for other peoples' accusations. The "news" becomes what someone says, rather than whether what they say is true or not. And the criteria for newsworthiness becomes whether there are sensational revelations -- which often are not accompanied by broader context.

Thus we likely would see more of the appalling journalistic performance we witnessed during the presidency of George W. Bush -- the reluctance to question the official story in case after case, from weapons of mass destruction to the neutering of regulators charged with keeping an eye on bankers and brokers. (We've seen how well the deregulation of the financiers worked out.)

Why did the media perform so badly? Recently, budgets for inquisitive journalism have been slashed. But for years, news organizations were producing huge profits, and even then, genuine reporting -- as opposed to high level stenography -- got short shrift. Digging to the root cause of problems requires a commitment of time and resources that taxes the bottom line and angers the influential. There's a natural tendency to leave it to someone else -- and hope a Congressional commission comes along to fill the void.

The most frustrating thing is that we never seem to get around to asking the bigger questions about how we got into this mess in the first place. The very idea that we would even need Leahy's proposed Truth and Reconciliation Commission for a president we elected twice is on its face absurd. It also suggests that there may be more to the story. In fact, there is. George W. Bush and his astonishing performance cannot be understood as an isolated occurrence. In truth, he was less the bumptious rebel we cathartically laugh at in Oliver Stone's *W.* and Will Ferrell's *Broadway* hit than a leading man in a much grimmer, long-running saga.

It is not insignificant that someone named George Bush has been president or vice president for

20 of the last 28 years. Even before that, we saw George the elder serve as UN ambassador, envoy to China, and CIA director. Prior to that, came George W.'s grandfather, investment banker and two-time Senator Prescott Bush. All three generations labored assiduously to skew public policy toward the interests of America's wealthiest people and their allies among oilmen, defense contractors, and bankers. A veneer of patrician civility obscured two of those generations' agendas. Only George W.'s transparent indifference to the harm he caused has forced us to begin peeking behind the curtain.

This pervasive enterprise has been a barely buried dimension in our national life: the big picture that somehow never quite makes it to the front page or to TV and computer screens. It should have informed the daily reporting of the last eight years, not been consigned to a special commission process that will flit briefly across America's collective consciousness and then be forgotten.

Official inquiries are not, in and of themselves, a bad thing. But Congressional committees, or commissions, are unlikely to produce the kind of in-depth revelations, and bracing public discussion, that we so desperately need. Getting to the bottom of what ails our democracy requires the exposure of long-hidden facts in meaningful historical context. For this, we need a new commitment to journalism that matters, that tells people the way things really are and how they got that way.

53

GEORGE BUSH

March 4, 2009

Dear Bill and Jim,

I am strongly in favor of the sentiments expressed in your letter to Senators Leahy and Specter. I don't sign joint letters, but feel free to put me down as strongly backing your proposition. It would be terrible if honest, decent CIA agents were hauled before some committee when they had simply followed policy instructions.

With great respect for you both,

A handwritten signature in black ink, appearing to read "G. Bush". The signature is written in a cursive, slightly slanted style.

**The Honorable William Webster
The Honorable R. James Woolsey**

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Leahy's un-American activities commission Politico.com March 3, 2009 Tuesday 4:32 AM EST

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March 3, 2009 Tuesday 4:32 AM EST

LENGTH: 1009 words

HEADLINE: Leahy's un-American activities commission

BYLINE: Hans A. von Spakovsky

BODY:

For more than 200 years, the reins of America's leadership have been peacefully handed over from one administration to another, regardless of party affiliation, in part because we have never seriously indulged in criminalizing our political differences.

My Russian immigrant father, who fled Communist persecution, told me more than once that avoiding political persecutions and show trials was crucial to preserving our republican form of government. But Sen. Patrick **Leahy** (D-Vt.) and House Speaker Nancy Pelosi (D-Calif.) are now proposing something that may well result in criminalizing policy differences.

Leahy has scheduled a hearing Wednesday on his proposal to convene a "**truth commission**" to conduct inquiries into Bush administration decisions on terrorist detainees, interrogation procedures and other practices. As precedent, **Leahy** cited the Truth and Reconciliation Commission, which was convened in South Africa to investigate the barbarous practice of apartheid.

That outrageous comparison falls flat. For one thing, **Leahy's "truth commission"** is not needed to serve any legitimate government function. Effective government oversight has never required such commissions. Moreover, Sen. Carl Levin (D-Mich.) held hearings, under oath, over a 2½- year period looking into many of the same issues. His report, though predictably partisan, found no criminal violations.

Why, then, does Congress need a **truth commission** at this point in time? Only because the findings of previous investigations didn't suit the far left's tastes?

Nevertheless, those pushing for a **truth commission** have made it very clear that they have already determined the guilt of the Bush administration. The proposal, therefore, seems targeted to define political crimes in the spirit of, "We won, which means that the former regime is criminal."

There is no other purpose to such a commission. If crimes were really committed, federal prosecutors can investigate and prosecute. If new legislation is required, Congress should implement it through the normal legislative process. The same is

true if Congress wants to reorganize its intelligence committees or internal reporting structures. The commission cannot be used for impeachment purposes, so there is no real constitutional or legal reason for an "independent" commission.

The proposed **truth commission** thus more closely resembles the Moscow trials staged by Joseph Stalin in the 1930s than the legitimate inquiries in South Africa. Stalin's show trials provided a showcase for inflammatory claims and predetermined judgments. They were a ruthless, cynical and chillingly effective means of purging inconvenient opponents and critics. Sound familiar?

Congress should be very reluctant to approve **Leahy's** proposal. After all, in these so-called crimes, members of Congress participated as conspirators when it repeatedly funded the Bush programs. Before Congress creates any commission, it should expose its own failures, if indeed there were any, to stop these practices.

Many of the same members who are so critical today remained silent when they were briefed about our counterterrorism efforts. In December 2007, The Washington Post reported that in 2002 four members of Congress were given a virtual tour of the CIA's overseas detention sites and were briefed on interrogation techniques. The bipartisan group, which included Pelosi, was specifically briefed on waterboarding. None of the four complained, and one of them asked if the methods being used were tough enough.

The CIA gave key legislative overseers about 30 private briefings, including waterboarding and other interrogation techniques in 2002 and 2003. It is curious that lawmakers who were repeatedly briefed and raised no objections should subsequently criticize those very same policies. That the criticism came only when memories of the Sept. 11 attacks faded and public opinion shifted suggests a political motive. If that is the case, trying to prosecute those involved is the concomitant attempt to criminalize these political differences.

Advocates of the commission should have a second concern, too: It will only harden partisan battle lines and ensure that public discourse becomes increasingly strident.

The Internet is filled with postings whose tenor is: "If you are on the other side of the political fence and hold different views on how to address our nation's problems, you must be evil, corrupt and, yes, a criminal." This commission will only exacerbate that problem.

Third, if the Obama administration and congressional leaders start deploying McCarthyite tactics against their former political opponents, they risk losing public support for their efforts to resolve our economic problems.

Finally, President Barack Obama should be especially wary of efforts to criminalize policy decisions of prior administrations; one day his staff will join the ranks of former administrations. The realities of governing already have led Obama to continue "controversial" positions on detaining enemy combatants and asserting the state secrets privilege. Does he really want to see honest differences of opinion on such questions - many of which do not enjoy support in his own party - become criminal issues?

Obviously, **Leahy** and Pelosi view national security and public policy differently than did the Bush administration. They disagreed on the solutions to many of the

problems faced over the past eight years, including how to fight a war against terrorists. But differences of opinion are not criminal. Exposing the prior administration to prosecution for these differences will impose great hardship on many individuals and create a precedent to criminalize public service in the future.

Moreover, it will impair the ability of government officials to deal with serious and ongoing problems. If **Leahy** is successful, his "**truth commission**" will do untold damage to the fabric of our political system.

Hans A. von Spakovsky, a former Justice Department official, is a visiting legal scholar at the Heritage Foundation.

LOAD-DATE: March 4, 2009

**Statement on Commission Relating to Detention,
Treatment, and Transfer of Detainees**

We urge President Obama to appoint a non-partisan commission of distinguished Americans to examine, and provide a comprehensive report on, policies and actions related to the detention, treatment, and transfer of detainees after 9/11 and the consequences of those actions, and to make recommendations for future policy in this area.

We believe all members of the commission must have reputations for putting the truth and the respect for our nation's founding principles ahead of any partisan advantage. Members should be persons of irreproachable integrity, credibility, and independence. Leading academics, retired judges and government officials, retired military officers and intelligence officials and human rights experts are examples of the types of profiles that should be sought. The President should solicit recommendations from the majority and minority leaders in both houses in the process of choosing commission members.

Juan E. Méndez, President, the International Center for Transitional Justice; Special Advisor to the Secretary-General of the UN on the Prevention of Genocide, 2004-2007; Commissioner, 2000-2003, and President, 2002, of the Inter-American Commission on Human Rights of the Organization of American States

Thomas Pickering, Vice Chairman, Hills & Co., Under Secretary of State for Political Affairs, 1996-2000

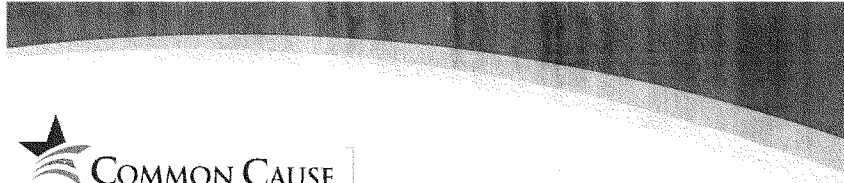
Judge William Sessions, Partner, Holland and Knight LLP, Director of the FBI, 1987-1993, Judge, United States District Court for the Western District of Texas, 1974-1987

Major General Antonio M. Taguba, USA (Retired)

Rev. Dr. John H. Thomas, General Minister and President, United Church of Christ
(*Affiliations for Identification Only*)

The following organizations have also endorsed the statement:

- Amnesty International USA
- The Brennan Center for Justice
- The Center for Human Rights and Global Justice, New York University, School of Law
- The Center for the Study of Human Rights in the Americas, University of California, Davis
- The Center for Victims of Torture
- The Constitution Project
- The Human Rights Center, University of California, Berkeley
- Human Rights First
- Human Rights Watch
- The International Center for Transitional Justice
- The International Justice Network
- The Jacob Blaustein Institute for the Advancement of Human Rights
- The Jewish Council for Public Affairs
- The National Institute of Military Justice
- The National Religious Campaign Against Torture
- The Open Society Institute
- Physicians for Human Rights
- The Rutherford Institute



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STATEMENT OF COMMON CAUSE
IN SUPPORT OF THE ESTABLISHMENT OF A
NON PARTISAN COMMISSION OF INQUIRY

For the Hearing Before the U.S. Senate Judiciary Committee

March 4, 2009

COMMON CAUSE / 1133 19TH STREET, NW / 9TH FLOOR / WASHINGTON, DC 20036 / 202.633.1200



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STATEMENT OF COMMON CAUSE
 IN SUPPORT OF THE ESTABLISHMENT OF A
 NON PARTISAN COMMISSION OF INQUIRY
 For the Hearing Before the U.S. Senate Judiciary Committee
 March 4, 2009

Common Cause strongly supports the creation of a Commission of Inquiry to publicly and thoroughly investigate all allegations of unconstitutional and illegal abuses of power by our government. We believe that such a Commission should not be limited in its inquiry to any one area of illegal or unconstitutional conduct, such as policies adopted to fight terrorism. The conduct to be investigated, no matter how heinous, is symptomatic of a larger problem, a grave crisis in our constitutional system that goes to the very core of our values and respect for the rule of law. That crisis, which continues today, is the result of a philosophy of governance grounded in a profoundly anti-constitution animus which has had, and will continue to have, ramifications in foreign and domestic policy beyond the nation's policies regarding fighting terrorism. The Commission of Inquiry, which must be both non-partisan and independent, should be authorized to investigate the various ways in which this anti-constitutional philosophy, which places absolute power in the Executive, has manifested itself, in both foreign and domestic affairs.

It is essential that there be a thorough fact-finding investigation into the full range of alleged violations of human rights and abuses of power by the prior Administration in both domestic and foreign activities, as well as Congress' failure to contain such conduct. We believe that such a broad inquiry is required in order to restore the nation's understanding of and reverence for the U.S. Constitution, the rule of law, a free and open society, human rights, and our American system of checks and balances.

To move forward, we must know the truth regarding past conduct. To do so is not looking back, but rather looking to the future. Continued secrecy and indifference to prior conduct will do lasting damage to the fabric of our democracy, weakening faith in our ability to live up to the promise of governance by laws, not men, enshrined in our founding documents. Arguments that some of the questioned past conduct is simply partisan policy that people can disagree about countered by accusations of criminal conduct can only be resolved by a thorough examination and a vigorous public dialogue as to the meaning and requirements of our constitutional system of checks and balances.

Common Cause is a nonpartisan, nonprofit organization founded by John Gardner in 1970, during the turmoil of the Vietnam War and growing abuses of power by the Nixon Administration, to "build a true 'citizens' lobby – a lobby concerned not with the advancement of special interests but with the well-being of the nation." At its outset, Common Cause sought a timetable for ending the war, a reordering

COMMON CAUSE / 1133 19TH STREET, NW / 9TH FLOOR / WASHINGTON, DC 20036 / 202.833.1200

of national priorities, and revitalization of politics and government. Our call today for a broadly empowered Commission of Inquiry is rooted firmly within the spirit of our founding.

This is the greatest challenge to government accountability of our time and we cannot shrink from it because inquiry may be uncomfortable, difficult or potentially embarrassing to some. The times demand of our leaders the courage to fully investigate allegations that our government abused its power and violated the law and the Constitution by:

- Legitimizing torture
- Pursuing policies which were designed to undermine the Constitution and Bill of Rights
- Allowing corruption and special interest abuses to flourish unchecked in numerous agencies and departments
- Politicizing the very administration of justice
- Engaging in warrantless spying and other affronts to personal liberty domestically and abroad

In order to “preserve, protect, and defend the Constitution of the United States,” as all federal office holders swear to do, these questions must be answered. A decent respect for the opinions of mankind requires no less. Some in low level positions have already been held accountable. It is unconscionable in our American system of justice to prosecute low-level soldiers and functionaries while ignoring the conduct of their superiors.

If crimes and abuses did occur, and we do not know – much less understand – their extent, then the likelihood that such misconduct will be repeated, but next time on an even larger scale, is virtually guaranteed.

To date, much of the discussion regarding the establishment of an independent commission has focused on the need to address abuses such as government authorized torture and rendition and warrantless spying on Americans domestically. It is easy to understand why. The conduct alleged is, in some cases, heinous, but in all cases threatens the very definition of what it means to be an American and the values our nation stands for. However, Common Cause believes that the Commission of Inquiry’s investigation should include, but not be limited to, what one of your witnesses today, Fritz Schwarz of The Brennan Center, has called “national counter-terrorism policies.”

The willingness to authorize torture and rendition, to craft legal arguments supporting such policies in countering terrorism, flows from a willingness to abandon the rule of law and our Constitution that remains unexamined and unchecked. It is that willingness which creates the constitutional crisis which Common Cause seeks to address. This abandonment of the rule of law manifests itself in other policies, including domestic policies unrelated to fighting terrorism. Policies such as substituting politically motivated prosecutions of officials for statutorily mandated enforcement of civil rights such as minorities’ access to the ballot, no-bid contracting that fosters war profiteering, and pervasive use of signing statements to signal an unwillingness to enforce laws as passed, appear to flow from the same anti-constitutional fount.

An inquiry which focuses only on conduct relating to national anti-terrorism policies and not the willingness to abandon our Constitution and the rule of law that allows such conduct will have the salutary effect of preventing future torture and rendition and may lead to holding those responsible

accountable. But it will not prevent future egregious actions, now unimaginable as torture has been in the past, that flow from a willingness to abandon the rule of law and our Constitution in times of national challenge.

We do not minimize the challenge of setting up a Commission of Inquiry so that its non-partisanship and independence are assured. There are those who will attack any such Commission, no matter how well-thought out and properly impaneled, as partisan. The only way to satisfy those voices is to continue turning a blind eye to the abandonment of the rule of law and resulting abuses of the Constitution, human rights, and international law which have taken place and which may reoccur in the future. Such a result is unacceptable. We believe that the bill introduced by Representative Conyers, H.R.104, provides a useful framework for setting up such a Commission, although we do not, clearly, agree with the jurisdictional limitations on the scope of the Commission which the bill would establish.

Common Cause commends Chairman Leahy and the Committee for addressing this important topic and the fundamental issues it raises which others have shrunk from. We look forward to working with the members of this Committee to craft and pass the necessary legislation establishing a Commission of Inquiry with an appropriate mandate and resources.



Statement of the Constitution Project
Submitted to the
Senate Judiciary Committee

Hearing on "Getting to the Truth Through a Nonpartisan Commission of Inquiry"

March 4, 2009

The Constitution Project submits this statement for the Committee's hearing on "Getting to the Truth Through a Nonpartisan Commission of Inquiry." The Constitution Project is an independent think tank that promotes and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to encourage constructive dialogue and to promote consensus solutions to pressing constitutional issues. Thomas R. Pickering, one of the witnesses testifying before this Committee today, is a member of our Liberty and Security Committee. William S. Sessions, who has submitted written testimony, is a member of our Liberty and Security, Death Penalty, and Right to Counsel Committees, as well as Co-Chair of our Courts Committee. The Constitution Project has earned wide-ranging respect for its expertise and reports, including practical, accessible material designed to make constitutional issues a part of ordinary political debate.

The Constitution Project has called upon President Obama to form a non-partisan commission to examine and report on policies related to the detention, treatment, and transfer of detainees after September 11, 2001. The purpose of this commission would be to provide a full and comprehensive understanding of our past and to make sure mistakes are not repeated in the future. This commission would be entirely consistent with President Obama's pledge to move the country forward and establish a firm foundation for doing so.

The Constitution Project believes that creating an investigative commission is a critical step in reaffirming our nation's commitment to the rule of law. The purpose of such a commission should be to learn all of the relevant facts about our detention policies and practices after September 11, not to seek criminal prosecutions. Therefore, the commission would neither promote nor preclude prosecution, but would leave that decision to federal prosecutors in the Justice Department.

We need a full understanding of what happened, including policy failures in the recent past in order to restore the rule of law and avoid making the same mistakes in the future. To fulfill its mandate, the commission should be established under procedures that guarantee independence and provide protection from undue political influence. This is not a partisan issue. Members of the commission, therefore, should be persons of irreproachable integrity who command public confidence. The commission must be empowered to issue subpoenas in order to uncover the entire truth. And it is imperative that this commission be able to execute its mandate in a timely and efficient manner so that both the American people and our policymakers can learn the truth and move forward into a new era of accountability.

We recognize that several government investigations and oversight efforts into related matters have recently been completed. While they represent meaningful steps in the right direction, the full extent

of our detainee policies and their consequences still remain unknown. Prior efforts have not been government-wide and have encountered unprecedented levels of government secrecy. They have not assessed the ways that the different agencies and government officials worked (or failed to work) together. No single congressional committee has jurisdiction over all of the agencies and officials involved to conduct a comprehensive assessment of the way our policies and practices were developed and implemented. A thorough investigation of detainee policies and practices is therefore necessary to enable the President and Congress to develop policies that preserve constitutional safeguards and promote national security as we move forward.

Our nation has a strong tradition of forming commissions that have led to important policy changes. Past experience—most recently the 9/11 commission—demonstrates that an effective fact-finding mission can generate proposals for reforms that garner support from both the executive and the legislature. A commission report would serve as a basis of cooperation for the two branches as we continue to confront difficult detainee policy issues. The widespread positive reaction to the 9/11 commission report also suggests that a report would inspire public support for any necessary changes in detainee policy.

Further, an investigative commission would be an important step in reaffirming our nation's commitment to the Constitution. Detainee policies after September 11 have shifted the balance of powers away from the system of checks and balances that is so fundamental to our system of government. Expansive claims of executive power have engendered policies that damaged individual rights and constitutional principles. Without a clear repudiation of these legal theories, dangerous precedents would remain, leaving the door open for future abuses. A commission would help restore institutional limits and ensure accountability for future administrations, Democratic or Republican.

Just as importantly, an independent, non-partisan commission would go a long way to restoring trust at home and abroad. Post 9/11 detainee policies have undermined shared values, shaken the foundations of democracy and compromised the public's faith in our government. Collectively, the American people have a right to know what actions were committed in their names. Likewise, countries from around the world have a strong interest in learning the truth. Detainee policies have eroded our international reputation and diminished our moral standing. A commission would send a clear signal to our allies that America is committed to understanding the truth, making necessary changes to restore the rule of law and to re-engage with the international community once more.

It is certainly tempting to move on without investigating what happened and to ignore this chapter of American history. We do not suggest that this process will be easy; uncovering hard truths never is. But we cannot allow these detainee policies to become an indelible mark of shame on our democracy. Our obligation to reveal the truth should not be seen as a distraction from the serious challenges our country currently faces. Understanding our past is a crucial step to building a better future free of these same mistakes.

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THE DAVIS GROUP¹
RECOMMENDATIONS FOR THE ESTABLISHMENT OF A
COMMISSION OF INQUIRY
INTO U.S. DETENTION POLICIES AND PRACTICES SINCE 9/11

1. Commission and Mandate. The President of the United States should appoint an Independent Commission of Inquiry into U.S. Detention Policies and Practices Since 9/11 (“the Commission on Detentions”) to provide a full accounting of the facts, circumstances and policies relating to the capture, detention, transfer, interrogation, and treatment of persons who have been detained by, or transferred for detention by others at the direction of the United States since September 11, 2001. The mandate of the Commission on Detentions should also include, but not be limited to, assessing the legality of such policies and practices, making recommendations it deems appropriate, and identifying any lessons learned.

2. The Need for the Commission on Detentions. Like President Obama, many Americans have expressed concerns that the detention, transfer, and treatment of detainees in U.S. custody carried out under expanded powers of the government have eroded the moral foundations upon which our country was built and undermined our national security and military objectives. Others maintain, however, that such expanded powers have been necessary and appropriate to protect our national security. It is only through an independent, nonpartisan, transparent, and thorough investigation into the facts, circumstances, and policies employed in response to the September 11 attacks, that we can begin to objectively assess what has been done in the name of the American people.

3. Composition. The Commission on Detentions should be nonpartisan rather than bipartisan in its composition. Its members should be men and women with a demonstrated commitment to truth and to our nation's founding principles. Commissioners should be individuals of irreproachable integrity, credibility, and independence. Retired military officers, judges, government officials, attorneys, intelligence officials, leading academics and human rights experts are examples of the types of members that should be sought. The Commission should be supported by adequate staff with appropriate expertise to carry out the mandate of the Commission.

¹ The Davis Group is an assemblage of individuals with diverse experiences and backgrounds, including: scholars; retired military officers; human rights specialists; practicing attorneys who have represented detainees held at Guantanamo Bay, Bagram and other locations; individuals with experience in conducting previous government commissions; intelligence specialists; and Constitutional rights experts. The Group first met January 16-18, 2009 at the University of California, Davis. The Davis Group continues to work toward the goal of establishing a United States Commission of Inquiry into U.S. detention policies and practices and has, since the original meeting, added several other experts who concur with this recommendation. These additional signatories are annotated by an asterisk (*) next to their name.

4. Security Clearances. In a manner consistent with existing procedures and requirements, members and appropriate staff of the Commission on Detentions should be granted such security clearances as are necessary to perform the functions of the Commission.

5. Subpoena Powers. Congress should grant the Commission on Detentions the authority of compulsory process, including subpoena power, in furtherance of its mandate.

6. Testimonial Immunity. In order to secure full and truthful disclosures to the Commission on Detentions, and in recognition of the Constitutional right of witnesses against self-incrimination, the Commission should have the authority, at its discretion, to grant limited testimonial immunity to witnesses.

7. Other Remedial Efforts. The Commission on Detentions should not impede other avenues of accountability or related efforts to effect reforms, prosecutions, or reparations.

8. Foreign Testimony. In order to thoroughly investigate and evaluate U.S. detention practices, the Commission on Detentions should solicit testimony and reports from foreign nationals, including former detainees, other nations, and non-governmental and international organizations. Robust efforts to include overseas evidence will also buttress the credibility of the Commission's findings, thereby strengthening foreign relations with our allies and our national security. The Commissions on Detentions may hear such evidence in person, when practical, or through alternative means such as remote testimony or reports of investigative efforts.

9. Transparency. The Commission on Detentions should carry out its mandate as openly and transparently as considerations of privacy and national security will allow.

10. Reporting. The Commission on Detentions should convey its findings by issuing one report in two versions—one public, the other classified. This report should provide the full accounting of the facts, circumstances and policies called for in the Commission's mandate, as well as make recommendations, and identify lessons learned. The public version should contain as much information as may be publicly disclosed. The second version should be classified but only to the extent strictly necessary to protect any classified information contained therein. Both versions should be released simultaneously.

11. Duration. The Commission on Detentions should issue its report no later than two years after it is convened.

12. Funding. The Commission on Detentions should be funded at levels that will enable it to carry out its mandate. These should be comparable to the levels of funding of the 9/11 Commission. The funds are to remain available until expended or until the Commission issues its reports.

The points of contact for The Davis Group are: The Constitution Project, Daniel Schuman, Communications Director and Counsel at (202) 580-6922 or dschuman@constitutionproject.org; Colby Vokey at (214) 237-0900, (214) 697-0274 or cvokey@fhsulaw.com; Stephen Abraham at (949) 706-5903, (949) 878-8608 or sabraham@falawyers.com; and Almerindo Ojeda at humanrights@ucdavis.edu.

In witness whereof, the undersigned signatures of members of The Davis Group have been affixed this third day of March, 2009.

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Florence Rogatz Visiting Lecturer in Law
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Testimony of John J. Farmer, Jr.
Senate Judiciary Committee
March 4, 2009

Mr. Chairman, members of the Committee:

Thank you for the invitation to appear today to discuss the question of whether an investigation should be conducted of the detention policies and practices employed to date in the struggle against transnational terrorism and, if so, how that investigation should be structured.

In the course of my career, I have worked for or been involved with many different types of investigative bodies and with equally diverse types of investigations. Years ago, as a student at Georgetown University, I interned with the House Select Committee on Assassinations. As a federal prosecutor and, later, as New Jersey's Attorney General, I conducted and supervised grand jury investigations. As Attorney General, I created the office of Inspector General and supervised investigations conducted by that office. I also led the response to federal Justice Department and state legislative investigations of New Jersey's State Police. After leaving office, I served for a year as a Commissioner on New Jersey's State Commission of Investigations, which examines organized crime and official corruption. I served as Senior Counsel to the 9/11 Commission, and led the investigation into our government's response to the attacks on 9/11 itself. In the private sector, I have conducted internal corporate investigations. Most recently, I have traveled to Armenia to assist that country's legislative commission in its investigation of the civil unrest that followed last year's elections, during which 12 people were killed. Those experiences inform my testimony here this morning.

1. The Need For An Investigation

The obvious threshold question facing this Committee is whether an investigation should be conducted of the practices and policies that have been employed concerning detention since 9/11/01 in our country's struggle against transnational terrorism.

Let me state at the outset that I have a lot of empathy for those who, like President Obama, have expressed a desire to move forward rather than look back. I was Attorney General in New Jersey in the midst of the racial profiling scandal that enveloped the NJ State Police. We conducted an internal review, acknowledged the problem, negotiated a Consent Decree with the Department of Justice, implemented reforms, and took the extraordinary step of waiving all privileges with respect to the issue and releasing all relevant documents. When, after all of that, the New Jersey Senate Judiciary Committee decided to conduct its own investigation, I raised concerns similar to those raised by the administration about the need to move forward. And make no mistake: the time devoted to preparation for testimony and responding to the investigation was diverting, and did, for a time, disrupt normal operations.

I have come to see, however, that there are some issues that touch so directly upon our identity as a people -- that touch so directly upon the values we profess -- that no amount of internal bureaucratic review will suffice to allay public concern about the way its government has been conducting itself. In the absence of public fact-finding, people will be left to believe the worst, and the lack of public trust will ultimately undermine the effort to move forward. Racial profiling was one such issue; 9/11 was another. I have come to believe that our government's handling of detentions is another.

Why? The turning point for me was the convening authority's decision recently that Mohammed al-Qahtani, the alleged 20th hijacker -- whom Mohammed Atta had driven to meet at the airport in Orlando Florida, on August 4, 2001, but who was turned away, only to be captured in December 2001 in Afghanistan -- could not be tried because of the way he has been treated. She concluded that he had been tortured.

Think about that for a moment. We have now reached a point where the tactics we have adopted in the struggle against terrorism have compromised our ability to respond to the 9/11 conspiracy itself. In my view, that fact calls into question exactly what we have done, to whom, why, when, and on what basis. Only by answering those factual questions can we determine whether our detention tactics have been self-defeating. There are other alleged examples, but for me the dismissal of charges against al-Qahtani elevates detention to one of those issues that touch so directly upon our identity as Americans that a public accounting of what occurred is necessary.

2. The Structure of an Investigation

Assuming that there is eventual agreement on the need for an investigation of detention practices, the next question is what form that investigation should take. One obvious option is a criminal investigation, either by the Justice Department or by a Special Prosecutor. This option has limited appeal in this context, in my opinion, for three reasons. First, prosecutions are necessarily narrowly focused on proving the elements of crimes in specific cases; whatever broader context they provide is incidental to that primary purpose. Second, in the absence of generally accepted, neutral fact-finding, criminal prosecutions may appear to be politically motivated. Third, it is not clear that criminal prosecutions will be efficacious in this context; potential targets may be able to invoke a viable advice-of-counsel defense.

Another option is congressional hearings. Certainly, Congress is capable of conducting thorough, bi-partisan investigations as part of its oversight responsibility of the executive branch. In my view, however, the highly charged politics of congressional hearings on this subject will frustrate any fact-finding effort.

In my view, these considerations argue in favor of establishing an independent body to conduct fact-finding with regard to detentions. Such fact-finding need not foreclose prosecution in appropriate cases; it may even serve to identify those cases.

Structuring an investigation into detention policies and practices involves four interrelated considerations: Composition; Scope; Powers; and Product.

Composition. The commission should be independent and nonpartisan in composition. Bipartisan commissions can reach nonpartisan results; the 9/11 Commission, under the leadership of Governor Kean and Congressman Hamilton, succeeded in that respect. The enabling statute for a commission on detentions should spell out specific professional qualifications – retired judges, professional historians, prosecutorial or defense experience -- that will ensure a nonpartisan composition. The commission should also have a professional staff, a definite timetable for completion of its work, and a budget adequate to its mandate.

Scope. After determining the commission's composition, the greatest challenge will be defining the scope of its investigation. If the mission is defined too broadly, it may not be achievable, and the breadth of the mission will also drive the potential cost of the project. In the context of detentions, I believe a focus strictly on Guantanamo Bay would be too narrow, while an open-ended mandate to investigate all tactics in the war on terror would be too broad. One limiting principle might be to link the investigation to the facts and circumstances surrounding detentions carried out pursuant to Congress's resolution of September 2001 authorizing the use of force to respond to the 9/11 attacks.

Powers. The scope of the inquiry will determine what powers the commission will need to employ. Essential to any investigation, however, will be the ability of the commission to compel cooperation. Compulsory process is essential; it was vital to the success of the 9/11 Commission, and its lack – as in the context of the Armenian investigation – can be a real handicap. So at a minimum the commission should be given subpoena power.

A trickier problem is whether the commission should be allowed to confer immunity in order to obtain testimony from witnesses who otherwise might assert their Fifth Amendment privilege against self-incrimination. Given the extremely fact-sensitive nature of detention, where individual exposure may be an issue in every case of alleged abuse, some form of limited immunity may be essential. The issue must be handled with care, however, as the grant of even limited testimonial immunity may jeopardize a current or future prosecution. That is a potential tradeoff that must be considered in the commission's quest to gain a full and comprehensive picture of what happened.

Product. The enabling legislation should also set forth the expected end product of the investigation. The 9/11 Commission was given a broad charge to investigate the facts and circumstances surrounding the attacks, but also to formulate recommendations based on those findings. In my view, such a broad mandate would be inappropriate to the detention context. I believe that the commission should be charged with writing a report setting forth the facts and circumstances surrounding the practices and policies relating to detentions carried out in the war on terror. Although the commission would be completely separate from any criminal investigation, it should be able to refer appropriate cases to the Justice Department for potential prosecution. To the extent possible, the

report should be a strictly fact-based narrative, and the report should state the evidentiary bases for the factual conclusions it reaches.

Once the facts are known, legislators and policymakers can debate the broader implications of those facts, and move forward with a clear understanding of where we have been and what we have done.

I look forward to answering any questions you may have, and to working with you to address these difficult issues in the future.

Thank you.

**Getting to the Truth Through a Nonpartisan Commission of Inquiry
Hearing before the Senate Judiciary Committee**

**Statement of Sen. Russ Feingold
March 4, 2009**

Mr. Chairman, I commend you for having this hearing and for your proposal to establish an independent commission of inquiry.

Long before the election, it was clear to me that one of the most important tasks for the new President was going to be restoring the rule of law in this country. I chaired a hearing in September on this topic. Nearly forty law professors, historians, advocates, and experts testified or submitted testimony. The record of that hearing is the most detailed collection of analysis and recommendations on what needs to be done to reverse the most damaging decisions and actions of the last Administration.

The Obama Administration has already taken several enormously important steps in the right direction, among them ordering the closing of the Guantanamo Bay detention center in a year, requiring adherence to the Army Field Manual's guidance on interrogation techniques, reinstating the presumption in favor of disclosure under the Freedom of Information Act, ending the very possibly illegal detention of Ali al Marri by indicting him in a criminal court, and, just this week, releasing nine Office of Legal Counsel memos that the Bush Administration had insisted in withholding from Congress and the American people. I am pleased and gratified that President Obama and his advisors recognized the need to take these actions, and take them quickly. It gives me great hope for the future.

A crucial part of restoring the rule of law, in addition, is a detailed accounting of exactly what happened in the last eight years and how the outgoing administration came to reject or ignore so many of the principles on which this nation was founded. I regularly hear from my constituents back home about this, and they are absolutely right. There can be no doubt that that we must fully understand the mistakes of the past in order to learn from them, address them, and prevent them from recurring.

At the same time, there should not be a focus on retribution or pay-back, and such an effort should not be used for partisan purposes. That is why your proposal, Mr. Chairman, is so important. Your proposal is aimed at finding the truth, not settling scores.

On the question of immunity, I think we should tread carefully. There are cases that may require prosecution, and I wouldn't want a commission of inquiry to preclude that. Those who clearly violated the law and can be prosecuted should be prosecuted. On the other hand, the country will really benefit from having as complete a telling of this story as

possible, so the ability of the commission to seek immunity for lower level participants certainly needs to be considered. How to do this is one of the complex questions that I hope can be explored in this hearing.

I do support the idea of an independent fact-finding commission, as opposed to relying solely on our regular committee structure. I'm on two of the relevant committees, and the members of Congress who serve on them are very hard working. There is much important investigative work that can be done in committee, but there are also significant time, staffing and jurisdictional constraints. I think a truth commission is the best way to get the comprehensive story out to the American people and the world.

One final point: while a commission of inquiry is the best way to get the facts out, Congress, the Justice Department, and the public should decide what to do with those facts. So I would be reluctant to task the commission with coming up with detailed recommendations for action. If we focus the commission on gathering the facts, there may be less wrangling about who is going to be on it, which could move the process forward a lot more quickly. I would rather see investigative professionals on this commission than policymakers and partisans.

I am looking forward to the testimony of the witnesses today on how exactly this endeavor should proceed. And again, I thank you, Mr. Chairman, for putting this issue squarely before the Congress and the public. It is extremely important.

NATIONAL INSTITUTE OF MILITARY JUSTICE
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**Testimony of
Eugene R. Fidell
President
National Institute of Military Justice**

**Before the
Committee on the Judiciary
United States Senate**

Getting to the Truth Through a Nonpartisan Commission of Inquiry

Wednesday, March 4, 2009

Thank you, Mr. Chairman. The National Institute of Military Justice ("NIMJ") is thankful for the opportunity to provide testimony to this Committee on this issue of significant importance. NIMJ is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and improve public understanding of the military law system. NIMJ's officers and advisory board include law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers. NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces and the United States Supreme Court. NIMJ is actively involved in public education through its website, www.nimj.org, and through publications including the ANNOTATED GUIDE TO PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (2002) and two volumes of MILITARY COMMISSION INSTRUCTIONS SOURCEBOOKS (2003-04) and the forthcoming MILITARY COMMISSION REPORTER.

As an organization interested in military justice and consisting of a board of advisors and staff that include numerous experts in military law, international humanitarian law, and

international human rights law, NIMJ is aware of our nation's long-standing commitment to the adherence to certain principles and values while engaging our service members in military missions around the world. The United States has consistently trained its fighting forces and commanded its service members in battle to fight wars in a manner respectful of human rights, including treating captured belligerents humanely. Respecting the humanity of captured enemy belligerents dates back to before our country's birth when Gen. George Washington ordered his troops to "treat [captured belligerents] with humanity, and let them have no reason to complain of our copying the brutal example of the British Army in their treatment of our unfortunate brethren." This same principle was implemented by President Lincoln when he issued the Lieber Code as General Orders No. 100. The Lieber Code required that captured belligerents not be subjected to "intentional suffering or indignity." The conduct of our soldiers and officers in the field through the course of over 200 years documents a national commitment to strictly adhering to the principle of providing humane treatment, both because of our belief that we share our humanity with captured belligerents and because of the rule of law.

Throughout the last century and a half, the United States played a major role in the development of international humanitarian law, also known as the law of armed conflict, especially after World War II when the world powers signed the Third Geneva Convention Relative to the Treatment of Prisoners of War (1949). Since then the United States has implemented laws, regulations, and procedures to ensure that all service members abided by the Geneva Conventions when deployed on military missions. Keeping in form with our national values, military regulations required the humane treatment of all captured persons.

Of course, treating detainees humanely was necessary beyond simply conforming to legal norms – it was always strategically important. In the same way that Gen. Washington understood, former Secretary of State and U.S. Army General Colin Powell knew that treating detainees inhumanely eroded our "moral basis." We cannot treat our enemies as outside the legal protections of international laws we have endorsed, yet expect our enemies to afford our own citizens who fall into enemy hands all the rights such laws are intended to protect.

NIMJ believes that allowing the use of "enhanced interrogation techniques" by military interrogators and CIA and other governmental officials on U.S. military bases diminished our service members' morale. Conforming behavior and missions to align with long-standing American principles and values is significant to our fighting force. Most people who have

enlisted to serve our country and agreed to make significant sacrifices for our freedom did so because they believed in what this country has represented through the ages. Strict adherence to military regulations ensured high morale in troops because then they knew they were fighting for the principles of liberty and justice for all. Today, the morale of U.S. service members has been dimmed with tales of abuse from Abu Ghraib, Bagram Air Base, and Guantanamo Bay.

Leaked memorandums from the departments of justice and defense authorizing “enhanced interrogation techniques” tell a story of how the humane treatment of detainees and military regulations were discarded. The impact of diminished respect for humane treatment cannot be overestimated; it decimated our moral standing, harmed our strategic interests, and placed U.S. actors in violation of the law. A large component of the back-bone of military effectiveness is “good order and discipline.” Good order and discipline naturally erodes when policies allow for extra-legal activities and actions contrary to American values. Bad behavior naturally ensues in such environments. It is clear that numerous good officers and enlisted soldiers became demoralized by the stories of abuse. In the same way that acts of mistreatment enflame insurgents, they deflate good soldiers, or in some rare cases inspire them to break with American values and traditions. The taint of Abu Ghraib will never leave the ranks until there is a full accounting of the policies and orders that set the stage for abuse. It is not enough to hang the event only on the shoulders of a few low-level enlisted men and women. This is not fair, and it helps to provide support for the belief of some that military justice provides one level of justice to enlisted soldiers and a lesser standard to senior officers.

It is in light of these facts that NIMJ wholeheartedly supports the demand for a non-partisan commission of distinguished Americans to examine, and provide a comprehensive report on, policies and actions related to the detention, treatment, and transfer of detainees after 9/11 and the consequences of those actions, and to make recommendations for future policy in this area. A commission is necessary in order to understand the policies of the past and return the United States to its tradition of leadership in the field of human rights

Evidence suggests that the protections legally required to be afforded detainees were eroded during the Bush Administration. Despite President Bush’s claim that all detainees would be treated “humanely,” the evidence seems to indicate a top-down erosion of protections for detainees with the loosening of interrogation methods by Secretary of Defense Rumsfeld. The policy discussions and memorandums written and approved by senior administration and

Department of Defense officials must be examined and discussed openly. Thwarting these efforts in the hope that President Obama and future administrations will simply not follow the path of the last eight years is not good enough. The darkness and lack of a full accounting will linger, ready to corrupt the next leader faced with a terrorist attack. And, unfortunately, our soldiers will live under the shadow of past abuses, instead of under the shining light of Gen. Washington's order. This is significant, as it is apparent that major military engagements will continue into the foreseeable future.

A commission is necessary for the health of this democracy. It is the requirement of the government and the citizenry that no one stand above the law. Ignoring core American values and violating laws as significant as the prohibition against torture mean nothing less than discarding our Constitution and make a farce out of our democracy. We, as a people, and you as leaders of this government, should not allow blindness to follow darkness. Otherwise, we are at serious risk of repeating the errors of the recent past and permanently damaging our nation's standing in the court of world opinion on human rights issues.

Testimony
of
Laurel E. Fletcher
Director, International Human Rights Law Clinic
University of California, Berkeley
&
Eric Stover
Faculty Director, Human Rights Center
University of California, Berkeley

Before the Committee of the Judiciary
United States Senate

“Getting to the Truth through a Nonpartisan Commission of Inquiry”
March 4, 2009

We wish to thank Committee Chairman Patrick Leahy and the members of the Committee of the Judiciary of the United States Senate for the opportunity of presenting this written testimony.

In this document we present the conclusions and recommendations stemming from a two-year study of former detainees who were held in U.S. custody in Afghanistan and Guantánamo Bay, Cuba. The study was published, in November 2009, in a report entitled *Guantánamo and Its Aftermath: U.S. Detention and Interrogation Practices and Their Impact on Former Detainees*.¹ The primary objective of the study was to record the experiences of former detainees, assess their treatment in detention, and explore how the conditions of their incarceration affected their subsequent reintegration with their families and communities.

Using semi-structured questionnaires,² our research team interviewed 112 people from July 2007 to July 2008. Of these, 62 were former detainees residing in nine countries who had been held in U.S. custody without trial for just over three years on average. Another 50 respondents were key informants, including former and current U.S. government officials, representatives of nongovernmental organizations, attorneys representing detainees, and former U.S. military and civilian personnel who had been stationed in Guantánamo or at detention facilities in Afghanistan. We compared this interview data to 1,215 coded media reports about former Guantánamo detainees, relevant documents released by the Department of Defense, and reports by the U.S. government, independent organizations, and the media.

Given the limited number of former detainees interviewed, the findings of this study cannot be generalized to the more than 500 people who have been released from Guantánamo over the past six years or to those still held in captivity. However, the patterns and trends of detainee treatment we documented are consistent with those found by numerous governmental and independent investigations of detainee treatment at U.S.

detention facilities in Afghanistan and Guantánamo, making it reasonable to conclude that their experiences are representative of a much larger number of former detainees.

Study Findings on Capture, Detention, and Reintegration

Our research revealed serious flaws in the system created by the Bush Administration for the apprehension, detention, interrogation, and release of suspected members of the Taliban and Al Qaeda taken into U.S. custody since the attacks of September 11, 2001. One of the most egregious aspects of this system was a series of high-level directives issued between September 2001 and April 2003 authorizing the use of “enhanced interrogation techniques.”³ Many of these interrogation methods—whether used individually or simultaneously over prolonged periods of time—appear to have violated international and domestic prohibitions on torture or other cruel, inhuman, or degrading treatment. By adopting a “take the gloves off” approach,⁴ top U.S. civilian and military leaders established unprecedented parameters for the treatment of detainees at U.S. detention facilities in Afghanistan, Guantánamo Bay, and other locations. This permissive environment allowed—if not encouraged—guards and interrogators to dehumanize and, in some cases, torture detainees in their custody.⁵ The totality of this experience deeply affected the lives of former detainees—many of whom government officials believe were imprisoned in error. Stigmatized by their imprisonment, a significant number of these detainees now face difficulties finding employment, and some report lasting emotional and psychological scars.

Our research raised troubling questions about the process by which the U.S. military apprehended and screened suspected Al Qaeda and Taliban fighters and their ostensible supporters. In particular, the U.S. government’s payment of cash bounties created an indiscriminate and unscrupulous dragnet in Afghanistan and elsewhere that resulted in the detention of thousands of people, many of whom it appears had no connection to Al Qaeda or the Taliban and/or posed no threat to U.S. security. Once in U.S. custody, the screening procedures of detainees often failed to distinguish civilians from combatants. Instead of holding battlefield hearings mandated by the Geneva Conventions to determine the combat status of detainees,⁶ President Bush determined unilaterally that all prisoners captured in the “war on terror” were “unlawful enemy combatants” and could be held indefinitely.⁷ Yet the Administration failed to employ sufficient procedural safeguards to minimize errors in determining who fell into that category. Ultimately, the incentive to capture suspected members of Al Qaeda and the Taliban became a higher priority than the diligence and investigation necessary to discern accurately whose detention was justified.

As early as September 2002, high-level U.S. officials were aware of concerns within military and intelligence circles about how many of those held at the U.S. naval base in Guantánamo Bay were actually dangerous Al Qaeda or Taliban fighters. A senior Central Intelligence Agency (CIA) analyst with extensive Middle East experience assessed detainees at the base in summer 2002, and concluded in a top-secret report that approximately a third of the population—at that time 200 of the 600 detainees—had no connection to terrorism.⁸ Many, he said, had been “caught in the dragnet. They were not

fighters, they were not doing jihad. They should not have been there.”⁹ Guantánamo’s commander, Major General Dunlavey, agreed with him and later estimated that half the camp population was innocent.¹⁰ A Federal Bureau of Investigation (FBI) counterterrorism expert went even further and told a committee of the National Security Council that there were at most only 50 detainees worth holding at Guantánamo.¹¹

The consequences of false identification were dire. Detainees faced years of confinement in Guantánamo without any meaningful opportunity to show they had been wrongly detained. In June 2008, more than six years after the first detainees arrived at Guantánamo, the Supreme Court ruled in *Boumediene v. Bush* that detainees held there had the right to access U.S. courts to review the legal basis of their continued confinement.

As of March 4, 2009, the Department of Defense states that approximately 245 detainees remain at Guantánamo.¹² Meanwhile, over 520 detainees have been released from the camp, while approximately 60 detainees continue to be held even though military status boards have recommended their release.¹³ Of the more than 770 individuals known to have been incarcerated for some period at Guantánamo, the U.S. government has charged only 23 with war crimes as of October 2008.¹⁴ These figures argue in favor of a full investigation to determine how and why the U.S. has held so many men for so long without adequate legal safeguards.

Our qualitative data and secondary sources indicate that many detainees held in U.S. custody in Kandahar and Bagram, Afghanistan repeatedly experienced physical abuse, deprivations, humiliation, and degradation. The conditions in which detainees were held, as well as their treatment at these facilities, contravened international guidelines for the humane treatment of detainees, violated fundamental cultural and religious taboos against public nudity, interfered with religious practice, and created an environment that maximized physical and psychological discomfort and uncertainty. Respondents held at Bagram in particular reported abuses that included beatings, stress positions, prolonged hanging by the arms, sleep deprivation, intimidation, and being terrorized with dogs.

In Guantánamo, military commanders explicitly subordinated camp administration and procedures to the priorities of interrogation and thus created an atmosphere of constant surveillance and intrusion in the cellblocks that dehumanized detainees. The operating assumption was that camp conditions should serve to weaken the defenses of detainees and enable interrogators to break them down psychologically. Indeed, each component of the camp system—from the use of numbers to identify detainees to solitary confinement—was designed to increase the authority and power of camp interrogators while compounding the detainees’ sense of isolation, powerlessness, and uncertainty.

Camp procedures were designed to support the work of interrogators; however, they also fostered hostility and conflict between detainees and camp personnel. With detainees’ autonomy and control greatly reduced, one of the few ways they could protest the conditions under which they were held was through collective resistance. Respondents said they felt particularly humiliated and outraged when guards mishandled, dropped, or

threw the Quran to the floor. Such incidents frequently sparked acts of collective resistance, including hunger strikes. Detainee resistance often exacted retribution by camp personnel, which generated a further response from detainees, fueling a vicious cycle in which the use of physical force by guards and the imposition of solitary confinement became predictable consequences.

Uncertainty over their fate, often encouraged by their interrogators, haunted Guantánamo detainees, who had no effective avenue to challenge the legality of their confinement. From January 2002 until June 2004, Guantánamo detainees had no access to courts or lawyers. This did not change in any meaningful way even after the 2004 Supreme Court ruling in *Rasul v. Bush*, which required that detainees be permitted access to the federal courts for the purpose of challenging the legality of their detention through habeas corpus review.¹⁵ Moreover, procedures established in the wake of the *Rasul* decision to review whether detainees were “enemy combatants” and therefore could be detained indefinitely were ineffective and fundamentally flawed. Many respondents said they did not understand the Combatant Status Review Tribunals and annual Administrative Review Boards. Other respondents understood only too well that these procedures did not provide a meaningful opportunity to prove their claims of innocence. Without access to an attorney, unable to obtain witnesses, and generally denied access to all evidence against them, detainees remained effectively outside of the rule of law.

In interviews former detainees used words like “futile,” “desperate,” “helpless,” and “hopeless” to describe their feelings as they reflected on their incarceration at Guantánamo. As months turned into years, the *cumulative effect* of indefinite detention, environmental stressors, and other forms of abuse began to exact an increasing psychological toll on many detainees. The International Committee of the Red Cross (ICRC) raised concerns over several years about the deleterious effects of confinement on the psychological health of detainees at Guantánamo.¹⁶ For example, when the ICRC visited Guantánamo in June 2004, it found a high incidence of mental illness produced by stress, much of it triggered by prolonged solitary confinement.¹⁷ Indeed, the number of attempted suicides reported and witnessed by former detainees interviewed for this study was considerable.

Over half of the study respondents (31) of the 55 who discussed their interrogation sessions at Guantánamo characterized them as “abusive,” while the remainder (24) said they did not experience any problems. Abuses reported by these detainees who were ultimately released included being subjected to short-shackling, stress positions, prolonged isolation, and exposure to extreme temperatures for extended periods—often simultaneously. On some occasions, these tactics were used in conjunction with sensory bombardment, including extremely loud rock music and strobe lights.

Camp officials attempted to integrate medical personnel into the process of interrogation at Guantánamo, prompting both the American Medical Association and the American Psychiatric Association to issue statements in 2006 restricting participation of members in interrogations.¹⁸ In September 2008, members of the American Psychological Association voted to prohibit psychologists from consulting or participating in the

interrogation of detainees held at Guantánamo or so-called black sites operated by the CIA.¹⁹ Former medical personnel at the base have said that through 2003 (and possibly later) interrogators had access to detainee medical records and used that knowledge to extract information from detainees. Furthermore, since late 2002, military psychologists and psychiatrists serving on Behavioral Science Consultation Teams (BSCTs) have played an active role in developing and implementing interrogation strategies at Guantánamo.²⁰

Interrogation policies and standards at Guantánamo changed over time, but the data demonstrate that some practices remained consistent throughout the period when the study respondents were held there (January 2002 to January 2007). While more needs to be revealed about the specific interrogation techniques used at Guantánamo, it appears that many of the methods which detainees complained about most bitterly—cold rooms and short shackling, in conjunction with prolonged isolation—were permitted under the U.S. military’s interrogation guidelines in force from April 2003 to September 2006.²¹ These practices contravene the Geneva Conventions of 1949, which the United States ratified in 1955. However, President Bush sidestepped these prohibitions in January 2002, when he determined that the Third Geneva Convention, also known as the Geneva Convention Relative to the Treatment of Prisoners of War (POWs), did not apply to suspected members of the Taliban and Al Qaeda taken into detention in Afghanistan.²²

To date, no independent, comprehensive investigation has been conducted to determine the role that camp personnel as well as officials farther up the civilian and military chains of command played in the design and implementation of interrogation techniques at Guantánamo. No broad investigation has yet addressed whether or not these officials should be held accountable for any crimes they or their subordinates may have committed.

After release from Guantánamo, many respondents said they confronted a host of challenges upon arrival in their country of origin or a third country. Only a handful of former detainees said they received any meaningful or effective assistance. Labeled the “worst of the worst,” they left Guantánamo shrouded in “guilt by association,” particularly as their innocence or guilt had never been determined by a court of law. Some respondents referred to this state of affairs as their “Guantánamo stigma” and said it contributed to their difficulties finding employment and reintegrating into their communities. Upon arriving home, some detainees found their families had extinguished their assets and assumed significant debt. Some respondents returned home with compromised physical and mental health, and were unable to afford or access rehabilitative care and services. To date, there has been no official acknowledgment of any mistake or wrongdoing by the United States as a result of its detention or treatment of any Guantánamo detainee. No former detainees have been compensated for their losses or harm suffered as a result of their confinement.

Recommendation: Establish an Independent, Non-partisan Commission of Inquiry

Our report provides the first *systematic* glimpse into the world of former detainees once held in U.S. custody in Afghanistan and Guantánamo Bay.²³ But it is only a glimpse, albeit a very troubling one. There is more to be learned, and our hope is that further investigations and studies will follow with the aim of removing the shroud of official secrecy that has hidden what has been taking place at Guantánamo and other detention facilities from full public scrutiny.

As a first step, we recommend the establishment of an independent, non-partisan commission to investigate and publicly report on the detention and treatment of detainees held in U.S. custody in Afghanistan, Iraq, Guantánamo Bay, and other locations since the attacks of September 11, 2001. The mandate of the commission should be sufficiently broad to include a probe of how the policies and practices of these detention facilities have affected the return and reintegration of former detainees in their countries of origin or third countries.

The commission should be composed of individuals of the highest caliber, known for their integrity, credibility, and independence. Commission members should include former members of the U.S. military and specialists in U.S. constitutional and military law, international humanitarian and human rights law, public health, psychology, and medicine. To leverage the expertise of its members, the commission should be divided into working groups to focus on discrete areas.

The commission should have subpoena power to compel witnesses and gain access to all classified materials concerning apprehension, detention, interrogation, and release of detainees taken into U.S. custody. The commission should be allocated adequate funding and expert staff to fulfill its mandate. Commission members and staff should undergo expedited review to ensure prompt receipt of the necessary security clearances to gain access to all relevant materials. Most important, the commission should have authority to recommend criminal investigations at all levels of the civilian and military command of those allegedly responsible for abuses or having allowed such abuses to take place. The work of this commission must not be undercut by the issuance of pardons, amnesties, or other measures that would protect those culpable from accountability.

The mandate of the commission should include—but not be limited to—the following areas of inquiry:

- **Apprehension and Screening.** What were the procedures used in the screening of suspected “unlawful enemy combatants” and were they lawful, appropriate, and effective? If not, what should be the proper screening procedures for suspected enemy fighters? Did the U.S. military detain and transfer individuals to Guantánamo who had no connection to Al Qaeda or the Taliban or otherwise posed no threat to U.S. security? Did the use of monetary bounties contribute to the detention and interrogation of individuals who should never have been taken into U.S.

custody? How did the decision not to apply the Geneva Conventions affect the apprehension and screening of detainees?

- **Conditions and Treatment of Detention.** Did the conditions in U.S. detention facilities in Afghanistan and Guantánamo meet humane standards of treatment? Did the decision not to apply the Geneva Conventions affect the conditions and treatment of detainees? How did the U.S. deviate from the “golden rule” standard articulated in the Army Field Manual which states that no interrogator should use a technique that the interrogator would not want used on a U.S. soldier?²⁴ What role did medical and psychological personnel play in the treatment of detainees? Did they contravene professional codes of conduct or violate any laws?
- **Interrogations.** Did U.S. interrogation practices subject detainees to abusive treatment including torture and cruel, inhuman, or degrading treatment? How did interrogation policies and practices evolve since President Bush’s declaration of a “war on terror” on September 20, 2001? And what was the role of civilian and military officials in designing and implementing these policies?
- **Reintegration and Rehabilitation.** What has been the *cumulative effect* of indefinite detention on those released from Guantánamo? What was the process to determine whether it was safe to transfer a detainee to the custody of a foreign government? What protections were used, and were they sufficient? Have any former detainees been subjected to cruel and inhumane treatment since their transfer to the custody of other governments? How successful are former detainees in reintegrating and resettling in their countries of origin or third countries? What impediments do they face? If any returnees pose a security threat, what steps and agreements with receiving governments have been taken to minimize such a threat?

If appropriate, the commission should recommend institutional reforms and other measures to (1) improve the apprehension and screening of suspected enemy fighters, (2) prevent abusive detention and interrogation practices, and (3) monitor the treatment of former detainees upon their release from U.S. custody.

If the commission concludes the U.S. government has violated the rights of individuals held in its custody, it should recommend corrective measures, including issuing an apology, providing compensation, and providing a fair means for clearing that person’s name. If applicable, the commission should make recommendations for further criminal investigation of those responsible for any crimes at all levels of the chain of command.

Now is an opportune time to review and correct policies and, if necessary, make institutional reforms to ensure the means used to protect U.S. security are consistent with American values and U.S. obligations under domestic and international law.

Notes

¹ The full report is available at <http://hrc.berkeley.edu/pdfs/Gtmo-Aftermath.pdf>.

² The questionnaires are available from the Human Rights Center, University of California, Berkeley and the International Human Rights Law Clinic, University of California, Berkeley.

³ These include (1) a secret directive by President Bush on September 17, 2001, granting the Central Intelligence Agency the authority to employ “an alternative set of interrogation procedures;” (2) a directive by Secretary of Defense Donald Rumsfeld on December 2, 2002, authorizing 24-hour interrogations, isolation for 30 days at a time, and the exploitation of “individual phobias (such as fear of dogs) to induce stress,” which was later rescinded on January 15, 2003; and (3) a directive by the Secretary of Defense on April 16, 2003, authorizing the use of 24 interrogation methods, including environmental manipulation, sleep adjustment, and extended solitary confinement. These directives were largely based on legal memoranda prepared by staff at the Department of Justice. See *Memorandum from Deputy Assistant Attorney General John Yoo to General Counsel of Department of Defense*, January 9, 2002, reprinted in Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005), 38-79; *Memorandum from Assistant Attorney General Jay S. Bybee to White House Counsel Alberto Gonzalez*, January 22, 2002, reprinted in Greenberg and Dratel, *The Torture Papers*, 81-117; and *Memorandum from White House Counsel Alberto Gonzalez to President George W. Bush*, January 25, 2002, reprinted in in Jameel Jaffer and Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (New York: Columbia University Press, 2006), A-1-3; *Memorandum from Assistant Attorney General Jay S. Bybee to White House Counsel Alberto Gonzalez*, August 1, 2002, reprinted in Greenberg and Dratel, *The Torture Papers*, 172; *Memorandum from Deputy Assistant Attorney General John Yoo to White House Counsel Alberto Gonzalez*, August 1, 2002, reprinted in Greenberg and Dratel, *The Torture Papers*, 218.

⁴ Cofer Black, head of the CIA’s counterterrorist center, told a September 16, 2002 Congressional hearing, “After 9/11, the gloves came off.” *Joint Investigation Into September 11th: Hearing Before the Joint House-Senate Intelligence Committee*, 109th Cong. (2002) (statement of Cofer Black, Former Chief of the Counterterrorist Center, Central Intelligence Agency).

⁵ See the International Covenant on Civil and Political Rights, December 16, 1966, art.7, 999 UNT.S. 171, *entered into force* Mar. 23, 1976, and UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, UN GAOR. 39th Sess. Supp. No. 51, *entered into force* June 26, 1987, UN Doc. A/Res/39/46, available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm (accessed September 30, 2008). See also Article 3 of the Geneva Conventions of 1949 [hereinafter Common Article 3], which prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “outrages upon personal dignity, in

particular humiliating and degrading treatment.” See, in particular, Geneva Convention Relative to the Treatment of Prisoners of War, incl. Annexes I-V, art. 3, August 12, 1949, 6 U.S.T. 3316, 75 UNT.S. 135 [hereinafter Geneva Conventions III], available at <http://www.unhchr.ch/html/menu3/b/91.htm> (accessed October 8, 2008).

⁶ On January 19, 2002, Secretary of Defense Donald Rumsfeld sent an order to the Joint Chiefs of Staff declaring that the military no longer needed to follow the Geneva Conventions in their handling of Al Qaeda and Taliban prisoners. The next day, he rescinded an earlier order by General Tommy Franks, commander of the Coalition Forces in Afghanistan, which had set up Article 5 hearings to screen captives. Now that the United States was no longer following the Geneva Conventions, there would be no need for Article 5 hearings. See Donald Rumsfeld, *Memorandum for Chairman of the Joint Chiefs of Staff*, January 19, 2002, available at <http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf> (accessed September 30, 2008). See Article 5 of Geneva Conventions III, available at <http://www.unhchr.ch/html/menu3/b/91.htm> (accessed September 30, 2008).

⁷ President George W. Bush, “Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” available at http://www.law.uchicago.edu/tribunals/exec_order.html (accessed September 30, 2008).

⁸ Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), 183; see also Tim Golden and Don Van Natta, “The Reach of War: U.S. Said to Overstate Value of Guantánamo Detainees,” *New York Times*, June 21, 2004; Christopher Cooper, “Detention Plan: In Guantánamo, Prisoners Languish in Sea of Red Tape,” *Wall Street Journal*, Jan. 26, 2005.

⁹ Mayer, *The Dark Side*, 183.

¹⁰ *Ibid.*, 184.

¹¹ *Ibid.*, 187.

¹² U.S. Department of Defense, Press Release No. 040-09, *Detainee Transfer Announced*, January 17, 2009, available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=12449> (accessed on January 22, 2009).

¹³ These detainees remain “stuck” either because the U.S. has been unable to negotiate release conditions with home governments or they are at risk of being tortured or persecuted if returned to their country of origin and the U.S. has not been able to reach agreement for resettlement with a third country.

¹⁴ The U.S. government has stated that it will bring war crime charges against 60 or more of the almost 800 detainees who have been held in Guantánamo since January 2002. Associated Press, “Fast pace set for US war-crimes trials,” *Military Global Allied Forces*, August 8, 2008, available at <http://www.militaryglobal.com/forum/index.php/topic,5268.0.html> (accessed September

13, 2008). The Department of Defense has prepared or filed charges against 23 detainees. U.S. Dept. of Defense, "Military Commission: Commission Cases," <http://www.defenselink.mil/news/commissionsCo-conspirators.html> (accessed October 12, 2008).

¹⁵ The *Rasul* decision prompted the U.S. government to create Combat Status Review Tribunals and Annual Review Boards as a means to determine whether a detainee should continue to be considered an "unlawful enemy combatant." Litigation challenging the status review system and its Congressionally-created review procedure led to the Supreme Court 2008 decision in *Boumediene v. Bush*, 553 U.S. __ (2008).

¹⁶ In late 2003, the International Committee of the Red Cross (ICRC) informed the U.S. Administration that the totality of the conditions under which detainees were held at Guantánamo, including their indefinite confinement, had led to a worrying deterioration in the psychological health of many detainees. See Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantánamo," *New York Times*, November 30, 2004.

¹⁷ *Ibid.* Several studies report similar mental disturbances among prisoners placed in solitary confinement. See Stuart Grassian, "Psychiatric effects of solitary confinement," *Journal of Law and Policy* 22 (2006): 327-380. Grassian notes that mental disturbances can include "an agitated confusional state, characteristics of a florid delirium, [with] severe paranoid and hallucinatory features and also by intense agitation and random, impulsive, often self-directed violence." Also see Hernan Reyes, "The worst scars are in the mind: psychological torture," *International Review of the Red Cross* 89, no. 867 (September 2007): 606-608. Again, in 2006, the ICRC expressed its concern that "uncertainty about the prisoners' fate has added to the mental and emotional strain experienced by many detainees and their families." ICRC, *Operational Update*, December 31, 2006, quoted in Amnesty International, *United States of America, Cruel and Inhuman: Conditions of Isolation for Detainees at Guantánamo Bay*, April 5, 2007, 19 (AI Index: AMR 51/051/2007).

¹⁸ See American Medical Association Council on Ethical and Judicial Affairs, *Statement on Interrogation of Prisoners*, July 7, 2006, available at <http://pn.psychiatryonline.org/cgi/content/full/41/13/4-a> (accessed July 30, 2008). The AMA statement provides: "Physicians must neither conduct nor directly participate in an interrogation, because a role as physician-interrogator undermines the physician's role as healer and thereby erodes trust in both the individual physician-interrogator and in the medical profession. Physicians should not monitor interrogations with the intention of intervening in the process, because this constitutes direct participation in interrogation. Physicians may participate in developing effective interrogation strategies that are not coercive but are humane and respect the rights of individuals." Also see American Psychiatric Association, *Psychiatric Participation in Interrogation of Detainees*, May 21, 2006, available at <http://pn.psychiatryonline.org/cgi/content/full/41/12/1-b> (accessed July 30, 2008). The APA resolution states: "No psychiatrist should participate directly in the interrogation of persons held in custody by military or civilian investigative or law enforcement authorities, whether in the United States or elsewhere. Direct participation includes being present in the interrogation room, asking or suggesting questions, or

advising authorities on the use of specific techniques of interrogation with particular detainees. However, psychiatrists may provide training to military or civilian investigative or law enforcement personnel on recognizing and responding to persons with mental illnesses, on the possible medical and psychological effects of particular techniques and conditions of interrogation, and on other areas within their professional expertise.”

¹⁹ The referendum prohibits psychologists from working in settings where “persons are held outside of, or in violation of, either International Law (e.g., UN Convention Against Torture and the Geneva Conventions) or the U.S. Constitution, where appropriate,” unless they represent a detainee or an independent third party. The Association’s bylaws require that it institute the policy at the next annual meeting in August 2009. See Benedict Carey, “Psychologists Vote to End Interrogation Consultations,” *New York Times*, September 18, 2008.

²⁰ Military psychologists developed interrogation techniques based on the “reverse engineering” of Survival, Evasion, Resistance, and Escape (SERE) tactics. SERE is a program developed to train U.S. military to resist torture and abusive interrogation. See, for example, Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by U.S. Forces*, 2005; M. Gregg Bloche and Jonathan H. Marks, “Doctors and Interrogators at Guantánamo Bay,” *New England Journal of Medicine* 353 (2005): 6–8. Also see Larry C. James (with Gregory A. Freeman), *Fixing Hell: An Army Psychologist Confronts Abu Ghraib* (New York: Grand Central Publishing, 2008).

²¹ See Army Regulation 15-6: *Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility*, April 1, 2005, amended June 9, 2005, 9-10 [hereinafter Schmidt-Furlow Report] (clarifying that environmental manipulation was approved as an interrogation tactic at Guantánamo through a memorandum released by the Secretary of Defense on April 16, 2003); see also U.S. Dept. of Justice, Office of the Inspector General, *A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq* (May 2008), 58–59 (“OIG/DOJ Report”) (explaining that environmental manipulation was first approved as an interrogation technique by the Secretary of Defense in a memorandum dated April 16, 2008, and that the memorandum remained in effect until September 2006, when the United States Army released a new field manual that delineated the scope of permissible interrogation techniques). See Headquarters, Dept. of the Army, FM 2-22.3 (FM 34-52), *Human Intelligence Collector Operations* (September 2006) [hereinafter FM 2-22.3].

²² Geneva Conventions III, art. 3. See also *Memorandum from President George W. Bush*, February 7, 2002, reprinted in Jaffer and Singh, *Administration of Torture*, A-6, also available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (accessed October 8, 2008) (declaring that Al Qaeda and Taliban detainees do not qualify as prisoners of war for purposes of Geneva Conventions III).

²³ McClatchy Newspapers has compiled profiles of 64 former Guantánamo detainees and published several articles on the camp and former detainees based on interviews in 2007 and 2008, available at <http://www.mcclatchydc.com/259/story/40334.html> (accessed September 12, 2006).

²⁴ FM 2-22.3 § 5-76.



**Statement of Caroline Fredrickson
Director, Washington Legislative Office**

American Civil Liberties Union

On

“Getting to the Truth Through a Nonpartisan Commission of Inquiry”

Before the Senate Judiciary Committee

March 4, 2009

We are pleased to submit this statement on behalf of the American Civil Liberties Union, a non-partisan organization with more than half a million members and fifty-three affiliates nationwide, regarding our views on how Congress and the next President can begin to restore the rule of law. The ACLU is well suited to provide this advice as we were founded in 1920 to defend the constitutional rights of political dissidents targeted in an illegal campaign of harassment led by U.S. Attorney General A. Mitchell Palmer during a period of perceived national emergency similar to the one we face today. As new crises emerged over the decades, the ACLU has remained a vigilant defender of the American values enshrined in our Constitution and Bill of Rights, and we have been at the forefront since the terrorist attacks of September 11, 2001, in challenging illegal and unconstitutional government programs undertaken in the name of national security.

The ACLU believes that preserving our commitment to the rule of law, human rights, and individual liberties at home and around the world is essential to developing effective and sustainable policies to protect our national security. As its primary goal, this Committee should put to rest the dangerously false assumption that new threats to our security justify a deviation from these fundamental values. In his first inaugural address, Thomas Jefferson acknowledged the honest fear some held that our republican form of government would not be strong enough to protect itself in troubled times, yet he argued it was our nation's commitment to individual liberty and "the standard of the law" that made it the strongest on earth.¹ Jefferson counseled that if we ever found, in a moment of "error or alarm," that our government had abandoned its essential principles we should retrace our steps in haste "to regain the road which alone leads to peace, liberty, and safety." The ACLU applauds the Committee for holding this hearing and for exploring, after an extended period of error and alarm, the quickest path to restoring that greatest protector of our national security: the rule of law.

There are many paths towards restoring the rule of law and the ACLU commends Chairman Leahy for inquiring whether and how a truth commission should be constituted. We recommend today that in addition to any such work done by a commission, the Attorney General appoint a special prosecutor to pursue criminal charges if appropriate and that Congress conduct an intensive investigation of abuses of the past to set a record of how to move forward. Indeed, multiple accountability efforts are only complementary. After revelations of wiretapping, assassinations and other abuses in the 1970s, two select committees and a presidential commission all operated concurrently. Just as in the '70s, there are many oversight goals, accountability initiatives and institutional interests and each can be fulfilled by a different investigating body.

THE NEED FOR TRUTH AND ACCOUNTABILITY

An effort by Congress and the President to account fully for government abuses of the recent past is absolutely necessary for several reasons. First, only by holding those who engaged in intentional violations of law accountable can we re-establish the primacy of the law, deter future abuses, and reclaim our reputation in the international community. Second, only by creating an accurate historical record of recent failures and the reasons for them can government officials, historians, and other chroniclers properly understand the failure of internal and external oversight mechanisms and how to reform our national security programs and policies. Finally,

only by vigorously exercising its oversight responsibility in matters of national security can Congress reassert its critical role as an effective check against abuse of executive authority.

In January 1776, Thomas Paine declared “in America, the law is king.”² With this simple statement, Paine sparked a revolution and altered forever the way people would evaluate the legitimacy of not only our government, but all governments. Around the world, wherever the law is king, freedom, equality, and legitimacy naturally follow. Unfortunately, after the devastating terrorist attacks of September 11, 2001, the Bush administration deliberately chose to abandon the law in favor of working “on the dark side,” in secret, in violation of our own core principles and universally recognized standards of international behavior.

Relying on an aggrandized theory of executive power that is diametrically opposed to the fundamental concept of checks and balances enshrined in the Constitution, the last administration secretly initiated extra-judicial detention programs and cruel, inhuman and degrading interrogation methods that violated international treaties and domestic law. It engaged in extraordinary renditions – international kidnappings – in violation of international law and the domestic laws of our allied nations. It conducted warrantless wiretapping within the United States in violation of the Foreign Intelligence Surveillance Act and the Fourth Amendment. And these are only the abuses that have come to light at this time. The Bush administration intentionally weakened internal oversight mechanisms by politicizing the Department of Justice in an unprecedented fashion and by promulgating secret legal opinions deliberately crafted to provide a veneer of legitimacy over these illegal programs, but which could not withstand scrutiny under any generally accepted standard for legal analysis. It intentionally hindered external oversight by obscuring its activities behind a cloak of secrecy designed not to protect our national interests but to hide abuse and illegality and to thwart constitutional checks and balances. Rather than improve our security these misguided policies have provided propaganda victories for our enemies, alienated our allies, and sown distrust of the government here inside the United States. Meanwhile, at least according to recent testimony from the leaders of our intelligence agencies, the threats to our national security are increasing rather than diminishing.³

Yet an honest assessment of our predicament cannot lay the blame entirely at the feet of that administration, or even the cumulative usurpations of power of Presidents past. For while a forceful desire to expand executive power beyond its constitutional limits was necessary to achieve such an unchecked concentration of power within one branch, it could not have been achieved without the willful abdication of responsibility by the other branches. James Madison explained in Federalist 51 that “the great security against the gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” In short, “[a]mbition must be made to counteract ambition.”

The Constitution provides ample tools for Congress and the courts to check executive abuses of authority, such as those described above. The failure to use those tools leaves the members of both other branches equally to blame for the consequences of the administration’s misguided policies. The courts have too often and too easily acquiesced to government state secrets privilege claims in dismissing lawsuits challenging illegal programs like extraordinary rendition and NSA warrantless wiretapping.⁴ Congress is perhaps more at fault, however,

because the Constitution gives it the more robust tools. As Madison said, “[i]n republican government, the legislative authority necessarily predominates,” yet Congress did not fulfill its responsibility.

THE ROAD BACK TO RESTORING THE RULE OF LAW

I. RESTORE CONSTITUTIONAL CHECKS AND BALANCES THROUGH CONGRESSIONAL OVERSIGHT

A program to restore the rule of law must focus on restoring the constitutional checks and balances that ensure the three branches of government are accountable to one another, and to the American public they serve. Congress should begin vigorous and comprehensive oversight hearings to examine all post-9/11 national security programs to evaluate their effectiveness and their impact on civil liberties, human rights, and international relations, and it should hold these hearings in public to the greatest extent possible. Congress has several options in how it could pursue such oversight, whether through standing committees with jurisdiction, or ideally, through a select committee that could allocate the necessary time and resources outside of the day-to-day demands of the current structure. However, it is critically important that Congress do this work itself rather than to just appoint an outside commission. Only by vigorously exercising congressional oversight powers will Congress be able to restore its authority to compel the timely production of documents and witnesses from the executive branch, thereby empowering Congress to perform more effective oversight going forward.

Passing substantial oversight responsibility to an outside commission without concurrently performing its own investigation might reinforce the perception that Congress has neither the authority, capability nor political will necessary to conduct proper oversight on its own. Outside commissions can also limit Congress’s options in addressing a particular problem by issuing recommendations. Because the public views these commissions as politically independent, deservedly or not, it often becomes politically expedient for Congress to adopt their recommendations wholesale, regardless of whether its own review would come to the same conclusions. The Constitution gives Congress the responsibility to conduct oversight, and Congress must fulfill this obligation to ensure the effective operation of our government.

President Obama may want to commission an independent review of his predecessor’s national security policies, and this would be entirely appropriate in determining which programs to continue and which to abandon going forward. But there is no reason two inquiries could not move forward simultaneously. A congressional select committee investigation would only complement other investigative and oversight efforts conducted either directly by the executive branch or by an independent commission. After revelations of wiretapping, assassinations and other abuses in the 1970s, two select committees and a presidential commission all operated concurrently. Just as in the ‘70s, there are many oversight goals, accountability initiatives and institutional interests and each can be fulfilled by a different investigating body.

As the “predominant” branch of our republican government, to use Madison’s expression, the Constitution provides Congress with robust powers to exert its will over the executive. The Congressional Research Service Congressional Oversight Manual lists six

constitutional provisions authorizing Congress to investigate, organize, and manage executive branch activities.⁵ The most direct and forceful tools are the power of the purse, the confirmation power, and the impeachment power. Congress can use these powers to leverage cooperation from the executive branch, but Congress can also directly compel compliance with congressional inquiries when necessary. The Supreme Court explained the constitutional basis for Congress's power to investigate, and to compel compliance, in *McGrain v. Daugherty*:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who possess it. Experience has taught that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain that which is needed... Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.⁶

Yet despite the unquestioned legitimacy of this authority, Congress has not used its inherent contempt power since 1935. While we respect Congress's self-restraint in its use of its power to deny people their personal liberty, the failure to compel compliance has allowed recalcitrant executive branch officials to thwart congressional oversight by using unjustifiable delaying tactics, incomplete compliance, or outright refusal to cooperate based on specious claims of privilege and litigation. Once the threat of inherent contempt proceedings becomes real, however, Congress would likely find future Presidents and executive officials more responsive to congressional requests for information.

And despite administration claims to the contrary, Congress retains these robust powers even in matters of national security and foreign affairs. Not only does the Constitution require a role for Congress in the decision-making process over national security matters, but sound government policy demands it. The Constitution gives Congress the power to declare war and to make rules regulating land and naval forces. Congress, and Congress alone, has the power to levy and collect taxes for the common defense and to appropriate funds as it sees fit. These powers were given to the legislative branch intentionally so that the legislature, as the representatives of the people and the more deliberative branch of government, would have direct control over the critical decisions regarding war and peace. The framers realized our democracy would be strongest when congressional action, supported by the will of the people, guides our use of military activities abroad.

Congress has the power to demand access to national security information and Congress must use this authority to oversee intelligence activities.⁷ The National Security Act of 1947 and the Intelligence Oversight Act of 1980 codify Congress's right to national security information, but access to this information is inherent in the constitutional power to legislate. Under the current statutory structure, congressional oversight of intelligence matters is primarily conducted in classified sessions, so Members of Congress who become aware of abusive security programs are prohibited from sharing this information with the public. This secrecy thwarts public

oversight, a key aspect of accountability for both the executive branch and Congress. Recent revelations that certain Members of Congress were advised of the NSA's domestic wiretapping activities and the CIA's interrogation practices long before they were revealed to the public illuminate this problem, as their ability to curb these activities was limited to filing secret letters of concern.⁸ This problem is only exacerbated when the executive limits notification regarding covert activities to the "Gang of Eight" -- congressional leaders of both houses and both parties and the chairmen and ranking members of the intelligence committees.⁹ Notice regarding particular intelligence activities is meaningless if congressional leaders cannot share the information with colleagues as necessary to pursue legislative measures curb executive abuse.

Congress has the power under its own rules to declassify national security information, though it has never exercised this authority.¹⁰ Congress should use its power to demand access to national security programs and should immediately declassify any information that reveals illegal government activities or abuses of rights guaranteed under the Constitution or international treaties, in a manner that does not disclose technical military information that could harm national security. Congress should also exercise the power of the purse to defund illegal or abusive programs, or any program the President refuses to let Congress examine.

The President has no right to deny Members of Congress access to national security matters, or to limit access to classified information to certain Members. Congress should examine why the intelligence committees and current congressional oversight procedures failed to check executive abuses in national security programs. Learning the reasons for these procedural failures is a necessary first step to establishing a more effective system for the future.

II. ENFORCE THE LAW

The rule of law is meaningless if left unenforced. Some of the programs that have been exposed through internal investigations, government whistleblowers, or press reports appear to involve violations of U.S. criminal statutes. American CIA officers allegedly involved in extraordinary renditions in Europe have found themselves prosecuted for kidnapping by Italian authorities, and under criminal investigation elsewhere.¹¹ Our government's failure to address these matters in our own courts of law and failure to defend these charges publicly diminishes our moral standing on the international stage.

Justice Department regulations require the appointment of an outside special counsel when a three-prong test is met.¹² First, a "criminal investigation of a person or matter [must be] warranted." Second, the "investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department." And, third, "under the circumstances it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter." When this three-prong test is met a special counsel must be selected from outside the government and given full investigatory and prosecutorial powers and the authority to secure the necessary resources.

The ACLU has previously called for the Attorney General to appoint outside special counsel to investigate the torture and abuse of detainees held in U.S. custody overseas; to

investigate the National Security Agency's warrantless wiretapping program; and to investigate the destruction of Central Intelligence Agency interrogation videotapes.¹³ Attorney General Mukasey did assign an Assistant United States Attorney from Connecticut to investigate the CIA's destruction of interrogation tapes, but this is not the type of independent investigation required under the regulation.¹⁴ Moreover, the investigation is improperly limited to illegal activity surrounding the destruction of the tapes, rather than the illegal interrogation methods they depict. The three-prong test for appointing an outside special counsel is met in each of these matters, and we urge Congress to join us in renewing the call for the Attorney General to appoint special counsel to investigate these potential violations of law. President Obama should order Attorney General Eric Holder to appoint outside special counsel regarding all of these matters, to ensure independence from any possible political influence.

CONCLUSION

It is now widely known around the world that since 9/11 the United States government authorized its agents and employees to conduct international kidnappings, indefinitely detain people without judicial process, often in secret prisons, and engage in cruel, inhuman and degrading treatment of those detainees – including the use of techniques most reasonable people recognize as torture. It is difficult to understand how a nation founded on the ideals articulated by Thomas Paine and Thomas Jefferson could have allowed such things to happen, but understand we must. We are at a crossroads. Unless we render a full accounting and create an accurate record of how top officials discarded our core principles, we will never be able to find our way back to that high road that made America a symbol of liberty, equality, and justice around the world. The ACLU remains confident, as we have since our founding in 1920, that the rule of law will ultimately prevail. But it is up to Congress, as the elected representatives of the American people, to provide this full accounting; to hold individuals accountable where appropriate; to reform the checks and balances that were designed to keep our government in equilibrium; and to restore the rule of law over the government of the United States.

¹ Thomas Jefferson, First Inaugural Address, Washington, DC, (Mar. 4, 1801), *available at* <http://www.yale.edu/lawweb/avalon/president/inaug/jefinau1.htm>.

² Thomas Paine, *Common Sense*, (1776).

³ See, *Current and Projected National Security Threats: Hearing before the Senate Select Comm. on Intelligence*, 110th Cong. (Feb. 5, 2008); *Annual World-wide Threat Assessment: Hearing before the House Permanent Select Comm. on Intelligence*, 110th Cong. (Feb. 7, 2008).

⁴ See, *El-Masri v. Tenet*, 437 F.Supp.2d 530 (E.D.Va. 2006); *Hepting v. AT&T Corp.*, 439 F.Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9th Cir. Nov. 9, 2006); *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006), *rev'd* 507 F.3d 1190 (9th Cir. 2007); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated* 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 1334 (2008); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006).

⁵ Frederick M. Kaiser and Walter J. Oleszek, CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL OVERSIGHT MANUAL, CRS REPORT FOR CONGRESS, 5 (Jan. 3, 2007).

⁶ 273 U.S. 135, 174-175 (1927).

⁷ See, Kate Martin, CENTER FOR NATIONAL SECURITY STUDIES, CONGRESSIONAL ACCESS TO CLASSIFIED NATIONAL SECURITY INFORMATION, (March 2007), *available at* http://www.openthegovernment.org/documents/congressional_paper.pdf.

⁸ See, Senator Jay Rockefeller, Letter to Vice President Cheney Concerning NSA Wiretapping Program (Jul. 17, 2003), available at <http://www.talkingpointsmemo.com/docs/rockefeller-letter/>; and, Greg Miller and Rick Schmitt, *Letter Said CIA Image to Suffer if Tapes Trashed*, LOS ANGELES TIMES, (Jan. 4, 2008), available at <http://articles.latimes.com/2008/jan/04/nation/na-ciatapes4>.

⁹ See, Alfred Cumming, CONGRESSIONAL RESEARCH SERVICE, STATUTORY PROVISIONS UNDER WHICH CONGRESS IS TO BE INFORMED OF INTELLIGENCE ACTIVITIES, INCLUDING COVERT ACTION, (Jan. 18, 2006), available at <http://epic.org/privacy/terrorism/fisa/crs11806.pdf>.

¹⁰ See, Project on Government Oversight, Congressional Tip Sheet on Access to Classified Information, (Oct. 2007), <http://pogoarchives.org/m/cots/cots-october2007a.pdf>. "The House rule allowing declassification by the House Permanent Select Committee on Intelligence can be found in Rules of the 109th Congress, U.S. House of Representatives, Rule X. Senate Resolution 400, section 8, agreed to May 19, 1976 (94th Congress, 2nd Session) allows the Senate to declassify."

¹¹ See, *Trial on CIA Rendition Resumes in Italy*, ASSOCIATED PRESS, (Mar. 19, 2008); and Don Van Natta, Jr. and Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N. Y. TIMES, (Jan. 9, 2005).

¹² 28 C.F.R. part 600.1 et seq. Any effort to restore the rule of law in the United States requires that serious allegations of illegal behavior by government agents be investigated thoroughly by a competent authority and, if sufficient evidence of criminal violations is established, prosecuted in criminal courts. When Justice Department officials cannot pursue investigations due to real or perceived conflicts of interest, the Attorney General should appoint an outside special counsel to conduct an independent investigation.

¹³ See, American Civil Liberties Union, Letter to Attorney General Alberto Gonzales, Requesting Appointment of Outside Special Counsel for Investigation and Prosecution of Civilian Violation, or Conspiracy to Violate, Criminal Laws Against Torture or Abuse of Detainees (Feb. 15, 2005), available at <http://www.aclu.org/safefree/general/17582leg20050215.html>; American Civil Liberties Union, Letter to Attorney General Alberto Gonzales Requesting Investigation of Possible Perjury by General Ricardo A. Sanchez; Renewal of Request for an Outside Special Counsel to Investigate and Prosecute Violations or Conspiracies to Violate Criminal Laws Against Torture or Abuse of Detainees (Mar. 30, 2005), available at <http://www.aclu.org/safefree/general/17554leg20050330.html>; American Civil Liberties Union, Letter to Attorney General Alberto Gonzales Requesting the Appointment of Outside Special Counsel for the Investigation and Prosecution of Violations, or Conspiracy to Violate, Criminal Laws Against Warrantless Wiretapping of American Persons (Dec. 21, 2005), available at <http://www.aclu.org/safefree/general/23184leg20051221.html>; and American Civil Liberties Union, Letter to Attorney General Michael Mukasey, Requesting the Appointment of Outside Special Counsel for the Investigation into the Destruction of CIA Interrogation Tapes, (Jan 7, 2008) available at http://www.aclu.org/images/general/asset_upload_file88_33530.pdf.

¹⁴ Congressman John Conyers, Jr., *Conyers Demands that DOJ Appoint Real Special Counsel*, Statement (Jan. 2, 2008), <http://judiciary.house.gov/news/010208.html>.

A 'truth commission' to probe Bush? Just say no The Globe and Mail (Canada) March 4, 2009 Wednesday

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HEADLINE: A **'truth commission'** to probe Bush? Just say no

BYLINE: JOHN IBBITSON

BODY:

Today, the Senate judiciary committee will consider whether to create a **"truth commission"** to investigate alleged abuses and crimes committed on the watch of George W. Bush. Here's hoping the committee gives up the idea.

Yes, this is dissatisfying. No one should be above the law, especially those in government. But the political fallout of a congressional investigation would exceed its utility.

When asked whether he supported a **truth commission**, President Barack Obama said: "I am more interested in looking forward than in looking backward." Democrats in Congress should point in the same direction.

It's not that there isn't stuff worth looking into. We learned this week that the Central Intelligence Agency destroyed 92 tapes of prisoner interrogations. The agency didn't want people to see those prisoners being waterboarded, a form of torture in the minds of everyone except those in the previous administration who said it was just an "enhanced interrogation technique."

(How can you tell when something is true and something is a lie? One way, George Orwell taught us, is to look at the words being used. People speaking the truth tend to use Anglo-Saxon words such as "water" and "board." People seeking to deceive lean heavily on the French/Latin side of the language: "enhanced," "interrogation" and "techniques." The former administration is guilty by vocabulary.)

We also learned that a raft of Justice Department opinions on the legality of the anti-terrorism measures made early in the Bush presidency had been rescinded in later years, because they were clearly flawed. One legal opinion said the government could suspend free speech, because the country was in a state of war.

So what is to be done?

Patrick **Leahy**, chairman of the Senate judiciary committee, wants to "develop and

authorize a person [or] a group of people universally recognized as fair-minded, without any axe to grind" to investigate "not for purposes of constructing criminal indictments, but to assemble the facts."

That's not nearly enough for a coalition of human-rights groups; it has called on Attorney-General Eric Holder in a petition "to appoint a non-partisan independent special counsel to immediately commence a prosecutorial investigation into the most serious alleged crimes" of Mr. Bush and his cronies. (Too much Latinate English there, too.)

The problem with hiring lawyers to investigate the government is that they can go rogue. Kenneth Starr was appointed to look into Bill Clinton's real-estate dealings and ended up submitting a report on his adultery.

Also, it becomes retaliatory. Because the Republicans sicced Mr. Starr on the Clinton administration, the Democrats forced the appointment of Patrick Fitzgerald to investigate the Valerie Plame affair. (If you've forgotten it, let it stay forgotten.)

If the Democrats appoint a special counsel to investigate the Bush years, count on the Republicans to one day appoint a special counsel to investigate the Obama years. The only way to reverse this corrosive political culture is for one side to declare a ceasefire. Appointing a special counsel will simply make the war go on.

And a **truth commission** could be even worse, dragging on for years and conferring immunity on people who should have been charged.

If the Obama administration which, by the way, has reserved the right to use some of the previous administration's measures - uncovers evidence of criminal wrongdoing by its predecessors, it should bring in the Federal Bureau of Investigation. Otherwise, it should bury any dead horses and move on.

We need to remember what the months after 9/11 were like. Everyone, including the most senior officials, believed another major attack was imminent. Anthrax was in the mail system. The American people demanded that their government go after the terrorists who had so savagely attacked them.

Things got authorized that should not have been authorized. Lawyers came up with opinions that were fig leaves. And a certain paranoia, already percolating through the White House, began to spread.

As fear of another attack subsided, people began having second thoughts. When the United States invaded Iraq on what turned out to be faulty or false pretenses, suspicion turned to anger. Mr. Bush ultimately lost all credibility in the eyes of the American people, the highest price a politician can pay. Unless someone knowingly committed a felony on government service, that's probably enough.

Besides, we really don't know why there hasn't been another attack.

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100

TESTIMONY OF
LEE F. GUNN
VICE ADMIRAL, USN (RET.)

HEARING ON
“GETTING TO THE TRUTH THROUGH A NONPARTISAN COMMISSION OF
INQUIRY”

BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

MARCH 4, 2009

Introduction

Chairman Leahy, Ranking Member Specter, and members of the committee, it is my pleasure to appear before you today, and I thank you for inviting me to share my views on the establishment of a nonpartisan commission of inquiry.

My name is Vice Admiral Lee Gunn, and I am the President of the Institute for Public Research at CNA in Alexandria, Virginia. I also am privileged to serve as President of the American Security Project, a bi-partisan, non-profit enterprise dedicated to engaging the American people in a broader and deeper conversation about the complex nature of national security policy. Before taking on these roles, I served in the United States Navy for 35 years. I commanded a Frigate, a Destroyer Squadron, and the Third Fleet Amphibious Force. I was a line officer, and for the last three years of my Navy career, I was the Inspector General of the Department of the Navy.

For the past several years, I have been an active member of a coalition of retired generals and admirals who speak out against torture. Our group, now numbering 49 members, joined together in 2004 with the assistance of Human Rights First to urge the United States government to put a stop to abusive interrogation practices. Though we are members of both major parties and independents, and we represent a wide variety of military backgrounds, I can safely say that we are unanimous in our view that the Bush Administration's decisions to sanction the use of torture and other cruel techniques came at an enormous cost to our nation—to our values, our laws, and our security.

During the 2008 presidential campaign, we made it our mission to talk to presidential candidates and the public about our views on torture, secret prisons and extraordinary renditions. Our group traveled to New Hampshire and Iowa for the presidential primaries, where we had the privilege of meeting individually with eight presidential candidates, from both parties, including then-Senator Barack Obama. We attended receptions hosted by Human Rights First at both the Democratic and Republican National Conventions where we talked with members of Congress and others about our views on detainee treatment. And we stood behind President Barack Obama on January 22, 2009—a historic day—when he issued a series of executive orders, closing secret CIA prisons, directing the closure of Guantanamo and prohibiting the use of torture in pursuit of intelligence.

You have asked me to focus today on the establishment of a non-partisan commission to examine U.S. counterterrorism efforts since September 11, 2001. I believe that such a commission is critical both to restoring the moral authority of the United States as a leader for human rights and to devising a more effective counterterrorism strategy for the future that adheres to United States and international law.

Uncovering Lessons Learned

President Obama's executive orders on interrogation represent an enormous victory in the struggle to enforce a single standard of humane treatment. But they are just a first step.

Ending abusive detention and interrogation policies not only requires dismantling the legal framework that sanctions torture and cruel treatment; it also requires building a more sustainable national security policy going forward. We cannot improve our national security policy unless we understand and learn from our past mistakes.

In the future, we will continue to send our soldiers, sailors, airmen and Marines into battle, subject them to extraordinarily stressful situations, and put them in harm's way. The Commander in Chief owes men and women in uniform the clearest possible guidance on detainee treatment. From the point of capture through the entire process of detainee care, movement, confinement, and interrogation, dealing with detainees is stressful and demanding for our military men and women. The orders of the Commander in Chief must be unambiguous and serve as the solid foundation for the behavior of Americans, wherever they serve on behalf of the Country, when their duties include the treatment and interrogation of detainees. It is the responsibility of the Commander in Chief and of the Congress, in my view, to ensure and demand that the behavior of Americans toward those who are in our custody complies with the Geneva Conventions and with the highest standards dictated by international conventions on detainee treatment.

Preparing to protect our service members demands a thorough, comprehensive and sober examination of the policies and practices that led us astray in the first place. Such an examination would help inoculate our country against committing future abuses; the examination also would go a long way toward enabling us to demonstrate to the world that the United States is committed again to the humane treatment of prisoners in its care.

Our military leaders' coalition is not of one mind when it comes to criminal accountability. I think some support criminal prosecutions; others do not. But we all believe that we cannot move forward without looking back and examining how our country got so far off track.

I believe this "look back" could be accomplished through the establishment of a nonpartisan commission of inquiry. A number of different models for such a commission have been proposed. But whatever model is ultimately employed, I believe a commission should have three principle areas of focus: (1) an in-depth study of the CIA's detention and interrogation program; (2) a thorough examination of the legal justifications used to rationalize policies and practices of abuse; and (3) most importantly, a cost/benefit analysis of the use of abusive techniques. The commission should be instructed to conduct its proceedings as publicly as possible consistent with legitimate national security interests. Ultimately, it should be tasked with compiling a public report that uncovers lessons learned and makes recommendations for avoiding future abuse.

Areas of Focus

Through extensive revelations of documents and multiple hearings, Congress has already shed some light on the extent of the abuse of detainees in U.S. custody. But there is much the American people still do not know about the parameters of the CIA's detention

and interrogation program and how torture and abuse came to be approved at the highest levels of government. A commission of inquiry should undertake an in-depth study of the CIA's program, how it was structured, who was held in secret CIA custody overseas, the reasons behind each detention, and the dates and circumstances of all releases, transfers or deaths.

Another area of focus should be the secret legal opinions used to justify abuse. The Bush Administration apparently employed an array of constitutional and legal justifications to rationalize its policies of official cruelty, renditions to torture, and secret detentions and to mask the extent to which those policies violated fundamental human rights norms and the rule of law. A full accounting of past abuses will require that these relevant legal opinions be made public. Additionally, the public and Congress must have a complete understanding of the reasoning used to circumvent humane treatment standards so that these standards can be fortified in the future. Arriving at such an understanding will require a comprehensive study of the legal opinions, memoranda and documents which authorized or provided legal clearance for secret detention, torture and other abusive techniques.

And finally the Commission should assess the strategic gains and losses of employing abusive detention and interrogation techniques. Senior Bush administration officials, including former Vice President Dick Cheney, continue to insist that the use of "enhanced" interrogation techniques such as waterboarding saved American lives. But those assertions are never accompanied by hard evidence or actual facts. By contrast, many experienced interrogators have shown that abusive interrogation practices actually impede efforts to elicit actionable intelligence, and that non-coercive, rapport-building techniques have yielded some of the most accurate and complete information. Importantly, information obtained through non-coercive techniques is admissible in U.S. courts of law where cases could be proven and killers and thugs brought to justice.

An independent commission could undertake the task of examining the facts and, in so doing, weigh the true effectiveness of the Bush administration's torture tactics. Did torture actually uncover actionable intelligence? Did it interrupt plans? And did it actually save lives? If so, what were the countervailing costs to our national security? Did the use of torture spark terrorist recruitment, increase danger to our troops, and damage U.S. leadership and prestige? And did these costs outweigh the benefits? Might actionable intelligence have also been obtained by the non-coercive methods experienced intelligence interrogators experts recommend and employ? What strategic security *gains* could be reaped from shifting to a policy of complete, consistent and transparent compliance with human rights norms?

A Military Tradition of Inquiry

Should you decide to undertake the inquiry you are discussing, I'm sure that you will spend substantial time considering the form it will take. My sense is that your decisions on format, immunity, and subpoenas will be driven, to a degree, by where you think the inquiry will lead and what you want to do with the information you develop. Among the

many options available, let me offer two approaches used by the military for you to consider as examples of how factual inquiries, distinct from criminal investigations, work to prevent the repetition of past mistakes.

One approach to consider is what the services variously call After Action Reviews (AARs) or Hot Wash-ups which are intended solely to answer the question "What happened?" Commanders in the field and at sea use these reviews to understand the outcomes of operations and exercises, to see what worked well and what didn't, and how reinforcing things that (and people who) worked well and improving those that didn't can make the fighting force better. Obviously, AARs are not intended to uncover malfeasance or criminal behavior. The focus is on understanding and improvement only. My personal recommendation is that understanding and improvement be the main theme in anything you do, whether or not criminal investigations for bad behavior are pursued.

The second model I want to offer is that of the aviation safety inquiries that each of our services conducts on the occasion of a major aviation accident or incident. As I know you are aware, the Services conduct investigations under the Uniform Code of Military Justice (UCMJ) that are for the purpose of assessing blame and determining culpability. I directed some of those as the Department of the Navy Inspector General. The aviation safety inquiries, on the other hand, are perhaps the purist form of proceedings intended only to answer the "what happened" question.

Briefly, here's how they work. A board is established to examine evidence and take testimony. The board can compel testimony and demand access to all evidence. The proceedings are fire-walled off from whatever UCMJ investigation may also be conducted. Everyone involved in the investigation, including witnesses, is expected to do everything possible to help; it's well understood that lives depend on it. The overriding concern of the safety board is to understand what happened: where training, or personnel performance, or leadership, or procedures, or support equipment, or maintenance, or aircraft design or performance broke down, and get corrective measures underway quickly.

I believe that these investigations get at the facts. Decades of candor, critical self-examination, and substantive, rapid changes by the services' aviation communities have created the finest and safest record of complex military aviation operations the world has ever seen. The effectiveness of such inquiries demonstrates how an objective, comprehensive, independent examination of the facts can serve to inform improved policies going forward. It is my opinion that a similar inquiry into the authorization of torture and other cruelty over the past seven years will help fortify our nation's new commitment to a single standard of humane treatment for all prisoners in U.S. custody.

Conclusion

The Bush Administration's misguided embrace of torture, secret prisons and renditions to torture came at an enormous cost to our American values, our laws, and our counterterrorism efforts. Repairing our reputation as a nation committed to human rights

and building a more sustainable framework for national security policy going forward requires a comprehensive examination of the policies and practices that sanctioned torture and abuse.

This Congress and the new Administration have a window of opportunity to conduct an examination that signals to the American people and to the world that the policies of the last seven years were an aberration and that the United States is invested in creating an effective, long-term strategy for counterterrorism and intelligence gathering which adheres to American principles and values and to United States and international law.

The stakes are incredibly high. In the balance hangs the ability of the United States to maintain the integrity of our counterterrorism policy; improve intelligence cooperation with allies; support the human intelligence community in employing proven, effective methods for gathering actionable information; and re-establish the moral authority necessary to restore the United States as a world leader in upholding human rights.

Thank you for your attention to these important matters.



Leahy's 'Truth Commission' Nonsense

by Fred J. Eckert (more by this author)

Posted 02/25/2009 ET

In a rare departure from his usual enthusiasm for really bad ideas, President Barack Obama sought to distance himself from Sen. Pat Leahy's (D-Vt) demand for the creation of a "Truth Commission" to investigate every Bush-induced Democratic hallucination. Leahy wants such a commission to look into everything from treatment of captured terrorists at Guantanamo and Abu Ghraib, to the dismissal of politically appointed US attorneys and the Bush administration's use (and alleged abuse) of intelligence information leading up to the Iraq War.

Oh, sure, he'll "look into it," says the President, "but generally speaking, I'm more interested in looking forward than I am in looking back." In other words, "guys, get over it and find something useful to do."

But being useful has never been the strong suit of the two leading proponents of this scheme to invest taxpayers money in a major performance of still more Bush-bashing -- Senator Patrick Leahy (D-Vt) and Congressman John Conyers, Jr. (D-Mi).

"It's a lot easier to look forward if you know what happened in the past," says Leahy. True enough -- and that explains why some of us are so leery of Leahy. Because we remember his being forced to resign in disgrace from the Senate Intelligence Committee for more than once leaking classified information which endangered and possibly led to the death of American agents.

In a speech at Georgetown University, Leahy said, "We need to get to the bottom of what happened and why. And the reason we do that is so it will never happen again. One path to that goal would be a reconciliation process, a truth commission."

Get it? The smear job propaganda that Leahy, Conyers and their Congressional Democrats allies are peddling is that America under Bush was on a par with South

<http://www.humanevents.com/article.php?print=yes&id=30835>

2/25/2009

Africa under its authoritarian apartheid regime and, just as post-apartheid South Africa investigated the previous regime with a "Truth and Reconciliation Commission," America needs to do the same because George W. Bush was so evil.

Congressman Conyers, a man who has difficulty mentioning the name George W. Bush in a sentence unless it also includes the phrase "war crimes," says there's nothing at all political about what they are up to. All he wants is to have an outside "blue ribbon" commission look into the facts and make suggestions. Of course its members would receive their blue ribbons from the Democratic President and the leadership of the Democrat-controlled Congress.

Senator Leahy had this inspiration: "We could develop and authorize a person or group of people universally recognized as fair-minded and without an ax to grind." He gives no clue as to what person or group might possibly fit such a description. Snow White? The Seven Dwarfs?

Forget that the Democrats' "Truth Commission" scheme is something befitting a country that changes governments in havoc and upheaval rather than a country that has a two century plus unbroken string of peaceful transitions from one government to the next.

Forget that it all but guarantees a retaliatory attack the next time there is a change in the party in control -- and the next and the next.

Forget that as presently outlined it is of dubious constitutionality -- it raises serious separation of powers and due process issues.

Forget that it was not very long ago that both parties were saying that they had finally wised up to the unintended consequences danger of a similar idea -- the independent counsel statute.

Forget that Conyers' "war crimes" smear of President Bush would soon also be applicable to President Obama since he has authorized military strikes identical to the kind that led to President Bush's being so smeared with that phrase.

Democrats don't need any commission. Congress already possesses the power to do what they claim they want their "Truth Commission" to do. So what! Having a

commission do it enables the Democrats to pretend it's not just political.

The records are all right there in the government departments that they now control. "You just have to walk in and ask where the file cabinets are," Senator → Arlen Specter (R-Pennsylvania) explained to them. So what? Having an outside commission demand to see them sounds better on the evening news.

"This is not only a bad idea," says Senator John Cornyn (R-Texas), "it is a diversion from the economic crisis we face."

Exactly.

Therein lies one explanation for why many Democrats are hell bent on pursuing their "Truth Commission" -- it would help steer media attention away from details of what the Democrats are up to with the economy while further demonizing George W. Bush as the cause of all that is wrong in the world.

And therein also lies a huge opportunity for Republicans.

Republicans should do two things: 1) Ignore advice from anyone who was a political strategist for the McCain campaign or, for that matter, any of the other 2008 Republican presidential campaigns; and 2) Counter-program the Democrats' show with one of their own that is more interesting to most Americans and genuinely good for the country.

Why not a Republican "blue ribbon" commission to investigate and detail how we got into the economic mess we're in?

A group of Republican Senators and Representatives should join together and say: "We agree with Senator Leahy and his Democratic Congressional colleagues that, 'We need to get to the bottom of what happened and why. And the reason we do that is so it will never happen again.' But we think that what we need to investigate is not whether some captured terrorists aren't happy that we are not putting them up at the Ritz but rather who is really responsible for causing our current financial crisis and how can we make them pay an appropriate price for what they did to the American people."

And then the Republican "Blue Ribbon" financial crisis "Truth Commission" should put out a list of all the people that it will invite to testify and answer questions -- the gangs from Fannie Mae and Freddie Mac, Members of Congress and Clinton Administration officials who pressured banks into making loans that they knew were fraught with great risk of default, etc.

Invite House Financial Services Chairman Congressman Barney Frank to come explain why he kept assuring us that Fannie Mae and Freddie Mac were just fine -- no problems -- and why his relationship with a key Fannie Mae official wasn't really a serious conflict of interest. Invite Senate Banking Committee Chairman Chris Dodd to drop by and explain his latest version of that sweetheart deal he had with Countrywide while he was supposedly overseeing it.

So what if Dodd and Frank decline. Do the empty chair bit. Then invite experts to come explain the role Dodd and Frank played -- and the ethics issues surrounding the two of them.

Let the American people hear the story of what really went wrong from people who truly understand it and have a flair for explaining it clearly. Thomas Sowell comes to mind.

Let the Democrats put on a show whining about a kinder gentler approach to terrorists and weeping about government lawyers who lost their political jobs.

And while they are doing this, let Republicans step up and finally do what they should have done during the presidential campaign: explain to the American people that it wasn't the free market that caused our financial crisis; it was to a large extent caused by the Clinton Democrats using HUD and the Department of Justice to force upon banks ill conceived quotas of high risk mortgage loans. Let Republicans make it clear to the American people that they will go all out to bring to justice every villain responsible for our current mess.

Fred J. Eckert is a former conservative Republican Congressman from New York and twice served as a US Ambassador under President Reagan, who called him "a good friend and valuable advisor."

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2/25/2009



Testimony for the Record
on behalf of:

Human Rights Watch

Senate Judiciary Committee Hearing
March 4, 2009

"Getting to the Truth Through a Nonpartisan Commission of Inquiry"

When photos of detainee abuse at Abu Ghraib first hit the news in 2004, the Bush administration tried to limit the damage by claiming that they showed the illegal actions of a few "bad apples." US Secretary of Defense Donald H. Rumsfeld described the abuses at Abu Ghraib as "an exceptional, isolated" case. In a nationally televised address on May 24, 2004, President George W. Bush spoke of "disgraceful conduct by a few American troops who dishonored our country and disregarded our values."

But over the past several years, the Bush administration's explanation of why abuses occurred has been shown to be false. We now know that the pattern of abuse did not, as Rumsfeld and Bush claimed, simply reflect the acts of individual soldiers who broke the rules. Rather, it resulted from decisions made at the top echelons of government to re-write, ignore, or cast rules aside. Abusive practices such as waterboarding, for example, were discussed and approved at the highest levels of the Bush administration, even though torture is illegal and waterboarding has been prosecuted as a crime by US courts for over 100 years.

As the recently released Senate Armed Service Committee's bipartisan report on detainee abuse states: "The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees. Those efforts damaged our ability to collect

accurate intelligence that could save lives, strengthened the hand of our enemies, and compromised our moral authority."

The American public deserves a full and public accounting of the scale of post-9/11 abuses, why and how they occurred, who was responsible for authorizing and facilitating them, and the impact of these policies and practices on America's national security. Although several congressional inquiries (including the Senate Armed Service Committee report), military reports, and Department of Justice investigations have looked into particular aspects of these questions, there has never been a comprehensive public inquiry into post-9/11 abuses covering both the military and intelligence agencies, and investigations to date have lacked either independence from the executive branch or access to necessary documentary and testimonial evidence.

A non-partisan commission of inquiry—along the lines being considered at today's hearing—should be established to investigate, document, and publicly report on post-9/11 counterterrorism-related abuses. The commission should specifically address the questions of what happened, how decisions were made, and who should be held accountable. It should also examine the effect of the abusive policies and practices on US national security by considering factors such as the impact on the United States' ability to gather accurate intelligence and the way in which abuses fed into the terrorist recruiters' message, ultimately undermining America's safety. The commission should also look into the ways in which such policies affected the ability of the United States to work with allies to pursue its agenda abroad, and to pressure other governments to put an end to abusive and counterproductive policies in their own countries.

Such a commission would serve multiple goals. It would help to inform the American public about the events of the last seven and half years. It would provide US policy makers the benefit of lessons learned, allowing future generations to avoid the mistakes of the past. And it would go a long way toward restoring America's reputation around the world, which would in turn promote US national security over the long run.

As Attorney General Eric Holder told the Senate Judiciary Committee at his confirmation hearing: "[T]here's a battlefield, if you want to call it that, with

regard to the hearts and minds of the people in the Islamic world. We have to do things in a way, conduct ourselves in a way that we win that battle, as well, so that people there who might otherwise be well intentioned, do not end up on the wrong side and against us." By openly and honestly confronting past abuses, the commission would show Muslims worldwide that the US government is sincere in repudiating these practices.

The following are criteria for the establishment of an effective and worthwhile commission of inquiry:

- (1) The commission should examine post-9/11 detention and interrogation practices across all US government agencies and at all levels of government.

While several inquiries have already looked at aspects of detainee abuse, no single entity has examined detention and interrogation practices across the entire US government, and up the chain of command. In order to gain a full picture of what happened, the commission should be empowered to examine military, law enforcement and intelligence detention and interrogation policies and practices, and the interplay between them. The commission should also be authorized to determine how decisions were made and who made them, an inquiry that will likely examine the actions at the highest levels of the Bush administration.

- (2) The commission should consider the impact of post-9/11 detention and interrogation policies on US national security.

In addition to considering what happened, how it happened, and who was responsible for abuses, the commission should also focus on the impact of the policies and practices on national security. This is particularly important given the narrative consistently advanced by former vice-president Cheney and other Bush administration officials that abusive practices saved lives and kept the nation safe, a claim that has been repudiated by many others, including FBI Director Robert Mueller.

Among the questions to be asked: How did these practices—some of which resulted in detainee deaths—affect the ability of the United States to gather

actionable and accurate intelligence? Could information that was gained through abusive tactics have been obtained through other means? How did abusive practices affect America's moral authority around the world, and, as a result, the ability to achieve its goals? How did abusive practices affect cooperation with key allies? To what extent did abuses perpetrated by the US government strengthen the message of terrorist organizations and fuel recruitment?

(3) The commission should be non-partisan.

To ensure that the commission operates fairly and impartially—and that it is not perceived as a partisan effort to punish those in the prior administration, nor stymied by partisan wrangling—its membership should be non-partisan. Commission members should be distinguished figures known for their intelligence, expertise, and achievements, rather than for their political affiliations, and they should be fully vetted for possible conflicts of interest.

(4) The commission should have subpoena power.

In order to ensure that the commission is equipped to make a full and accurate assessment of the activities and decision-making post 9/11, it will be essential that the commission be vested with subpoena power to compel the testimony of those involved.

(5) The commission should have full access to classified materials.

Commission members must have full access to classified materials related to the detention, treatment, and transfer of terrorist suspects post-9/11, as well as materials concerning interrogation techniques. Once a commission is established, the administration should dedicate resources to a rapid security clearance process for commission members, and direct all relevant government agencies to facilitate the sharing of information.

(6) The commission should not grant blanket immunity in exchange for testimony.

The commission should not foreclose criminal prosecutions if in fact serious crimes have been committed. This would only reinforce the impunity that has so tarnished America's reputation. While in some circumstances it may be useful for the commission to offer immunity in exchange for critical testimony, this should be done in extremely limited circumstances and only with the explicit approval of the Department of Justice.

(7) The commission should make recommendations to the Department of Justice for the prosecution of current or former government officials found responsible for serious crimes.

The commission should neither foreclose ongoing prosecutions nor be deemed a pre-requisite to prosecution. Rather, the work of the Department of Justice in investigating and prosecuting should continue alongside and separate from the commission. That said, the commission should make specific recommendations for prosecution if and when it determines that crimes were committed.

It is clear that a comprehensive investigation into post-9/11 abuses is needed. Such an investigation would be critical for uncovering and rectifying the abuses of the past, and for restoring the role of the United States in promoting respect for human rights around the world. We thank Senator Leahy for advocating the establishment of a commission to carry out such an investigation, and for the opportunity to submit this testimony.

Human Rights Watch

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Juvenile Court Investor's Business Daily February 11, 2009 Wednesday

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INVESTOR'S BUSINESS DAILY
Investor's Business Daily

February 11, 2009 Wednesday

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HEADLINE: Juvenile Court

BODY:

Washington: Sen. Pat **Leahy** has proposed a "**truth commission**" that would probe the activities of the Bush administration. Does the senator really want to take the U.S. down the road of radical Third World politics?

Don't forget this is "Leaky **Leahy**," a nickname the Vermont Democrat earned for his habit of revealing sensitive government information. A series of negligent -- some might say deliberate -- disclosures led to his 1987 resignation from the vice chairmanship of the Senate Select Committee on Intelligence.

Such a person has no moral authority to sit in judgment of anyone.

Lawmakers should shun **Leahy's** witch hunt. Any tribunal over which he presides will be less about getting "the truth out," as he claims, and more about trying to demonize a political opponent.

Truth commissions are the hallmark of Banana Republics and Leninist regimes, not of freely elected republics in which political adversaries settle their differences in a civilized manner. No self-respecting representative of the people should want to be associated with such a stunt.

Leahy, of course, insists he's "doing this not to humiliate people or punish people." But we've seen too many efforts to criminalize politics and policy differences to put much confidence in his word.

It was a Democrat, former ambassador Joseph Wilson who worked for Democrats on Capitol Hill and has funded their campaigns, who wanted Bush aide "Karl Rove frog-marched out of the White House in handcuffs" when Rove clearly had not broken any laws. It was Democrats who hounded vice presidential aide Scooter Libby into prison for the offense of having a lousy memory.

In the House, Rep. John Conyers has called for an independent counsel to open a criminal probe into the Bush administration. The House Judiciary Committee chairman's proposal has the support of fellow Democrats House Speaker Nancy

Pelosi and Majority Leader Rep. Steny Hoyer.

Leahy himself threatened in 2007 to cite the Bush White House for criminal contempt if it refused to turn over documents related to the administration's entirely legal firing of nine U.S. attorneys.

"Certainly not since I've been old enough to vote have we had an administration so willing to ignore the law," said **Leahy**. "I've never known an administration so willing to operate outside the law, even to operate against the law, in violation of the law, as this administration."

Two years later, **Leahy** wants a show trial for an administration that's out of office. And he just might get it.

President Obama and **Leahy's** Democratic colleagues, however, would be wise to block his thirst for revenge. It's not fitting for the U.S. to plunge itself into the depths of Third World childishness.

Testimony of Rev. Richard L. Killmer
Executive Director
National Religious Campaign Against Torture
Before the
Senate Judiciary Committee
March 4, 2009

Thank you for the opportunity to submit this statement in strong support of legislation to establish a nonpartisan Commission of Inquiry on the use of torture and cruel, inhuman, and degrading treatment by the United States following the terrorist acts of September 11, 2001.

The National Religious Campaign Against Torture (NRCAT) is a coalition of more than 250 religious organizations joined together in the common belief that the torture and cruel, inhuman and degrading treatment of detainees violate the basic dignity of human beings that all religions hold sacred. NRCAT member organizations include representatives from the Catholic, Protestant, Orthodox Christian, evangelical Christian, Buddhist, Hindu, Quaker, Unitarian, Baha'i, Jewish, Muslim, and Sikh communities.

NRCAT strongly supports establishing a nonpartisan Commission of Inquiry because we believe such a commission is of the utmost practical and moral importance to our nation. We believe such a commission is the only way we can publicly condemn the use of torture and cruel, inhuman, or degrading treatment as a nation and establish the necessary safeguards to make sure such methods are never again used by the United States.

NRCAT believes that torture is immoral, illegal, and counterproductive. We believe it causes profound and lasting harm, both to its victims and to its perpetrators. And we believe it contradicts our nation's deepest values.

In order to gain national public acceptance of its findings and conclusions, we believe the Commission of Inquiry should be composed of individuals who are noted for their lack of partisanship, who are broadly respected for their ethics and intellect, and who are committed to getting to the truth of the use of torture by the United States. We believe the commission must have subpoena authority in order to achieve the objective of getting the complete truth, and we believe it should be adequately funded and staffed. The commission should be charged with the responsibility of investigating and issuing a final report with respect to the extent of the use of torture by the United States, the identification of the "enhanced" interrogation techniques that were used by both the CIA and the military, how such techniques were approved, who approved them, how many people were subject to the techniques, how many people died as a result of the techniques, and how many people were injured. The commission should also be charged with making recommendations as to how to best prevent the use of torture in the future.

On March 3rd, NRCAT released a statement in support of a Commission of Inquiry signed by 23 heads of faith groups. The statement and the names of the signers are attached to this statement.

A nation that hides from the truth of its mistakes is neither strong nor moral. Let us take the strong, morally courageous path and establish a Commission of Inquiry to investigate our nation's use of torture. By doing so, we can learn from our past mistakes and begin to atone for them.

Thank you.

U.S.-Sponsored Torture: A Call for a Commission of Inquiry

The United States must never again engage in torture. Torture is immoral, illegal and counterproductive. It causes profound and lasting harm, especially to its victims but also to its perpetrators. It contradicts our nation's deepest values and corrupts the moral fabric of our society.

We call for an impartial, nonpartisan, and independent Commission of Inquiry. Its purpose should be to gather all the facts and make recommendations. It should ascertain the extent to which our interrogation practices have constituted torture and "cruel, inhuman or degrading treatment". Understanding the causes, nature and scope of U.S.-sponsored torture is essential for preventing it in the future and eliminating it from our system without loopholes. U.S. law will determine the extent of any criminal culpability.

As people of faith, we know that brokenness can be healed – both in individual lives and in the life of the nation. All religions believe that redemption is possible. Learning the truth can set us on a path toward national healing and renewal.

The United States must never again allow itself to be driven by blinding fears and bitter resentments in responding to national tragedy. The use of torture only serves to undermine our security in a dangerous world.

Nothing less than the soul of our nation is at stake in confronting U.S.-sponsored torture and completely renouncing its use. Let the U.S. reaffirm its values by establishing a Commission of Inquiry.

HEADS OF FAITH GROUPS ENDORSING THE CALL FOR A COMMISSION

Rev. Dr. John H. Thomas
General Minister and President
United Church of Christ

Dr. Ingrid Mattson
President
Islamic Society of North America

Rabbi David Saperstein
Director, Religious Action
Center of Reform Judaism

Rev. Dr. David Gushee
President
Evangelicals for Human Rights

Rabbi Gerry Serotta
Chair
Rabbis for Human Rights – North America

Very Rev. Thomas Picton, CSsR
President
Conference of Major Superiors of Men

Rev. Dr. Wesley Granberg-Michaelson
General Secretary
Reformed Church in America

Jim Winkler
General Secretary
United Methodist Church
General Board of Church and Society

Bishop Demetrios of Mokissos
Chancellor
Greek Orthodox Metropolis of Chicago

Rev. Dr. Sharon E. Watkins
General Minister and President
Christian Church (Disciples of Christ)

Rev. Dr. Stan Hastey
Minister for Mission and Ecumenism
Alliance of Baptists

Suhag Shukla
Managing Director
Hindu American Foundation

Rev. William G. Sinkford
President
Unitarian Universalist Association of Congregations

Rabbi Brian Walt
Executive Director
Rabbis for Human Rights – North America

Archbishop Nicolae Condrea
Romanian Orthodox Archdiocese in the Americas

Rev. Grady Parsons
Stated Clerk of the General Assembly
Presbyterian Church, USA

Bishop Gregory Vaughn Palmer
President, the Council of Bishops
United Methodist Church

Rabbi Toba Spitzer
President
Reconstructionist Rabbinical Association

Rev. Dr. Michael Kinnamon
General Secretary
National Council of Churches

Dr. Sayyid M. Syeed
National Director, Interfaith and
Community Alliances
Islamic Society of North America

Charlie Clements
President and CEO
Unitarian Universalist Service Committee

Joe Volk
Executive Secretary
Friends Committee on National Legislation

Dr. Anahat Kaur Sandhu
Secretary General
World Sikh Council - America Region

*Editorial : Democrat wants a 'truth commission' Las Vegas Review-Journal (Nevada)
February 12, 2009 Thursday*

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Las Vegas Review-Journal (Nevada)

February 12, 2009 Thursday

SECTION: B; Pg. 6B

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HEADLINE: Editorial : Democrat wants a '**truth commission**'

BODY:

The chairman of the Senate Judiciary Committee called Monday for a "**truth commission**" to investigate controversial actions of the Bush administration, including the firings of U.S. attorneys, the treatment of terror suspects and the authorization of warrantless wiretapping.

Sen. Patrick J. **Leahy**, D-Vt., said his proposal is meant to launch a fact-finding inquiry into the key decisions of George W. Bush's presidency, including intelligence matters before and during the Iraq war and "scandals" at the Department of Justice. He said such a commission would not seek to prosecute former administration officials - though he failed to explain, if there was such widespread misbehavior, why not.

Because prosecutions would require that certain extra je ne sais quoi - "proof"?

"Rather than vengeance, we need a fair-minded pursuit of what actually happened," Sen. **Leahy** said as he outlined his proposal during a speech at Georgetown University, where he likened the proposed commission to the "truth and reconciliation" panels that investigated the apartheid regime in South Africa and the 1979 Ku Klux Klan massacre in Greensboro, N.C. He said the commission could be made up of "a group of people universally recognized as fair-minded and without axes to grind."

You know, the kind of people who compare the modern Republican Party to white supremacist murderers - when the last two Ku Klux Klansmen to have actually served in the U.S. Senate are, um ... Democrats.

Leading to today's first question: If that last assertion were being delivered with an equally straight face at 11:45 p.m. on a Saturday night on your local NBC affiliate by Sen. **Leahy**'s potential Democratic colleague, Al Franken - would you be laughing out loud yet?

Sen. **Leahy**'s proposal is similar to legislation introduced by another famously sober-minded and impartial lawmaker, Rep. John Conyers Jr., D-Mich., chairman of the House Judiciary Committee, who wants to create a bipartisan commission to

investigate the Bush administration's activities on detention, interrogation and surveillance.

Congress has the authority to hold hearings and thus investigate anything it sees fit. Perhaps the most chilling aspect of this silliness is that it shows Democrats don't expect to be presenting us with much good news in the year to come, if they already foresee the need to ritually heave out and pummel the political corpses of the Bush administration, insisting "See? They still stink worse than we do!"

Incoming presidents routinely request the resignations of all sitting U.S. attorneys, who sit at the president's discretion. Bill Clinton accepted a lot more of those mass resignations than George W. Bush - including the resignations of U.S. attorneys who had been actively investigating Clinton family misdeeds in Arkansas. If Sen. **Leahy** wishes to convert such posts to lifetime tenure, perhaps he can find a constitutional lawyer to tell him how.

Torture is a legitimate issue of national policy, though men who have never been in combat risk appearing a bit silly when they move from stating that Americans abhor systematic torture regimes - of course we do - to attempting to micromanage how a captain in combat decides to intimidate a prisoner with information that could save the lives of an entire patrol.

Of the issues raised here, warrantless wiretapping is the most serious because it clearly deals with the government's treatments of U.S. citizens in America.

Needless to say, none of these Bush initiatives could have prospered had not Democratic members of Congress routinely allocated funds to finance them.

But if Sen. **Leahy** and company really intend to do anything here other than partisan posturing, let them by all means put some teeth in the laws against snooping on Americans without proper, written search warrants accompanied by sworn affidavits of probable cause. Let them especially publish a "hot line" through which any communications company executive asked to do such a thing may reach a high-ranking U.S. attorney, specifically authorized to go find the government agents who have made such a request, placing them that very day in orange jumpsuits and leg chains, and trooping them out for the cameras.

Or is this to be just one more sideshow to keep Americans from dwelling on the current economic crisis? "Look! Over there! A Klansman! Oh, Sen. Byrd, never mind. Say, how's the new eight-lane coming between Bald Knob and Pickens? Stim-u-LUS! Stim-u-LUS! Stim-u-LUS!"

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[< Return To Hearing](#)

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
March 4, 2009

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Getting To The Truth Through A Nonpartisan Commission Of Inquiry"
March 4, 2009

In the wake of the tragic attacks on September 11, 2001, we came together as Americans. We need to do so, again, in these difficult economic times. Regrettably, too many seem mesmerized by the siren call of talk radio personalities and extreme special interest groups. Far from grasping the bipartisan hand that President Obama has extended, congressional Republicans are, with few exceptions, following the play book laid out by conservative pundits to "obstruct and delay."

Nothing has done more to damage America's place in the world than the revelation that this Nation stretched the law and the bounds of executive power to authorize torture and cruel treatment. The Bush administration chose this course, but tried to keep its policies and actions secret, knowing that they could not withstand scrutiny in the light of day. How many times did President Bush go before the world and say that we did not torture and that we acted in accordance with law?

There are some who resist any effort to look back at all, while others are fixated on prosecution, even if it takes all of the next eight years, or more, and further divides this country. Over the last month, I have suggested a middle ground to get to the truth of what went on during the last several years, in a way that invites cooperation. I believe that that might best be accomplished through a nonpartisan commission of inquiry. I would like to see this done in a manner removed from partisan politics. Such a commission of inquiry would shed light on what mistakes were made so that we can learn from these errors and not repeat them.

Today's hearing is to explore that possibility. I am encouraged that many have already embraced this idea, including several of the distinguished witnesses I welcome today. These are witnesses who speak from experience about the need to uncover the truth and shed light on our policies for the good of our Nation, to ensure that we have strong national security policies and to ensure that we do not make repeat mistakes. I look forward to their discussion.

As Justice Kennedy said in the recent Supreme Court decision restoring the great writ of habeas corpus, the Constitution is not something an administration is able "to switch ? on and off at will." We must not be afraid to look at what we have done, to hold ourselves accountable as we do other nations who make mistakes. We must understand that national security means protecting our country by advancing our laws and values, not discarding them.

This idea for a commission of inquiry is not something to be imposed. Its potential is lost if we do not join together. Today is another opportunity for Republicans to come forward to find the facts and join in developing a process to reach a mutual understanding of what went wrong and learn from it. If they remain absent or resistant, this opportunity can be lost, and calls for accountability through more traditional means will become more insistent and compelling.

http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3686&wit_id=2629 6/10/2009

I held early hearings exploring how our detention policies and practices, from Guantanamo to Abu Ghraib, have seriously eroded fundamental American principles of the rule of law. I think that we are less safe as a result of the mistakes of the last administration's national security policies. I also believe that, in order to restore our moral leadership, we must acknowledge what was done in our name. We cannot turn the page until we have read the page.

President Obama, Attorney General Holder and others in the new administration are already hard at work on detainee and interrogation policies to determine the best way to form effective and lawful national security policies. A commission of inquiry would address the rest of the picture, to understand the full extent of what our country did and why it happened. With a targeted mandate, it could focus on the issues of national security and executive power in the government's counterterrorism efforts, including the issues of cruel interrogation, extraordinary rendition, and executive override of laws. We have had successful oversight in some areas, but on these issues, we have remained too much in the dark.

People with first-hand knowledge would be invited to come forward and share their experiences and insight, not for purposes of constructing criminal indictments, but to assemble the facts. If needed, such a process could involve subpoena powers, and even authority to obtain immunity to secure information, in order to get to the whole truth. Of course, this avenue would be pursued in consultation with the Justice Department and would not rule out prosecution for perjury.

Vice President Dick Cheney and others from the Bush administration continue to assert that their tactics, including torture, were appropriate and effective. We must not let only one side define history on such important questions. It is important for an independent body to hear these assertions, but also from others, if we are going to make an objective and independent judgment about what happened, and whether it made our nation safer or less safe.

Just this week, the Department of Justice released more alarming documents from the Office of Legal Counsel demonstrating the Bush administration's pinched view of constitutionally protected rights. These memos disregarded the Fourth and First Amendments, justifying warrantless searches, the suppression of free speech, surveillance without warrants, and transferring people to countries known to conduct interrogations that violate human rights. How can anyone suggest that such policies do not deserve a thorough, objective review?

I am encouraged that the Obama administration is moving forward. But how did we get to a point where we were holding a legal U.S. resident for more than five years in a military brig without ever bringing charges against him? How did we get to a point where Abu Ghraib happened? How did we get to a point where the United States Government tried to make Guantanamo Bay a law-free zone, in order to try to deny accountability for our actions? How did we get to a point where our premier intelligence agency, the CIA, destroyed nearly 100 videotapes with evidence of how detainees were being interrogated? How do we make sure it never happens, again?

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<http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=7686&witnessid=2629> 6/10/2009

Senator Patrick Leahy 433 Russell
Senate Office Building United
States Senate Washington, DC
20510 February 27, 2009

Dear Senator Leahy,

I am writing to you as the mother of a soldier, Adam Lucas, who is presently serving his second tour of duty in Iraq and I feel it is our duty as concerned citizens of this country to call for an in depth look at the alleged abuse of our Constitution which has occurred under the George W. Bush administration. It is of paramount importance that we not only look at these alleged misdeeds but then act according to the rule of law to which NO ONE is considered to be unaccountable. We only further endanger our sons and daughters serving over there if we flagrantly admit (as Dick Cheney did) that yes, we tortured combatants from other countries. What is there to stop them from doing the same to our soldiers if they are captured? This is an issue that keeps me awake at night. My family has never felt as insecure as we have in these last 7 *Vi* years when we were bombarded by the fear tactics being used by the Bush administration to justify the decision to unilaterally go into another country which had not attacked us. If they were so hell bent on bringing democracy to the Middle East, they should have first ensured that it continue here at home where it was being abused!

I applaud your efforts to bring this issue before the American people and try to bring some accountability for the wrongs that have happened. Please don't let this opportunity pass and someday down the road have our country be further embarrassed when another country which does honor the Geneva Convention brings charges against the United States for these alleged abuses. And while we are only now, with the election of Barack Obama, beginning to regain some of the lost stature we had prior to the Bush Administration, this is a safety issue that supercedes even our status in the world.

Please take a look backward and act lest we repeat the mistakes that have been made. I'm sure you are hearing from people on both sides of this issue but in order to prevent this from ever happening again, action needs to take place now.

"The Star Spangled Banner" has always been my favorite song and as the mother of 2 sons who have served in the military, (I also have a younger son who graduated from U.S.M.A at West Point-class of 2000. His name is Eric Lucas, nominated by Congressman John Murtha) I always used to tear up when it I sang it or hear it played. When I hear it now, I cry, but for a different reason. Someone needs to be held accountable. To miss this opportunity would be a grave mistake.

Thank you for this opportunity to have a voice in our government.



Sincerely,

Testimony of Lisa Magarrell
US Accountability Project Director, International Center for
Transitional Justice
Before the Judiciary Committee
United States Senate
Getting to the Truth through a Nonpartisan Commission of
Inquiry
March 4, 2009

Mr. Chairman, thank you for the opportunity to testify in written form today. My name is Lisa Magarrell, and I direct the US Accountability Project at the International Center for Transitional Justice (ICTJ). The ICTJ is an international non-profit organization founded in 2001 by the former Deputy Chair and Executive Secretary of the South African Truth and Reconciliation Commission, Alex Boraine and Paul van Zyl, respectively, and Priscilla Hayner, an internationally recognized expert on truth commissions.

Over a dozen ICTJ staff either have worked directly within truth commissions or have advised such efforts in countries around the world. During my more than 25 years in the field of human rights, I worked on human rights issues in Guatemala and El Salvador for more than a decade and observed firsthand the truth commission processes in those countries. Since joining ICTJ in 2001 I have advised commission initiatives in Peru, Canada, Ghana, Timor-Leste, and Greensboro, North Carolina. While important distinctions must be drawn in each setting, a proposed US Commission of Inquiry shares many challenges and opportunities with these other commission experiences. A review of past inquiries in the United States, whether presidentially appointed commissions, congressional investigative committees or commissions created by legislation, also brings important lessons to the fore.

The ICTJ's mission is to assist in the development of integrated, comprehensive and context-appropriate approaches to accountability and reconciliation after massive or systematic abuses of human rights, by such means as truth-seeking, prosecutions, reform and reparations. We work in developing countries and established democracies where confidence in government's ability to protect and guarantee human rights in the future depends on addressing a legacy of past abuses.

In November 2008 we published a policy briefing paper setting out a range of considerations and urging the new administration to ensure the establishment of a non-partisan commission of inquiry to analyze

available information in a comprehensive way, to pierce the secrecy and denial of the past years to reveal what we do *not yet* know, and to receive the testimony of witnesses, victims and others who can shed light on US policies, actions, and their human and institutional impact. In February, ICTJ's President, Juan E. Méndez, and the ICTJ joined a number of distinguished individuals and organizations in calling for President Obama to appoint a non-partisan commission of inquiry on detention, treatment, and transfer of detainees after 9/11 and the consequences of those actions and to recommend future policy in this area.

Recent public opinion polls reveal that a significant part of the US public also wants to get to the bottom of what has been done in its name. A commission of inquiry could effectively and comprehensively examine the way in which counter-terrorism policy and actions since 2001 have sabotaged the United States' commitment to constitutional, legal and international standards and ideals and affected this country's standing in the world community. It could also shed light on the victims themselves, and consider how to address the ongoing suffering of individuals and families subjected to torture, inhuman and degrading treatment, unlawful detentions, and disappearance

A commission of inquiry into past abuses can reveal systemic problems and provide a solid basis for determining needed reforms and new, rights-respecting policies. Such an inquiry can send a normative message going forward that the government cannot act in secret and immunize itself from legitimate oversight. It can signal a renewed commitment to the rule of law and respect for human rights. And it can be the basis for a paradigm shift in the way the US government and the public understand and promote human rights as an integral part of its response to acts of terrorism.

We applaud your initiative to underscore the need for such an inquiry and agree that a failure to thoroughly understand what has occurred in the past provides only an illusion of closure. ICTJ's experience in country after country has taught us that unresolved abuses in the past will continue to leave a corrosive legacy in the present. Blindly turning the page will only serve to undermine the capacity of the new administration and this Congress to move forward in a way that truly overcomes past abuses and ensures respect for the rule of law, human rights, and the United States Constitution in the future. These values must be honored and strengthened anew even as the country struggles to identify and appropriately address real threats to national and international security.

ICTJ's experience around the world and our research into past commissions of inquiry in the United States provide guidance on key questions that arise in this debate. Accepting that an inquiry is necessary, the focus must turn to how to accomplish this task. I outline some crucial considerations and suggestions for a successful commission below.

- **Selection and identity:** A commission should be non-partisan. It should be appointed through an open and transparent process, selecting respected and fair-minded individuals of high moral standing. We urge the adoption of a selection process that allows a range of groups to nominate commissioners and which seeks candidates for commissioners based on their integrity and respect for the rule of law, not their partisan identity. The source of a commission's mandate and its investigative authority must convey legitimacy, credibility and capacity. Its motivation should be explicit and convey an unimpeachable commitment to allow the investigation to follow the facts where they may lead.
- **Independence:** The commission, ideally, should be institutionally independent and sufficiently funded. It could be authorized by Congress or appointed by the President.
- **Powers:** An effective investigation often, though not always, entails the power to subpoena witnesses and documents and to protect individuals and information, in aid of its mandate to seek the truth. There should be no generalized offer or expectation of immunity in exchange for truth, but rather a robust investigative power which should utilize all available avenues for seeking information while respecting the rights and security of witnesses. In South Africa, despite an "amnesty for truth" provision, the bulk of the truth, both quantitatively and qualitatively, was not secured through this process, but rather through the taking of statements, conducting of many interviews and hearings, and through investigation and research. Much attention has focused recently on the question of whether a commission should wield the power to grant "use immunity" to compel the testimony of an individual who invokes his 5th Amendment right against self-incrimination, by making that person's testimony (or evidence derived from it) unavailable as evidence against him in a criminal case. Some complications have arisen from this practice by US Congressional inquiries in the past, so this issue requires careful scrutiny. In South Africa, some

important information was secured in a select number of cases through the power to subpoena individuals and to compel answers under guarantees of use immunity. The individualized use of this type of immunity in limited and strategic cases may be one form of investigative tool but, on balance, should not be necessary. If it were provided for in the US context, it should be conferred sparingly and only with great care. If this power is wielded by partisan commissioners or used to further a political agenda, its use – and results – could undermine the commission's credibility and the greater cause of truth and accountability.

- **Mandate:** The commission of inquiry should have a sufficiently expansive mandate so that its conclusions are not predetermined. A balance between too broad a mission and one that can reasonably be accomplished over a relatively limited time period is critical, although some key issues may be usefully highlighted against a broader historical backdrop. Abuses beyond the explicit mandate might be linked to the main subject of inquiry to complete the bigger picture. The mission should be flexible enough to allow new information to inform the direction of the inquiry while focused enough, whether by time period or types of abuses under investigation, to ensure that the inquiry can draw meaningful conclusions and recommendations from its work. Commissions generally have a mandate to explore causes and consequences of abuses and make findings and recommendations.
- **Safeguards:** Safeguards are required to protect national security-related information, but not to cover up politically embarrassing facts or other information about wrongful conduct that pose no national security risk. Generally, a commission's default should be openness and transparency, but it should have the ability to review information and hold hearings privately where strictly necessary to protect the security of individuals and to avoid real national security risks. The legitimacy and credibility of a commission will have an enormous bearing on whether it will be trusted to confront hard truths or fall back upon exaggerated claims of security needs.
- **Cooperation:** Government agencies must be encouraged and, where necessary, pressed into cooperating with the inquiry. This requires political will at the highest level of government. A commission of inquiry should gather information already developed from diverse sources and engage in thorough review and analysis of that information, especially in light of new information gathered during the course of the commission's investigation. The

commission should consider what will happen to the information it has gathered over the course of its mandate once its business has concluded.

- **Public engagement, comprehensive and accessible report:** Through public hearings, outreach efforts and, ultimately, an accessible report, the commission should aim to spark public interest and debate. It should provide a well-documented basis for its findings and recommendations for any further investigations, reforms, preventive and remedial measures. This will allow an informed public and informed public officials to engage the issues in a new light and to use the report as a valuable tool for education, making policy and drawing lessons for the future.
- **Relationship to other accountability policies:** Commissions of inquiry that are initiated as a means to sidestep accountability rather than to deepen it will fail on many levels, but perhaps most importantly will result in increased skepticism about government capacity and commitment to hold institutions and individuals accountable in the future.

ICTJ welcomes the opportunity to share with the Committee in greater depth its practical experience working with commissions of inquiry in a wide variety of contexts. We believe that a serious and studied proposal for an in-depth and comprehensive commission of inquiry, as advocated by this Committee's Chair, can make an indelible contribution to restoration of core American values, the rule of law and the United States' commitment to human rights. The United States cannot move forward without a complete examination of policies and practices that have wrongly harmed individuals and institutions, profoundly disrupting their lives and their contribution to society. The failure to examine the past not only condemns a nation to carry that painful legacy forward but also undermines trust in government's commitment to protecting human rights in the future. ICTJ looks forward to assisting this process in any way that we can.

A STATEMENT BY ELISA MASSIMINO
CHIEF EXECUTIVE OFFICER AND EXECUTIVE DIRECTOR OF
HUMAN RIGHTS FIRST

BEFORE THE SENATE JUDICIARY COMMITTEE

HEARING ON
“GETTING TO THE TRUTH THROUGH A NONPARTISAN
COMMISSION OF INQUIRY”

MARCH 4, 2009

We are pleased to submit this testimony on behalf of Human Rights First. Human Rights First works in the United States and abroad to promote a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights law and principles are enforced in the United States and abroad. Human Rights First applauds the Committee for holding this hearing to examine the need for a nonpartisan inquiry into detention, interrogation and rendition policies that violated fundamental humanitarian and human rights standards.

On January 22, 2009, his second full day in office, President Obama issued executive orders putting an end to policies authorizing torture and abuse and shuttering secret prisons.¹ By taking this action, the new Administration took a significant step toward reclaiming America's role as a champion of human rights and realigning our values and interests.

Work remains to be done to ensure that this administration and future administrations do not repeat past mistakes. Providing policymakers and the public with a clear picture of the past policies and practices and their consequences for national security is essential to inoculate against future abuses and to inform responsible forward looking policies. As Chairman Patrick Leahy stated in a presentation at Georgetown University, “We need to be able to read the page before we turn the page.”

A prompt, open and comprehensive accounting of past abuses and their strategic consequences is also needed to allow the United States to move beyond the highly criticized prisoner treatment policies and practices of the past administration. If a public inquiry is not launched, classified information about the secret detention program and the use of cruel interrogations will continue to slowly surface—through the media, litigation, and victim accounts. The trickling out of new information could go on for years, generating a constant stream of headlines and cover-up accusations that would damage the world's perception of the United States and remind the American public of past abuses. This would clearly undermine the efforts of the Administration and the Congress

to demonstrate fundamental changes to U.S. policy. An independent commission could preempt repeated waves of public backlash by releasing information at one time, while recognizing that mistakes that were made and making recommendations for reform.

There's debate about whether and how a commission evaluating past policies should be formed.ⁱⁱ Congressman Conyers has introduced legislation calling for the establishment of a National Commission on Presidential War Powers and Civil Liberties, and Chairman Leahy has called for a truth commission. Over sixty percent of Americans favor an inquiry of some sort into torture and the abuse of detainees.ⁱⁱⁱ However, in his first White House press conference, President Obama responded to a question on Senator Leahy's call for a commission by saying that he was "more interested in looking forward than I am in looking backwards."^{iv}

Human Rights First, in our blueprint *How to End Torture and Cruel Treatment*, recommended that in his first six months in office the President should support the establishment of a nonpartisan commission, modeled on the 9/11 Commission, to examine the facts and circumstances relating to U.S. government detention and interrogation operations since September 11, 2001; assess the strategic impact of these operations; identify lessons learned; make recommendations to avoid future abuses; and make its findings public. A detailed strategy for setting up such a commission follows below.

Summary

- **Forming a Commission**
- **Appointing Commissioners**
- **Timeline**
- **Scope of the Commission**
- **Authority of the Commission**
- **Reporting**

Details

Forming a Commission. The United States has a long history of employing investigative commissions. Commissions can be established by the President, through a Congressional resolution, or via legislation.^v We reiterate our call for the President to initiate the establishment of an independent nonpartisan commission to examine the facts and circumstances relating to U.S. government detention, interrogation, and prisoner transfer operations since September 11, 2001 and to assess the strategic impact of these operations. We also call on Congress to support the establishment of such a Commission including with legislation to provide commissioners with the authority and resources they need to successfully fulfill their mandate.

Preserving documents. In order to guarantee the commission will have access to all documents relating to detention and interrogation of terrorist suspects, the

President should immediately require all agencies to identify and preserve all documentation relating to actions or policies in these areas. After these documents are examined by the commission, they should be preserved for examination by scholars, students, and the public.

Appointing Commissioners. The success of the commission and the acceptance of its findings by the public will hinge on its independence and the identity and reputation of the commissioners. The commission should be comprised of universally respected experts, including individuals who have familiarity with interpreting intelligence information and with military operations. The President should announce a process by which commissioners will be chosen that guarantees representation from both political parties, and the selection of distinguished individuals noted for their knowledge and experience in fields relevant to the issue, including former intelligence officials and retired military officers. Once chosen, commissioners should be given prompt, high-level clearance permitting them access to relevant classified information.

Timeline. Within two months of being initiated the 9/11 Commission had convened; within four months it held its first public hearing; within eight months it issued its interim report; and within 20 months it completed its final 567 page report. To assist in promptly moving the nation beyond past abuses, the new Commission also must be given the mandate and resources to be able to begin its work without delay and to report on its findings within a limited timeframe.

Defining the Scope of the Commission.

Fact Finding. Despite multiple congressional hearings on interrogation policies, internal Justice Department investigations, and military investigations in the aftermath of Abu Ghraib, the information currently available to Congress and the public on U.S. detention and interrogation practices since September 11, 2001, is fragmented and incomplete. An independent, impartial and thorough examination of U.S. detention and interrogation policies and practices in Iraq, Afghanistan, Guantanamo Bay and secret U.S. prison facilities, as well as rendition practices, including how and why such practices and policies were authorized must be a primary aim of the Commission.

Effective Interrogation Policy. Experienced interrogators maintain that abuse is ineffective in gaining actionable intelligence.^{vi} Commissioners and their staff must have access to the record on individual cases to establish whether abusive techniques resulted in accurate and/or actionable intelligence and to assess whether information could have been gained from non-abusive techniques.

An Analysis of Strategic Consequences. An assessment of strategic gains (such as attacks provably averted) and strategic losses (such as failure to gain reliable information or encourage cooperation by detainees as a result of coercive interrogations; undermining of the rule of law, both domestically and abroad; and harm to U.S. counterterrorism efforts, including through diminished cooperation by allies) due to these policies and practices should be a major focus of the Commission's work.

Foreign Policy Consequences. The United States' embrace of torture harmed relationships with our allies and our influence with the world at large. Incidents where the United States' foreign policy and national security interests were undermined due to other nations' reaction to U.S. interrogation policies should be catalogued and assessed.

Operational Consequences. Alberto Mora, the former General Counsel of the Navy, maintained in testimony before the Senate Armed Services Committee that the operational consequences of policies of torture included the following:

First, there are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq – as judged by their effectiveness in recruiting insurgent fighters into combat – are, respectively the symbols of Abu Ghraib and Guantanamo. And there are other senior officers who are convinced that the proximate cause of Abu Ghraib was the legal advice authorizing abusive treatment of detainees that issued from the Department of Justice's Office of Legal Counsel in 2002.

Second, allied nations reportedly hesitated on occasion to participate in combat operations if there was the possibility that, as a result, individuals captured during the operation could be abused by U.S. or other forces.

Third, allied nations have refused on occasion to train with us in joint detainee capture and handling operations because of concerns about U.S. detainee policies.

And fourth, senior NATO officers in Afghanistan have been reported to have left the room when issues of detainee treatment have been raised by U.S. officials out of fear that they may become complicit in detainee abuse.

The Commission should examine these negative operational consequences in making their assessment of the costs of policies of abuse.

Defining the Authority of the Commission.

Subpoena Power. The Commission should be equipped with subpoena power to secure access to all relevant and necessary information and to call witnesses, including former government officials to testify. Difficulties in acquiring subpoena power from Congress should not, however, prevent the establishment of a Commission. There is much that a Commission could accomplish even without subpoena power with the full support of the President.

No Blanket Immunity. Chairman Leahy has proposed immunity for everything except perjury in his proposal for a Truth Commission^{vii} while the Speaker of the House, Nancy Pelosi, has said she is hesitant to embrace a proposal that would include immunity and block the possibility of criminal prosecutions.^{viii} Human Rights First believes that the Commission should not offer blanket immunity. The work of the Commission should not interfere with efforts of the Department of Justice to investigate past crimes, including crimes of torture which the U.S. government has an obligation to investigate under the Convention against Torture.^{ix} Moreover, the experiences of past commissions of inquiry indicate that immunity does not significantly contribute to fact finding nor does it motivate implicated individuals to disclose information.^x

Transparency

Public Proceedings. The Commission should be instructed to conduct its proceedings in as public a manner as possible, consistent with legitimate national security interests. Specifically, the Commission should hold a series of public hearings, issue public updates on progress made, and make public the documents upon which it bases its conclusion.

Reporting. In addition to conducting its proceedings in public, the Commission should issue an in-depth report on past abuses, which also includes forward looking recommendations. This report should be declassified to the greatest extent possible consistent with legitimate national security interests. In making classification determinations, officials should give significant weight to the benefits of voluntarily releasing such information through the commission process.

Conclusion

It is imperative that the public and Congress have a full understanding of the faulty reasoning that was used to circumvent humane treatment standards so that these standards can be effectively fortified. A nonpartisan commission of inquiry, if sufficiently independent and properly resourced, will allow the U.S. government to determine how it can best guard against future abuses and restore its moral authority as a global leader in advancing human rights.

Endnotes

ⁱ Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009); Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

ⁱⁱ Jill Lawrence, *Even reversed, Bush policies divided*, USA TODAY, February 12, 2009, available at http://www.usatoday.com/news/washington/2009-02-11-investigation-side_N.htm.

ⁱⁱⁱ Jeffrey M. Jones, "No Mandate for Criminal Probes of Bush Administration," *Gallup*, February 12, 2009, <http://www.gallup.com/poll/114580/No-Mandate-Criminal-Probes-Bush-Administration.aspx>.

^{iv} White House press conference with President Barack H. Obama (February 9, 2009), available at http://www.whitehouse.gov/the_press_office/PressConferencebythePresident/.

^v LISA MAGARRELL, POLICY BRIEF: U.S. INQUIRY INTO HUMAN RIGHTS ABUSES IN THE "WAR ON TERROR", INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (November 2008), http://www.ictj.org/static/Americas/ICTJ_Commission_of_Inquiry_Policy_Brief_rev1_07_Jan_09.pdf.

^{vi} Press Release, Human Rights First, Top Interrogators Declare Torture Ineffective in Intelligence Gathering, (Jun. 24, 2008), <http://www.humanrightsfirst.org/media/usls/2007/statement/313/index.htm>.

^{vii} Senator Patrick Leahy, Take Action: Support a Truth & Reconciliation Commission, Leahy for U.S. Senator Committee petition website, http://ga3.org/campaign/btcpetition?qp_source=btc_dk.

^{viii} Interview with Nancy Pelosi, Speaker of the House of Representatives, on MSNBC's Rachel Maddow Show (February 25, 2009), <http://www.msnbc.msn.com/id/29394872/>.

^{ix} Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 12, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85., http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

^x MAGARRELL, *supra* note v.

*'Truth Commission' is a bad idea The Miami Herald (Florida) February 23, 2009
Monday*

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February 23, 2009 Monday

SECTION: COMMENTARY

ACC-NO: 20090223-BC-TRUTH-EDITORIAL

LENGTH: 512 words

HEADLINE: 'Truth Commission' is a bad idea

BYLINE: McClatchy-Tribune News Service

BODY:

The following editorial appeared in the Miami Herald on Friday, Feb. 20:

—

Toward the end of the Bush administration, hardly a news cycle went by without another revelation of a secret program or some kind of political skulduggery. Bush and his inner circle managed to keep the lid on in most cases. But now that Bush is out of office, Democrats in Congress are demanding to air all the dirty secrets before a "**Truth Commission**" or a similar forum. Sounds like a good idea ... but it isn't.

Before Congress jumps the gun, it should let the new administration delve into the record to determine if there is any basis for further investigation, given the broad authority of presidents. "You just have to walk in and ask where the file cabinets are," said Sen. Arlen Specter of Pennsylvania, who is anything but a doctrinaire Republican yet doesn't favor any sort of "**Truth Commission**."

In fact, Attorney General Eric Holder is doing just that at the Justice Department, which produced the secret memos authorizing torture, warrantless surveillance and other practices showing contempt for established legal practices. Even before Holder came aboard, career officials at Justice began preparing a report that is said to contain sharp criticism of Bush administration lawyers who wrote these dubious opinions. Public disclosure of the report is pending approval by Holder and other top officials.

Meanwhile, Congress itself has a number of open investigations into possible criminal violations. These include probes by the Senate Judiciary and Intelligence panels of harsh interrogation of detainees, the allegedly political prosecution of a former Democratic governor of Alabama, the secret memos, and the role of former White House aides Karl Rove and Harriet Miers in the firing of federal prosecutors.

The latter is also the focus of a special Justice Department prosecutor, appointed last year. Isn't that enough? These investigations should be allowed to run their course before pondering creation of a "**Truth Commission**" such as the one favored by Sen. Patrick **Leahy**, D-Vt., and Rep. John Conyers, D-Mich., chairmen of the Senate and House Judiciary committees.

One danger of such investigations is that they unwittingly provide immunity to anyone who is forced to testify. That's a get-out-of-jail-free card for any witness who might have actually committed a crime. Another problem is that any such endeavor would inevitably prove to be a huge distraction for official Washington at a time when the government needs to focus on winning two wars and restoring a sound economy. A "**Truth Commission**" would undoubtedly make it harder for President Obama to secure bipartisan support for these efforts.



National Religious Campaign
Against Torture

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U.S.-Sponsored Torture: A Call for a Commission of Inquiry

The United States must never again engage in torture. Torture is immoral, illegal and counterproductive. It causes profound and lasting harm, especially to its victims but also to its perpetrators. It contradicts our nation's deepest values and corrupts the moral fabric of our society.

We call for an impartial, nonpartisan, and independent Commission of Inquiry. Its purpose should be to gather all the facts and make recommendations. It should ascertain the extent to which our interrogation practices have constituted torture and "cruel, inhuman or degrading treatment". Understanding the causes, nature and scope of U.S.-sponsored torture is essential for preventing it in the future and eliminating it from our system without loopholes. U.S. law will determine the extent of any criminal culpability.

As people of faith, we know that brokenness can be healed – both in individual lives and in the life of the nation. All religions believe that redemption is possible. Learning the truth can set us on a path toward national healing and renewal.

The United States must never again allow itself to be driven by blinding fears and bitter resentments in responding to national tragedy. The use of torture only serves to undermine our security in a dangerous world.

Nothing less than the soul of our nation is at stake in confronting U.S.-sponsored torture and completely renouncing its use. Let the U.S. reaffirm its values by establishing a Commission of Inquiry.

HEADS OF FAITH GROUPS ENDORSING THE CALL FOR A COMMISSION

Rev. Dr. John H. Thomas
General Minister and President
United Church of Christ

Rev. Dr. David Gushee
President
Evangelicals for Human Rights

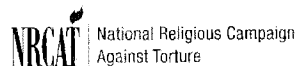
Dr. Ingrid Mattson
President
Islamic Society of North America

Rabbi Gerry Serotta
Chair
Rabbis for Human Rights – North America

Very Rev. Thomas Picton, CSsR
President
Conference of Major Superiors of Men

Rev. Dr. Wesley Granberg-Michaelson
General Secretary
Reformed Church in America

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Jim Winkler
 General Secretary
 United Methodist Church
 General Board of Church and Society

Bishop Demetrios of Mokissos
 Chancellor
 Greek Orthodox Metropolis of Chicago

Rev. Dr. Sharon E. Watkins
 General Minister and President
 Christian Church (Disciples of Christ)

Rev. Dr. Stan Haste
 Minister for Mission and Ecumenism
 Alliance of Baptists

Suhag Shukla
 Managing Director
 Hindu American Foundation

Rev. William G. Sinkford
 President
 Unitarian Universalist Association of
 Congregations

Rabbi Brian Walt
 Executive Director
 Rabbis for Human Rights – North America

Archbishop Nicolae Condrea
 Romanian Orthodox Archdiocese in the
 Americas

Rev. Grady Parsons
 Stated Clerk of the General Assembly
 Presbyterian Church, USA

Bishop Gregory Vaughn Palmer
 President, the Council of Bishops
 United Methodist Church

Rabbi Toba Spitzer
 President
 Reconstructionist Rabbinical Association

Rev. Dr. Michael Kinnamon
 General Secretary
 National Council of Churches

Dr. Sayyid M. Syeed
 National Director, Interfaith and
 Community Alliances
 Islamic Society of North America

Charlie Clements
 President and CEO
 Unitarian Universalist Service Committee

Joe Volk
 Executive Secretary
 Friends Committee on National Legislation

National Religious Campaign Against Torture
 316 F Street NE, Suite 200, Washington, DC 20002

SUBJECT: Religious leaders call for torture commission

NATIONAL RELIGIOUS CAMPAIGN AGAINST TORTURE

For Immediate Release – March 3, 2009

Prominent Religious Leaders Call for “Commission of Inquiry” on Torture as Senator Leahy Launches Hearings to Establish “Truth” Commission

National Religious Campaign Against Torture to submit statement to Leahy along with testimony for hearing

Contact: Steve Fox, Fenton Communications, 202-822-5200 or sfox@fenton.com
Rev. Richard Killmer, NRCAT, at 202-547-1920 (cell 207-450-7242) or rkillmer@nrcat.org

WASHINGTON, DC – Today, the National Religious Campaign Against Torture (NRCAT) released a statement calling for an impartial, nonpartisan, and independent “Commission of Inquiry” to investigate U.S.-sponsored torture and to ascertain the extent to which Bush administration interrogation practices constituted “cruel, inhuman or degrading treatment.” The statement has been signed by nearly two dozen prominent religious leaders, representing a broad array of religious denominations. Signatories include Rev. Dr. John H. Thomas, General Minister and President, United Church of Christ; Dr. Ingrid Mattson, President, Islamic Society of North America; Rev. Dr. David Gushee, President, Evangelicals for Human Rights; and Rabbi David Saperstein, Director, Religious Action Center, Union of Reform Judaism

The statement reads in part:

“The United States must never again engage in torture. Torture is immoral, illegal and counterproductive. It causes profound and lasting harm, especially to its victims but also to its perpetrators. It contradicts our nation’s deepest values and corrupts the moral fabric of our society. [...] As people of faith, we know that brokenness can be healed – both in individual lives and in the life of the nation. All religions believe that redemption is possible. Learning the truth can set us on a path toward national healing and renewal.”

The full statement, along with the names of the 23 religious leaders who have signed it, is included at the end of this email.

The release of this statement comes as momentum is building for an investigation into the Bush administration’s program of “enhanced interrogation.” Senator Patrick Leahy (D-VT), is holding a Judiciary Committee hearing on Wednesday, March 4, to explore establishing a “Truth” Commission, which would carry out a comprehensive investigation into the approval of and use of torture by the U.S. government. The Commission would include significant use of public testimony and would ultimately issue a report on its findings.

NRCAT, which is providing written testimony for Senator Leahy’s hearing, strongly supports the establishment of an independent, non-partisan Commission of Inquiry, with the power to subpoena witnesses, to investigate the roles elements of our government played in the torture of detainees.

"The American people have been kept in the dark about this nation's involvement in torture for long enough," said Rev. Richard Killmer, executive director of NRCAT. "If we hope to heal the nation's soul, we must conduct a public inquiry into the actions of the last eight years. This is not a time to hide from our past. We must investigate and report on the torture policies and practices of the past and then develop safeguards to assure that torture never happens again."

**For more information about NRCAT's campaign for a Commission of Inquiry
Visit www.tortureisamoralissue.org**

###

The National Religious Campaign Against Torture (NRCAT) is a growing membership organization committed to ending U.S.-sponsored torture, and cruel, inhuman and degrading treatment. Since its formation in January 2006, more than 250 religious groups have joined NRCAT, including representatives from the Roman Catholic, evangelical Christian, mainline Protestant, Unitarian, Quaker, Orthodox Christian, Jewish, Muslim, Baha'i, Buddhist, and Sikh communities. Members include national denominations and faith groups, regional organizations and local congregations

###

The following is the text of the NRCAT statement calling for a Commission of Inquiry to investigate U.S.-sponsored torture:

U.S.-Sponsored Torture: A Call for a Commission of Inquiry

The United States must never again engage in torture. Torture is immoral, illegal and counterproductive. It causes profound and lasting harm, especially to its victims but also to its perpetrators. It contradicts our nation's deepest values and corrupts the moral fabric of our society.

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The United States must never again allow itself to be driven by blinding fears and bitter resentments in responding to national tragedy. The use of torture only serves to undermine our security in a dangerous world.

Nothing less than the soul of our nation is at stake in confronting U.S.-sponsored torture and completely renouncing its use. Let the U.S. reaffirm its values by establishing a Commission of Inquiry.

HEADS OF FAITH GROUPS ENDORSING THE CALL FOR A COMMISSION

Rev. Dr. John H. Thomas General Minister and President United Church of Christ	Suhag Shukla Managing Director Hindu American Foundation
Dr. Ingrid Mattson President Islamic Society of North America	Rev. William G. Sinkford President Unitarian Universalist Association of Congregations
Rabbi David Saperstein Director, Religious Action Center of Reform Judaism	Rabbi Brian Walt Executive Director Rabbis for Human Rights – North America
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The New York Times

March 4, 2009

EDITORIAL

The Tortured Memos

We had two powerful reactions this week after the C.I.A. admitted to destroying 92 videotapes of interrogations that may involve torture and the Justice Department released several of the legal manifestos that former President George W. Bush used to justify mangling the Constitution after Sept. 11, 2001.

We were horrified to be reminded that the nation still has not plumbed the depths of the Bush administration's abuses. At the same time, it was a relief to see President Obama beginning to make good on his promise of greater transparency.

While the C.I.A.'s admission was made in legal proceedings, the government voluntarily released the Justice Department memos. A lot more transparency is needed. The documents do not include memos justifying harsh interrogations nor those justifying Mr. Bush's decision to authorize illegal eavesdropping on Americans.

The Bush administration admitted last year that the chief of the spy agency's clandestine service had ordered the destruction of tapes showing the interrogations of two Al Qaeda suspects, who may have been subject to the torture technique known as waterboarding.

But the Central Intelligence Agency redacted the number of tapes destroyed when it provided an accounting for a federal lawsuit that seeks release of its interrogation records. On Monday, the Justice Department said there were 92 — a stunning amount of evidence-shredding that needs further scrutiny.

The released memos were written by the Justice Department's Office of Legal Counsel, which is supposed to ensure policies comply with the Constitution and the law. They make it chillingly clear how quickly that office was rededicated to finding ways for Mr. Bush to evade, twist or ignore both. Some low points:

- In an Oct. 23, 2001, memo, John C. Yoo, then a Justice Department lawyer, explained how Mr. Bush could ignore the Fourth Amendment and the Posse

Comitatus Act and deploy the military within the United States in “anti-terrorist operations.” In the same memo, Mr. Yoo argued that Mr. Bush could also suspend First Amendment rights to free speech and a free press.

- On March 13, 2002, Jay Bybee, the head of the office at the time, wrote that Mr. Bush could ignore the Geneva Conventions and the anti-torture treaty. Mr. Bybee, who now has a lifetime seat as a judge on a federal court, said Mr. Bush was free to send prisoners to countries known to employ torture — a practice known as extraordinary rendition — as long as there was no agreement to do the torturing.

- On Jan. 15, 2009, five days before Mr. Bush left office, Steven G. Bradbury, the head of the counsel’s office in Mr. Bush’s second term, repudiated the earlier memos and tried to excuse them by saying they were made “in a time of great danger and under extraordinary time pressure.” They were, but that should have led honest lawyers to exercise extra prudence, not to rush into sweeping away this country’s most cherished rights.

The Justice Department’s internal ethics office is reviewing these and other memos and trying to decide whether political appointees knowingly twisted their interpretations of the law to provide legal cover for decisions made by the White House. At least two Congressional committees are, quite rightly, also looking into these issues.

Patrick Leahy, chairman of the Senate Judiciary Committee, is holding a hearing on Wednesday into the creation of a bipartisan inquiry into the range of Mr. Bush’s abuses and has raised the possibility of granting immunity to witnesses. We are skeptical about immunity, but we are looking forward to hearing a careful debate about how to proceed toward the essential goal: providing Americans with as much truth and accountability as possible about their government’s actions.

March 2, 2009, 12:24 pm

Washington Post 02/12/2009

Public Supports Investigations of Bush Misdeeds

Jill Lawrence writes for USA Today: "The Bush administration's anti-terror policies have generated controversies, lawsuits and indelible images such as those of abuses at Abu Ghraib prison in Iraq.

"They've also given rise to multiple opinions on whether to investigate, prosecute or just move on."

President Obama showed no appetite on Monday night for Sen. Patrick Leahy's proposed truth and reconciliation commission to investigate Bush administration misdeeds. Obama said he'd rather look forward than backward. But the public appears to believe we can do both at the same time.

In a separate story, Lawrence writes: "Even as Americans struggle with two wars and an economy in tatters, a USA Today/Gallup Poll finds majorities in favor of investigating some of the thorniest unfinished business from the Bush administration: Whether its tactics in the "war on terror" broke the law.

"Close to two-thirds of those surveyed said there should be investigations into allegations that the Bush team used torture to interrogate terrorism suspects and its program of wiretapping U.S. citizens without getting warrants. Almost four in 10 favor criminal investigations and about a quarter want investigations without criminal charges. One-third said they want nothing to be done.

"Even more people want action on alleged attempts by the Bush team to use the Justice Department for political purposes. Four in 10 favored a criminal probe, three in 10 an independent panel, and 25% neither."

A Truth Commission for the Bush Era?

First, Find Out What Happened



David Cole, a professor at Georgetown University Law Center, is the author, most recently, of "Justice At War: The Men and Ideas That Shaped America's 'War on Terror.'"

Why are so many so afraid of the truth? Senator Patrick Leahy's proposal that a nonpartisan truth commission be appointed to investigate possible crimes committed in the "war on terror" has sparked criticism from a wide range of Republicans, all of whom urge us to look forward, not backward. But in the face of credible evidence that high-level Bush administration officials authorized torture, a crime against humanity, the least we should do is undertake a serious, independent investigation.

As a legal matter, we are compelled to investigate by the Convention Against Torture, a binding treaty, that requires its signatories to investigate and refer for possible prosecution credible evidence of torture under their jurisdiction.

It may have been wrong, but not criminal, to rely on flawed legal advice from the Justice Department's Office of Legal Counsel.

That obligation has been triggered by, among other things, the admissions that C.I.A. interrogators used waterboarding on at least three suspects with the express approval of Vice President Dick Cheney and other Cabinet officials, and by the finding of Susan Crawford, head of military prosecutions at Guantanamo, that interrogators there, acting under orders of then Defense Secretary Donald Rumsfeld, tortured Mohammed al-Qahtani. If we do not investigate such evidence, foreign courts have the right to pursue torture prosecutions of U.S. officials under the principle of “universal jurisdiction.”

As a moral matter, investigation is also the right thing to do. The United States has committed grave wrongs in past security crises, most infamously when we interned over 110,000 Japanese and Japanese Americans during World War II. It took us more than 40 years to do it, but the United States eventually acknowledged its wrong in 1988, when Congress officially apologized and paid reparations to the surviving internees. We should not wait 40 years to admit our mistakes this time around.

Some complain that a truth commission is not enough — and that crimes require criminal prosecutions. Depending on what the evidence shows, prosecution may be the appropriate response in the long run, but for the moment, it is not yet obvious.

For example, it may have been wrong, but not criminal, to rely on flawed legal advice from the Justice Department’s Office of Legal Counsel that waterboarding was not torture; the legal advice itself may have been morally repugnant and professionally incompetent without necessarily being criminal. At this point, it is too early to conclude that prosecution is either required or ruled out. But it is too late to deny that a serious independent investigation is necessary.

Testimony of Wendy Patten
Senior Policy Analyst, Open Society Institute

Before the Committee on the Judiciary
United States Senate

Hearing on "Getting to the Truth Through a Nonpartisan
Commission of Inquiry"

March 4, 2009

Chairman Leahy and Members of the Committee:

Thank you for the opportunity to provide written testimony for this important session on a commission of inquiry. My name is Wendy Patten and I am a senior policy analyst at the Open Society Institute. Throughout my career in government and in the non-profit sector, I have worked on a wide range of legal policy, human rights, and national security issues. During my time in government, I served as director of Multilateral and Humanitarian Affairs at the National Security Council and as senior counsel in the Office of Policy Development and special counsel for Slavery and Trafficking at the U.S. Department of Justice.

I commend you for convening this hearing. It comes at an important time, as we consider how best to move forward as a country on the detention and treatment of persons held after September 11, 2001. These are challenging issues; they require us to take a hard look at government practices in recent years. A commission, however, will play a vital role in helping us look to the future. From a good government perspective, we should not fail to learn from a challenging period and use that information to improve our policies and practices going forward.

A commission would serve several interrelated purposes. First, it would gather the facts in order to present a comprehensive picture of what transpired. We need to understand fully what happened and how these policies and actions came to pass. Armed with a full understanding of what happened, we can then take stock and use that information to help shape future policy. We must learn the lessons of the past so that wherever mistakes were made, we can ensure they never happen again. A commission that examines these issues can help us renew our commitment to our principles and restore our standing in the world, which is vital to America's interests and our long-term security.

To achieve these critically important objectives, we need a commission to provide a comprehensive review of all agencies involved in the handling of detainees. Such a commission complements the important work of congressional committees in conducting oversight, but would be unique in its ability to examine the involvement of all relevant agencies and provide a comprehensive, government-wide review of these issues.

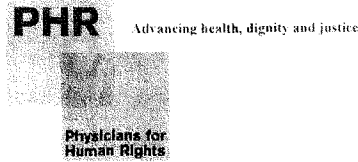
Above all, a commission must be non-partisan. Members should be persons of unimpeachable integrity and independence. They could include retired government officials, scholars, retired military officers, and human rights experts. The commission must stand above partisan politics and ensure that the American people have a full understanding of what transpired and a clear vision of how best to move forward.

A number of prominent individuals - including those from military, diplomatic, law enforcement, faith, and legal backgrounds - have called upon the President to establish a non-partisan commission of distinguished Americans to examine policies and actions related to detainees after 9-11. The commission would review policies and actions related to the detention, treatment, and transfer of persons detained after 9-11 and the consequences of these policies and actions. Their call has been endorsed by 18 organizations, including the Open Society Institute.

The commission should operate in public as a general rule, with only very limited exceptions. Closed hearings should be held only when strictly necessary to receive and consider properly classified national security information, or where appropriate to protect the privacy of an individual. While there may be instances in which it is appropriate to hold closed hearings, they should be rare. The very purpose of the commission is to inform the American people about what transpired and to enable policy makers and the public to draw lessons from its work.

At the conclusion of its work, the commission would issue a report with policy recommendations. It would be authorized to formulate whatever recommendations it deems appropriate to address problems identified in its report. The report would provide invaluable insight and information to the Congress, the Executive Branch, and the public in deciding how to shape policy in these areas and, most importantly, in ensuring that we advance our security while honoring our most cherished values.

Thank you for the opportunity to submit this testimony to the Committee.



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**STATEMENT FOR THE RECORD
FROM PHYSICIANS FOR HUMAN RIGHTS**

Senate Judiciary Committee

Senator Patrick J. Leahy, Vermont,
Chairman of the Committee, Presiding

"Getting to the Truth Through a Nonpartisan Commission of Inquiry"

March 4, 2009

Physicians for Human Rights (PHR) commends Judiciary Chairman Leahy for his initiative in holding this hearing to define the scope and goals of the planned non-partisan Commission of Inquiry to examine policies and practices which have resulted in tremendous damage to our nation's standing, to the historic struggle to end torture, longstanding standards of medical ethics, and to individual torture victims and their families.

Commission Mandate

PHR encourages the Committee to work toward the establishment of an independent Commission which will rigorously investigate all aspects of U.S. interrogation and detention policy in recent years. The Commission should have access to all relevant documents and make every effort to declassify and release to the public as many documents as possible. The Commission should take testimony from a full range of officials from both the operational and policy level and should have subpoena power to facilitate the appearance of witnesses. If the Commission uncovers information which demonstrates that crimes, including torture, have been committed, it should have the power to recommend appropriate prosecutions. Such a Commission, by determining how our nation abandoned its core values and by making recommendations on how to prevent future abuses, would go a long way toward restoring America's global standing as a nation that respects the rule of law and does not torture.

Examining Health Professional Complicity

As part of the Commission's broad investigation, PHR believes it is vital that two important aspects of the regime of torture and abuse receive special attention:

First, PHR urges the Commission to scrutinize the role of health professionals and their complicity in facilitating the torture regime. When Bush Administration officials decided to ignore the Geneva Conventions and institute a program of "enhanced" interrogation they turned first to psychologists, not lawyers. As the recent report by the Senate Armed



Services Committee describes, one of the first steps Defense Department officials took in early 2002 was to contact psychologists from the military's Survival, Evasion, Resistance and Escape program (SERE), to find methods of psychological coercion that they could "re-purpose" against detained terrorist suspects. Some psychologists turned out to be all too willing to cooperate with the Defense department, setting in motion a process that eventually pulled in psychiatrists and other health professionals and led to ethical and perhaps criminal violations that have stained the reputation of the health professions.

Health professionals, who are collectively held in the highest regard by the American public, had the power to stop the torture regime before it started. If those who were recruited by the Defense Department and other government agencies had refused to lend their expertise to constructing a system of harsh psychological abuse, the program would not have been able to move forward quickly toward its goal of "breaking" detainees. Once the psychological basis for the "enhanced" interrogation program had been established, psychologists, psychiatrists and other doctors were enlisted to monitor and help implement the program. This misuse of knowledge represented a fundamental perversion of the healing and therapeutic function of the health professions, violating medical ethics and the overriding ethical duty to "do no harm."

An independent, non-partisan Commission, of the type Chairman Leahy and others have proposed, must specifically shine a light on the role of health professionals in this process. The Commission should look at the role health professionals played in the design of abusive interrogation techniques, their failure to document evidence of harm perpetrated against detainees and violations of doctor-patient confidentiality that enabled the use of information gathered in the course of treatment for intelligence purposes. By officially investigating the behavior of medical and psychological personnel, the wrongs of the past can be uncovered, addressed and prevented from recurring. Appropriate discipline for ethical misconduct should be handled by state licensing boards; if the commission discovers evidence that crimes have been committed, that information should be pursued by the proper law enforcement authority.

Upholding Ethical Standards

In addition to determining how health professionals came to be placed in harmful roles, the Commission needs to recommend that effective guidelines be put in place to ensure that such a gross subversion of medical ethics cannot be repeated. The Defense Department continues to mandate that health professionals play a major role in interrogations, through its Behavioral Science Consultant teams. This is ethically inappropriate. By helping interrogators determine when to push harder to get detainees to reveal information, health professionals abandon their role as healers and become instead advisors on calibrating harm. Psychologists and psychiatrists should be limited to training personnel in non-coercive rapport-building interrogation techniques. Health professionals should also be removed from participation in the brutal and inhumane force-feeding tactics currently used against hunger-striking detainees. According to widely accepted guidelines from the World Medical Association, adopted by the American Medical Association, force feeding a competent and informed patient is never justified. The patient's autonomy and right to refuse an invasive medical procedure must be protected. It is also vital for the new Administration to implement safeguards for health



professionals in detention settings to ensure that they remain outside the intelligence chain of command. Safeguards must also be put in place to prevent information gathered in the course of the doctor-patient relationship from being used in intelligence collection. The traditional autonomy of health professionals in the military chain of command must be respected on all clinical matters.

The enormous prestige of the health professions in this country was earned over many decades, in part by adherence to a strict set of ethical standards. The participation of some health professionals in ethically disturbing and even criminal behavior while engaged with the national security apparatus serve to erode that high standing, especially if their actions are not investigated and corrected. The medical and health professions as a whole have a responsibility to support a national commission that will move toward a restoration of the highest moral and ethical standards, rooted in the respect for human dignity.

Examining the Human Consequences of Torture

Second, the Commission needs to bring to public attention the plight of the victims of U.S. torture, many of whom were never charged with a crime, and subsequently released. As PHR detailed in our report, *Broken Laws, Broken Lives* (BLBL), these victims have suffered severe, long-term physical and psychological consequences that resulted directly from the torture and ill-treatment they experienced. Our report demonstrated that the permissive environment created by the implicit and explicit authorizations by senior U.S. officials encouraged forms of torture even beyond the harsh methods that were officially approved. The detainees were held in an environment of moral disengagement that tolerated techniques designed to humiliate and dehumanize detainees, and unsurprisingly, other forms of human cruelty such as physical and sexual assault were practiced. The detainees suffer lasting harm, enduring severe physical and psychological effects including persistent pain from being beaten or kept in stress positions, severe anxiety and post-traumatic stress disorder. Their torment continues and their livelihoods remain impaired.

The U.S. government should issue a formal apology to detainees who were subjected to torture and/or ill-treatment as part of U.S. military and intelligence operations since Fall 2001 in Afghanistan, Iran, Guantánamo Bay, and elsewhere. Reparations are a critical element of justice provided for under international and domestic law. The government should establish a fair process for compensation and victim assistance, including access to rehabilitation and re-integration services for these individuals. The victims of abuse deserve a public acknowledgement of the facts and require monetary compensation to ensure rehabilitation for the long-term health consequences of ill-treatment.

As Major General Antonio Taguba (U.S. Army, Ret.) wrote in the preface to our report: *"The former detainees in this report, each of whom is fighting a lonely and difficult battle to rebuild his life, require reparations for what they endured, comprehensive psycho-social and medical assistance, and even an official apology from our government. But most of all, these men deserve justice as required under the tenets of international law and the United States Constitution. And so do the American people."*



Conclusion

On the issues of health professional complicity and damage to the health of detainees, the Commission can serve a crucial public function in informing the American people of the shameful deeds that were done in their name. Only a full airing of the facts will provide Americans with confidence that we are a nation of laws and that we have entered an era of responsibility. We must take a clear-eyed view of the horrific institutional and personal consequences of torture and ensure that it never happens again.

**Testimony of Ambassador Thomas Pickering
Before the Senate Committee on the Judiciary
March 4, 2009**

Thank you, Chairman Leahy, and distinguished members of the Senate Committee on the Judiciary for affording me the opportunity to testify before you on this extremely important topic. I am honored to appear before you today.

I believe that the question of how we, as Americans, should come to grips with our handling of detainees in recent years is critically important for our country. It is essential to have a full understanding of what happened, why, and the consequences of those actions in order to chart the right course for the future. As President Obama said in addressing the Congress last week with regard to the pressing economic situation, we must assess the policies that led us to our current place in order to learn how to move forward. To quote the President (albeit from a different but still apt context), "I say this not to lay blame or look backwards, but because it is only by understanding how we arrived at this moment that we'll be able to lift ourselves out of this predicament."

I come before you today to urge you to support the establishment of a commission to examine the detention, treatment, and transfer of post 9-11 detainees. In calling on the President to create such a commission, I have joined together with a former general in the U.S. Army, a former FBI Director, the President of the United Church of Christ, and an internationally respected lawyer and scholar who is a noted authority on commissions of this nature. I am pleased that many organizations strongly committed to human rights and the rule of law have endorsed this call. My convinced support of such a commission stems from my over 45 years of service to this country in the military, in diplomacy overseas and as a senior official at the Department of State. As a career foreign service officer who retired with the rank of Career Ambassador, I believe that a commission on the handling of detainees is vital to our country's future – to its security, to its standing in the world, and to our collective commitment as a people to honor, respect and remain committed to our founding ideals in all that we do. Let me be clear as well that I am not a lawyer and not qualified to address technical, legal questions involving the advice of trained counsel.

I would like to speak first to the purposes such a commission would serve and then to some of its principal features.

Purpose of a Commission

A commission of the kind we are proposing is needed in order to arrive at an in-depth, unbiased and impartial understanding of what happened, how it happened, and the consequences of these actions. By carefully gathering all of the facts, a commission can tell the whole story not just of each individual agency, studied in isolation, but of how all parts of the U.S. government interacted in the handling of detainees. Indeed, the

interagency aspect is crucial, as is how the various agencies related to the most senior officials in government. On the basis of this full and comprehensive review, the commission can then make recommendations that will help guide us in the future. This process is fundamentally about understanding where we have been in order to determine the best way to move forward.

Some might argue that such a commission is not needed. After all, President Obama has issued a series of executive orders that chart a new course on detention and interrogation policy. As important as these orders are, something more is needed. It is not enough to say that America is discontinuing the policies and practices of the recent past. We must, as a country, take stock of where we have been and determine what was not acceptable, what should not have been done, and what we will never do again. It is my sincere hope that this commission will confront and reject the notion, still powerful in our midst, that these policies are proper choices that could be implemented again in the future.

Such a commission will strengthen our credibility in promoting and defending our values and advancing a better, safer world. As the 9-11 Commission found, the United States must engage the struggle of ideas around the world in order to combat extremism and ultimately prevail against terrorism. To do that effectively, the Commission found, the U. S. government “should offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors.”

It is far better for American foreign policy if we acknowledge willingly what went right and what went wrong than to address bits and pieces of the story as they emerge over time. It is far better for our country and our standing in the world if we critically examine our own record and take account of what happened. To the extent that the Guantanamo detention camp, Abu Ghraib, secret detention sites, and torture and abuse enhance the efforts of our adversaries to recruit others to join their ranks and to make a case against us, we cannot simply turn the page. We must engage in a genuine effort to take stock of these policies and actions. We must acknowledge any mistakes that were made and commit not to repeat them. It is a crucial step in neutralizing our adversaries’ narrative about U.S. abuse of detainees. Only in so doing can we say to ourselves and to the world that we have not just turned the page on the past, but we have confronted it, learned from it, and strengthened our resolve to remain true to our principles in the future. Only great countries, confident in themselves, are prepared to look at their most serious mistakes, learn from them and lead on forward. The United States has been and still is today, I believe, that kind of country.

Some Principal Features of a Commission

Turning now to the question of what such a commission would look like, its most important attribute is that it must stand above politics. It should report to and answer to the American people. To achieve its vital purpose, the commission should be comprised of persons whose duty is to the truth and to our nation’s founding principles. We have

called on the President to appoint persons of irreproachable integrity, credibility and independence to serve on this commission. Commission members might well include leading academics; retired judges, military officers, intelligence and government officials; and human rights experts. While the President should welcome input from the Congress regarding potential appointees, he should be guided by the need to ensure that the commission will stand above partisan politics.

Second, the commission should operate in public to the maximum extent possible. Public proceedings and reports should be the norm. Closed sessions, redactions, and classified annexes should be used only when absolutely necessary and should be a rare exception and not the general rule. It is necessary for the commission to do its work openly and transparently because the American people must be allowed to see the facts and to understand what happened. While this process may well complement other examinations of these events that may occur within the government and in secret sessions or classified reports, a public accounting is essential – both for the American people first and foremost – and then also for the world. We must remake our commitment – not just as a government but as a people – to upholding our values as we advance our security.

Third, the commission should be a separate and distinct process from any investigation or prosecution of unlawful conduct. The establishment of a commission would not in any way preclude the possibility of a criminal investigation or prosecution, but the purpose of the commission would not be prosecution. That is the job of the criminal justice system. The commission should operate fully separate from that system and outside of it. It is for prosecutors, operating independently, to determine whether criminal enforcement is warranted against particular individuals based on the facts and the law. The commission would play a different role and serve a different purpose than criminal prosecutions – the purpose of assuring that U.S. policy in this critical area remains in full compatibility with our principles and values.

Fourth, the commission should have subpoena power in order to gather and tell the full story of what transpired. I would hope that the President would ensure that all government documents are made readily available to such a commission. Still, subpoena power is important in maximizing the value of the testimony and information that is received and reviewed by the commission. This feature will help ensure that the commission achieves its objective of a comprehensive examination of the handling of detainees.

Fifth, the issue of whether the commission should have the power to grant immunity has engendered a great deal of debate. I am not an expert on this technical legal issue, but I would hope that policy makers would consider it carefully. Persons who are called to testify can invoke their 5th Amendment right against self-incrimination. In my view, the commission should not have the power to grant *blanket* immunity, meaning immunity to all who testify truthfully or full immunity – in effect immunity for what may have been done rather than just for what is said in the testimony given. Rather, the commission should grant immunity to witnesses only in very limited circumstances. I hope that the question of immunity will be given careful consideration, even as we

recognize that there are many ways that the commission can gather information that do not require a grant of immunity, such as the disclosure of documents and testimony that does not implicate 5th Amendment rights.

Thank you, Mr. Chairman, for this opportunity to testify regarding a commission. I look forward to your questions.

TESTIMONY OF PROFESSOR JEREMY A. RABKIN

George Mason University School of Law

Before The

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

March 4, 2009

Hearing on "Getting to the Truth Through a Nonpartisan Commission"

I should start by saying that I did not serve in the Bush administration and I do not mean to defend any particular policy undertaken during the two terms of that administration. I am simply offering my personal views based on very general considerations of public policy.

It might be worthwhile to mention that, in addition to teaching international law and constitutional history at George Mason, I serve on the Board of Directors of the U.S. Institute of Peace. The USIP has published a number of important studies on the experience of foreign countries with "truth commissions." So, both from my own research and through my association with USIP, I have developed some degree of familiarity with "truth commissions." At the least, I have some familiarity with the extensive literature that has appeared in the last two decades on foreign "truth commissions."

So the first thing I want to say is that it is naïve to expect a mere commission to settle an ongoing and embittered controversy about past government policy and replace it with a new consensus on historical "truth." We can, of course, ask a commission to establish certain facts, such as precisely what advice the Justice Department gave to the Defense Department and the CIA regarding the legality of controversial interrogation practices. But much of the documentary record is already becoming public, as the Justice Department continues to release opinions on such questions by the Office of Legal Counsel. What many advocates of a "truth commission" seem to have in mind is not simply an exercise in gathering facts but in assessing blame.

Last summer there was a hearing before the House Judiciary Committee which was informally known as a "pre-impeachment hearing." Representative Dennis Kucinich and former Representative Elizabeth Holzman and a number of

other formidable witnesses insisted that the President Bush was guilty of such "high crimes" that the House had an obligation to commence impeachment proceedings, even in the final months of the administration. Frederick Schwarz of the Brennan Center testified at that hearing on behalf of the seemingly more modest proposal for an "investigatory commission" that would "play the important role of holding accountable those who are responsible for wrongdoing and for legal and constitutional violations."

I happened to be a witness at that hearing. I recall how angry many of the witnesses were. When I said – in front of the C-SPAN camera – that my fellow witnesses were lacking in historical perspective, I received a torrent of angry email from ordinary people around the country. These people were even more vehement in denouncing the "crimes" of the Bush administration, starting with the "crime" of taking the country to war in Iraq on knowingly false pretenses – as they were quite sure the Bush administration had deliberately lied the country into a pointless war.

To think that a bi-partisan commission can arrive at a consensus truth on the larger questions of blame for all that happened between September 12, 2001 and January 19, 2009 is really naïve. Mr. Schwarz, for example – who was one of the calmer and more serious witnesses, in my opinion – insisted that Bush administration policies were responsible for having "squandered one of our greatest assets – respect for our values" and thereby had not only "given vicious terrorists powerful recruiting tools" but "lost much of the support of our allies, as admiration for America has dropped substantially."

It is not remotely credible that a bi-partisan commission, however distinguished its membership, can persuade Americans to embrace an official "accounting" that purports to say just how much blame can be apportioned to which Bush administration policies for what subsequent consequences. Will the commission balance the possible benefits of disputed practices – such as the value of information acquired from water-boarding or other coercive interrogation practices – as against the damage to our national reputation from charges that we engage in "torture"? Will it then persuade the American people that we were left only 12 per cent safer from the information received through water-boarding but 28 per cent more vulnerable to attack from the damage to our reputation around the world?

In South Africa, the Truth and Reconciliation Commission did establish the facts regarding many specific acts of violence committed by the government during the era of apartheid. The commission also reported on terrorist acts committed by followers of the African National Congress. The Commission did not establish a consensus on how these categories of violence should be balanced or compared. Among those who denounced the commission's report was Nelson Mandela – probably the most admired man in South Africa at the time but also, of course, a partisan of the ANC (though not responsible for its earlier acts of terror, since he was in prison when they occurred). The Chilean truth commission was not much more successful in bringing Chile to consensus on how to view the abuses of the Pinochet regime – which also occurred in a context where there was resort to

violence on both sides. Scholars who have studied these experiences differ in their emphases and particular conclusions. But it is fair to say there is widespread agreement that calling an investigatory body a "truth commission" does not give it magical powers to resolve bitter societal divisions.

The next point I want to make is that, with all their limitations, commissions of this kind were a plausible response to extraordinary circumstances in countries like Chile and South Africa. In Chile, President Pinochet had seized power in a military coup in 1973. He had agreed to cede power to a democratically elected successor in 1990 – but only after issuing a broad-reaching amnesty for all the participants in his government's policies over the previous 17 years. And even after he stepped down as president, he remained, under arrangements he established beforehand, commander-in-chief of the Chilean armed forces. For the next government to have tried to rescind the amnesty and launched prosecutions would have risked provoking a new military coup. So, too, in South Africa, where the white minority government agreed to cede power to a government elected by the black majority only after getting assurances that a general amnesty would be respected. In many other countries in Latin America, in Africa, in Eastern Europe, truth commissions were established as an alternative to prosecutions because prosecutions would have endangered precarious transitions to democratic (or civilian) government.

We are not remotely in that situation in the United States. If actual crimes were committed by officials of the Bush administration, there is no reason at all why they cannot be prosecuted in the ordinary way we prosecute crimes. President Bush did not issue any blanket amnesty to protect the members of his administration from criminal liability. President Obama has not indicated that he intends to issue an amnesty of this kind. It is absurd to imagine that the Obama administration might have to fear a military coup – or even violent protests across America by talk-radio listeners – for proceeding with prosecutions where the Justice Department thinks they are appropriate. We are a nation with deeply established democratic practices and broad respect for the rule of law. We do not need an extraordinary alternative to the normal process of criminal justice.

There may be questions of blame that do not rise to the level of criminal liability. But we have a time-tested method for exploring such questions in congressional oversight. There will, of course, be some skepticism if committees dominated by Democrats seem to be engaged in partisan attacks on officials of the previous Republican administration. But Congress has to answer to the voters. And the voters understand that Congress has a mix of motives when it pokes into dark corners of administration policies. Congress can help bring issues to public notice. And the public can see officials defending themselves as well as members of Congress challenging or blaming them. If we need new policies, Congress has the legislative authority to enact new prohibitions or new safeguards against abuse. And we can have follow-on debates about whether proposed new policies don't

have new problems that make them vulnerable to new criticism. That is all part of democratic politics. It is something different from establishing "truth."

My last point is that, insofar as we ask a "truth commission" to be a substitute for criminal process, it is subject to all sorts of abuses. Will the commission be charged, as Mr. Schwarz proposes, with "holding accountable those who are responsible for wrongdoing" and so "serve as a warning for future government officials"? How does an official charged with "wrongdoing" by this "truth commission" challenge the commission's findings? When a prosecutor makes an allegation, the accused can defend himself before a jury and even if convicted, can file subsequent appeals before independent appellate judges. We have an elaborate set of safeguards to assure that accusations in the criminal justice system don't just gain the stamp of truth on the say-so of a prosecutor. We have no established system for checking unfair accusations by a "commission" which is unmoored from ordinary legal process.

As it is, there has been much criticism of special prosecutors on the grounds that their limited mandates make them go overboard in pursuing those associated with their one particular investigation. But special prosecutors are still supposed to follow normal prosecutorial procedure. They are supposed to secure indictments from grand juries, not publish accusations outside of the criminal process. There is serious danger that a "truth commission" set loose on supposed "wrongdoing" of the Bush administration will have all the temptations of abuse which beset special prosecutors – with none of the safeguards built into the criminal justice system.

Let me conclude by offering what I regard as a reasonable analogy. Suppose, after 9/11, the Bush administration had established an "investigating commission" to identify persons responsible for rallying support for terrorist networks, for raising funds, organizing false identities and providing other forms of assistance for terrorist networks. Suppose in the interest of informing the public, the commission had been authorized to publish its findings and name names of individual suspects. Surely, such a procedure would have been denounced by civil libertarians. Where there is enough evidence for criminal prosecution, they would have said, the government should secure indictments and proceed with criminal prosecution. Where there is not such evidence, the government should keep silent. Otherwise, the government can destroy reputations and inflict terrible damage on people's careers and livelihoods, without giving them any real way of defending themselves against reckless or ill-founded accusations.

How is the proposed "truth commission" any less objectionable, from the standpoint of due process? One might argue that government officials should be more accountable because they volunteered to accept special responsibilities to the public when they assumed their offices. But one can argue, on the other hand, that if we want capable and reputable people to assume public office, we have to treat them with at a modicum of respect and fair dealing. I think it is very hard to justify

imposing on public officials what we have not been willing to impose on terror suspects.

I am afraid such a recourse has come to look plausible to some critics of the Bush administration because they have been blinded by their own rage. President Bush may deserve all sorts of criticism. Still, there is no sane comparison between America under George W. Bush and Chile under Augusto Pinochet. I don't think we are likely to secure "reconciliation" by a process that starts from such a very extremely partisan premise.

162

TESTIMONY OF

DAVID B. RIVKIN, JR.
PARTNER, BAKER & HOSTETLER LLP

HEARING ON

"GETTING TO THE TRUTH THROUGH A NONPARTISAN COMMISSION OF
INQUIRY"

BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

MARCH 4, 2009

Chairman Leahy, Ranking Member Specter, and members of the Senate Judiciary Committee, I am pleased to appear before you and to testify at a hearing on "Getting to the Truth Through a Nonpartisan Commission of Inquiry." The idea of creating a special commission to "investigate" the Bush Administration's alleged abuses of power, including and especially in the context of the prosecution of the war on terror, has gathered much support in the media and appears to be contemplated seriously by Congress. In the House, Judiciary Committee Chairman John Conyers (D-MI), has already introduced legislation to establish a "National Commission on Presidential War Powers and Civil Liberties." You, Mr. Chairman, have called for a similar type of entity to be created. In my opinion, creating a commission to investigate the Bush Administration activities and its officials is a profoundly bad idea – both for policy and, depending on how the commission is organized and operated, legal and constitutional reasons.

Of course, there is nothing new about "blue ribbon" commissions. Our history is replete with examples of numerous such commissions. Notable examples include the Roberts Commission, established by President Franklin D. Roosevelt to investigate the 1941 attacks on Pearl Harbor; the Warren Commission, established by President Johnson to review the circumstances of President Kennedy's assassination; and most recently, the 9/11 Commission, organized by Congress to consider the intelligence and security failures surrounding that day's events. There have been many others. Based on their unique organizations, these commissions very often exist outside of the three branches of government provided for in our Constitution. This would certainly be the case with the proposed commission for investigating the supposed misdeeds of the Bush Administration.

Because the Constitution requires that anyone exercising significant authority under federal law must be appointed by the President with the Senate's advice and consent, or by department heads or the courts in the case of lower level officials, the commission would be unlawful if it served anything but a purely advisory role. Separation of powers principles also require that officials exercising executive authority, such as the power to investigate potential violations of federal law with a view towards prosecution, be subject to Presidential removal – at least for good cause. In addition, a commission designed to investigate alleged criminal conduct by particular individuals – especially one with subpoena power – raises serious Due Process concerns that could render it unconstitutional.

On its face, the proposed commission to investigate the Bush Administration appears advisory. It is plain, however, that many of its advocates clearly expect much more. This includes Chairman Conyers, who has suggested that the statutes of limitations applicable to criminal offenses for "torture" and "war crimes" be extended as part of his effort to "reign in the Imperial Presidency." Much, therefore, depends on how the commission operates, and upon the nature of its conclusions and recommendations.

In this regard, I am greatly discouraged by the ongoing discourse about the intent and purpose of this commission. Far from seeking to establish a body to make recommendations on policy on the lines of the 9/11 Commission, Chairman Conyers and those who agree with him clearly want to establish a body that would engage in what would in essence be the criminal investigation of the former Bush Administration. Their desire to target a relatively small number of the former Administration's most senior lawyers and policymakers is not concealed. That the subject matter areas, which such a commission would investigate – among them the interrogation and handling of captured enemy combatants and the gathering of electronic intelligence – are heavily regulated by comprehensive criminal statutes ensures that the commission's activities would inevitably invade areas traditionally the responsibility of the Department of Justice. Congress, of course, can also constitutionally properly delve into such

matters, as a part of its oversight and legislative activities. This proposed commission, I submit, cannot.

The power to investigate and bring criminal charges against individuals is the government's most formidable domestic power. As such, it is heavily circumscribed by the Constitution and federal statutes. An effort to outsource any aspects of this power to entities operating outside of the structure of government established by our Constitution is therefore extremely troubling and must be strongly resisted by all concerned with upholding the Constitution's ordering of our government and its barriers to politicized criminal investigation and prosecution.

I anticipate that the commission defenders may seek to rebut this argument by pointing out that, after all, the power to bring forward criminal indictments and proceed with the subsequent criminal prosecutions would remain in the Executive branch. In my view, this defense reflects an unduly crabbed view of the federal government's law enforcement functions. The very decision to initiate what amounts to a criminal investigation, whether or not it is formally designated as such, is too weighty to be outsourced to commissions operating outside of the constitutionally-prescribed tri-partite framework of our national government. In this regard, I would remind the Committee of the strident criticism which attended the alleged loosening, by the FBI during the Bush Administration, of the threshold determinations that had to be made to commence national security investigations. I also recall the indignation which attended the claims that the Bush Administration's Justice Department may have been seeking to investigate Democrat-leaning groups and Democrat officials for election fraud and other alleged offenses. I fail to see why having Congress task a group of private citizens to investigate former Bush Administration officials does not implicate the exact same, if not far greater, civil liberty concerns. Indeed, that the number of the persons to be targeted for investigation is quite small, potentially makes the commission's threat to civil liberties all the more acute.

Let's also reflect briefly on how the proposed commission might operate. This is not an easy task. No legislation has yet been introduced in the Senate detailing such a body's procedures. Yet, in order to compel people to testify, such a commission would have to wield a subpoena power, which it, presumably, would have to go to court to enforce in particular cases. Given the vague nature of the commission's responsibilities, as well as its strange blend of law-enforcement and policy investigations, it is difficult to imagine how the federal judiciary could meaningfully police such subpoena requests.

The question of how to balance the constitutionally-protected interests of the commission's targets, for example their Fifth Amendment protection against self-incrimination, with its desire for information is also a very difficult one. I have heard you, Mr. Chairman describe on a Sunday television show, the possibility of granting immunity in such circumstances, but I am not clear how an entity that is neither executive nor legislative could grant immunity which would be respected in the future by federal and even state law enforcement authorities. To the extent that grants of immunity, including the specific parameters of the immunized testimony, would have to be approved by the Executive branch, I am again troubled by the difficulty of coming up with a mechanism for meaningful review, as distinct from a rubber stamp, of the proposed commission's activities.

And then there is the question of how the commission would protect the privacy interests of its targets. The commission that has been proposed would go about what are essentially law enforcement investigatory functions in an unusually public manner. Despite unfortunate but inevitable leaks, the details of investigations into the kinds of offenses that the commission would investigate are typically held very closely by the Department of Justice. One interesting aspect of this broader issue is the question of whether commission members would be granted some form of immunity, including libel action immunity, while discharging their commission duties, or would they be amenable to lawsuits just like all other private persons. In this regard, I certainly don't believe that commissioners would enjoy any inherent government immunity,

being neither Members of Congress, protected by the Speech and Debate Clause, nor members of the Executive, protected by sovereign immunity and other privileges.

Setting aside the constitutional problems raised by charging a commission with the discharge of what are really law enforcement responsibilities, another large problem looms. It is important to recognize that one of the commission's most dangerous effects would be to increase the likelihood of former senior U.S. government officials being prosecuted overseas, whether in the courts of foreign countries or before international tribunals. The nature of the offenses supposedly at issue vastly increases the possibility of the commission's work having the effect of priming politicized foreign prosecutions. However erroneously, senior Bush Administration officials have been the subject of accusations that implicate not only U.S. criminal statutes but also international law, and which are arguably subject to claims of "universal jurisdiction" by foreign states. Foreign prosecutors could seize upon a supposedly "advisory" determination that criminal conduct occurred – especially if it is the only "authoritative" statement on the subject by an official U.S. body – as a ready pretext for their bringing charges against individual former U.S. officials. They might argue that the mere fact that the commission was established shows that grave crimes must have occurred and interpret the United States' non-prosecution of the individuals concerned as a mere technicality to be repaired by their own broad assertions of jurisdiction. Indeed, all of these circumstances appear to be tailor-made to support the invocation of universal jurisdiction by foreign judicial bodies and its utilization of this jurisdiction as the basis to launch prosecutions of Bush Administration officials. Doubtless, many commission advocates – who also have been among the most vociferous Bush Administration critics throughout the war on terror – hope for exactly this result.

They should think twice. Attempting to prosecute your political opponents at home, or facilitating their prosecution abroad, is like pouring acid on the machinery of democracy. The late and unlamented Independent Counsel Statute repeatedly showed that once this Pandora's Box is opened, its contents can wreak havoc equally across the political and party spectrum.

Indeed, if al Qaeda is no more than a criminal conspiracy – as some have claimed for many years – then President Obama's charge sheet has already been started. By authorizing continued Predator missile attacks against al Qaeda's leadership in Afghanistan and Pakistan, he has directly targeted those "civilians" with deadly force. That is a war crime.

President Obama and the Democrat-controlled Congress are entitled to revise and reject any or all of the Bush Administration's policies. No one, however, is entitled to hound their political opponents with criminal prosecution – whether directly or through the device of a politically unaccountable commission. Those who support such efforts now may someday regret the precedent it sets. Claims that the Bush Administration abused presidential powers have been thoroughly reviewed by several congressional committees. The Justice Department is fully capable of considering whether any criminal charges are appropriate.

Let me close by pointing out a great, and perhaps unintended irony. Much of the anger about the Bush Administration's war on terror policies, has been focused on its treatment of captured alien enemy combatants and especially its rendition policy. In an effort to "investigate" these matters, the proponents of the commission appear to be giving short shrift to the civil liberties of Americans, outsourcing law enforcement functions to private entities and even to be practicing a soft form of rendition, in that they are virtually inviting foreign courts to go after American citizens. I would respectfully suggest that this is a wrong way to proceed.

BRENNAN
CENTER
FOR JUSTICE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

**“GETTING TO THE TRUTH THROUGH
A NONPARTISAN COMMISSION OF INQUIRY”**

Wednesday, March 4, 2009

Written Testimony of

Frederick A.O. Schwarz, Jr.
Chief Counsel

Supporting the establishment of a nonpartisan, independent Commission of Inquiry to examine our policies and practices in confronting terrorism and to recommend necessary reforms.

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**Testimony of Frederick A.O. Schwarz, Jr.¹ in Support of a Nonpartisan,
Independent Commission of Inquiry**

Throughout American history, in times of crisis, the executive branch has accumulated significant new powers, some of which have been abused. Crisis always makes it tempting to ignore the wise restraints that both keep us free and reduce the likelihood of self-defeating mistakes. This nation has, at times, admirably set about correcting its course – realizing, as the dust settles or as previously secret facts are revealed, that constitutional and legal norms have been breached.

One such correction, in which I was involved, came in 1975-1976, when an investigation conducted by a Senate Select Committee – known as the “Church Committee” for its Chair, Senator Frank Church of Idaho – revealed intelligence agencies’ excesses in all administrations from Franklin D. Roosevelt’s through Richard M. Nixon’s. The Church Committee found that the intelligence agencies, including the FBI, the CIA, the NSA and other components of the Defense Department, had exceeded their authority through abusive surveillance and disruption of political activity at home (e.g., trying to provoke Martin Luther King, Jr. to commit suicide) and unwise covert action abroad (e.g., hiring the Mafia to try to assassinate Cuba’s Fidel Castro). While rank and file employees of these agencies directly committed abuses, the most serious

¹ Mr. Schwarz is Chief Counsel at the Brennan Center for Justice at NYU Law School. He was Chief Counsel for the United States Senate’s Committee to Study Governmental Operations with Respect to Intelligence Activities, commonly known as the Church Committee. He is co-author (along with Aziz Huq) of *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (The New Press, 2007). For many years a litigation partner in a leading New York City law firm, Mr. Schwarz’s other governmental service includes being the Corporation Counsel for New York City, and chairing the New York City Charter Revision Commission and the City’s Campaign Finance Board. Mr. Schwarz’s testimony reflects his own views as well as the views of the Brennan Center.

breaches of duty were those of presidents and other senior executive branch officials who, the Committee determined, had the “responsibility for controlling intelligence activities and generally failed to assure compliance with the law.”²

The Church Committee’s investigation illustrated what had been going wrong with our intelligence agencies and led to the enactment of the Foreign Intelligence Surveillance Act, which brought the government’s intelligence practices back in line with our constitutional principles and ensured that intelligence resources were not wasted on inappropriate and counter-productive endeavors. Exposing the truth thus strengthened our democracy and our ability to keep the nation safe.

It is time once again for such a searching assessment and self-correction. The unspeakable acts of terrorism that occurred on September 11, 2001 demanded a strong response by our government and a rethinking of our national security policies. All of us would agree that some of the government’s actions in response to 9-11 were necessary and productive. But there is evidence that some of the counter-terrorism policies and practices that were implemented after 9-11 departed from the rule of law and from our nation’s shared values. This country has three choices for how it can respond to that evidence. For the reasons set forth in this testimony, the Brennan Center believes that an independent, non-partisan commission of inquiry to examine our counter-terrorism policies is the best of these options.

The first option is simply to do nothing. That approach would be ill-advised at best and dangerous at worst. As an initial matter, there is no question that this country is,

² *Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, Book II*, 1 S. REP. NO. 94-755, at 137 (1976).

and should remain, a nation of laws. If it is true that our government has operated outside the law in any of its counter-terrorism practices, we want to make sure that these practices are brought back into line with the law and that the problem does not happen again. This process of restoration is necessary, not only to stay true to this nation's core principles, but also to restore our standing in the eyes of the world as a champion of the rule of law. But in order to implement the changes necessary to fix our policies and guard against future abuses, we have to have all of the facts. As the Chairman of this Committee recently put it, "we must read the page before we turn it."

In addition, we need to understand the consequences of our counter-terrorism policies if we are serious about protecting this country from the threat of terrorism. Elsewhere, I have argued that some of our counter-terrorism policies, such as detaining suspects for years without charge and employing harsh interrogation techniques, have made our country less safe.³ Regardless of whether they have produced useful intelligence in specific cases, they have harmed us, on balance, by giving the Bin Ladens of the world powerful recruiting messages; alienating our allies and making their intelligence services less willing to cooperate with us; and placing our own troops at increased risk of mistreatment if they are captured abroad. We need to have a full understanding of what the effects of our policies have been in order to fix any damage that has resulted and to ensure that our policies going forward serve this nation's security interests.

³ See Schwarz & Huq, *supra* n. 1. I am also appending to this testimony my testimony before the Constitution Subcommittee in its September 16, 2008 hearing on "Restoring the Rule of Law." That testimony provides further discussion on the need for an independent commission.

The second option, championed by some, is to pursue criminal prosecution against those in the government who may have broken the law. This approach has superficial appeal. As Attorney General Holder has acknowledged, no one is above the law; in theory, if crimes were committed here, they should be prosecuted. The problem with this approach is that much of the conduct in question was sanctioned by the Justice Department's Office of Legal Counsel. As a result, criminal prosecution is both unlikely to occur and, if it did occur, unlikely to succeed. It might also be unfair in some cases – namely, those in which government actors relied on the opinions and were not in a position to judge the opinions' legal soundness.⁴

Even if criminal prosecutions were a desirable and viable option, they would leave important questions unanswered. When official government policies stray from the rule of law, something has gone wrong with the system, and a systemic solution is required. In addition to knowing what happened, we need to know why and how it happened, what institutional failures allowed it to happen, and what steps must be taken to correct those institutional failures. Furthermore, as I have already noted, we need to know what harms have resulted from these actions and what needs to be done to mitigate those harms. These are critical questions for our safety as well as our commitment to the rule of law, and they would not be asked in a criminal proceeding.

⁴ Of course, going forward, we cannot have a system in which secret and patently unsound OLC opinions are permitted to insulate unlawful conduct. OLC's role is thus one of the issues that should be considered by the independent commission. If the commission determines that OLC opinions were misused to justify unlawful conduct or otherwise did not meet the professional obligations of the office, it should examine possible reforms to prevent a future recurrence.

The best way to get answers to these questions is to pursue the option that the Chairman of this Committee has proposed: an independent commission of inquiry established by Congress. A commission would shed much-needed light on exactly what our counter-terrorism policies have been, including information that even some members of Congress still do not have. To the extent any policies departed from the rule of law, the commission would examine the process by which these policies came into being, including who made the key decisions and whom they consulted – or did not consult. It would go beyond the symptoms – i.e., the policies themselves – and look for the root causes.⁵ Where appropriate, it would examine the effectiveness of the policies, and it would assess their impact on our national security and foreign relations. Based on what it learned, it would make informed recommendations about the reforms that may be necessary in order to ensure that our counter-terrorism policies respect the law and keep us safe. And it would do one additional thing that neither inaction nor criminal prosecution would do: Where allegations of unlawful or inappropriate conduct prove to be unsupported, it would air the facts and clear the names of those implicated.

In short, a commission would enable us to learn from the past without seeking punishment. One hundred and forty five years ago, shortly after his reelection in 1864, President Abraham Lincoln nicely articulated the value of such an approach:

⁵ Two of those root causes, in my view, are excessive government secrecy, which allows and even encourages misconduct by removing accountability, and inadequate congressional oversight. I will not expound on these here, but I believe an independent commission would need to address them in order to assemble a full picture of what went wrong with our post-9-11 counter-terrorism policies.

“[L]et us study the incidents of [recent history] as philosophy to learn wisdom from and none of them as wrongs to be avenged.”⁶
It is in this fair-minded spirit that a commission should be established and then proceed. When its mandate and its approach are so understood, a nonpartisan commission could serve yet another worthy function: bringing Americans together.

Commissions of inquiry are a tried and true method of dealing with situations in which there may be serious problems in government. When done correctly, they are quite effective – as this nation’s recent experience with the 9-11 Commission shows. As with the 9-11 Commission, a commission to examine counter-terrorism policies should be comprised of individuals with well-established reputations for integrity and impartiality. It must have full power to subpoena information, including classified information, and to enforce those subpoenas in court – a power that the 9-11 Commission possessed but never had to use, since the ability to subpoena information often spurs voluntary compliance. It also should have the authority to grant immunity to witnesses in response to their testimony, but it would be expected to use that authority sparingly and judiciously. The Church Committee had the authority to grant immunity, but managed to uncover a wide range of illegal activities without ever exercising that authority.⁷ Finally,

⁶ 8 Roy P. Basler, *The Collected Works of Abraham Lincoln* 101 (Rutgers Univ. Press 1974) (1953).

⁷ In fact, witnesses have frequently disclosed their own potentially illegal activities to investigative commissions and committees without requesting immunity. One can hypothesize many reasons for this – for example, witnesses who feel justified in their actions may want to tell their “side of the story,” or high-level government officials may fear the political ramifications of asserting the protections of the Fifth Amendment when asked about government policies. Whatever the explanation, investigative committees and commissions in this country have been able to fulfill their missions without granting “blanket immunity” to witnesses.

the commission would need sufficient personnel and resources to do its job thoroughly and exactly.⁸

Several arguments have been raised against pursuing an independent commission, but none of them are persuasive. Some have argued that the matters in question involve sensitive national security information, and that it would be too risky to disclose this information to a commission (and pointless to proceed without it). This potential problem has been faced by many independent commissions and congressional investigatory bodies – including the Church Committee – and it has been dealt with successfully in each case. In the case of the 9-11 Commission, for example, much of the relevant information was classified at the highest levels. The commission members and staff obtained the necessary clearances to review the classified information, held closed sessions where necessary, and produced both classified and unclassified versions of their reports. No classified information was leaked.

Another argument is that our country should be looking forward, not backward. That is a false choice, much like the false choice between our safety and our values that President Obama rejected in his inaugural address. We cannot fix the damage that may have been caused by some of our counter-terrorism policies, nor can we institute the reforms necessary to ensure effective and lawful policies going forward, if we don't know what happened. President Obama acknowledged this principle, albeit in a different context, when he addressed a joint session of Congress last week. After discussing failures of

⁸ I have presented here only a brief summary of the most important features that a well-designed commission should possess. If Congress continues to pursue the idea of an independent commission, I and others who have participated in inquiries of this kind could provide assistance on a more detailed level if that would be helpful.

responsibility that led to the current economic crisis, he said: “I say this not to lay blame or look backwards, but because it is only by understanding how we arrived at this moment that we’ll be able to lift ourselves out of this predicament.” That principle is just as true for mistakes in our counter-terrorism policies as it is for mistakes in our financial or mortgage systems.

There are those who argue that our country faces more a more serious and immediate crisis right now – our ailing economy – and that an independent commission would be a distraction from that crisis. That is one reason the Brennan Center supports an independent commission, rather than a congressional inquiry. Congress is preoccupied right now with fixing our economy, and properly so. An independent commission could be set in motion and left to do its work without disturbing the operations of government. It is highly unlikely that any of the persons chosen to serve on or appear before the commission would otherwise be engaged in fixing the economy, since there is little overlap in the relevant issues, and so there is no reason to fear that the commission would be a “distraction.” And the fact that the economy is our government’s first priority right now does not excuse the government from taking action on other serious problems this country faces. The possible existence of unlawful and counter-productive counter-terrorism policies, affecting our image in the world and our national security, undoubtedly qualifies as a serious problem that requires action.

The least persuasive argument against a commission is that it would be a “partisan” exercise, and that it would divide the country and/or lead to a cycle of political recrimination. That argument fundamentally misunderstands what the true function and mandate of an independent commission would be. The commission would be looking at

possible departures, not from a preferred party position, but from the rule of law. The rule of law is not a partisan issue; it is a founding principle of our nation that has guided Democrats and Republicans alike throughout this country's history. Serious allegations of unlawful government policies are not a common occurrence. Where there is any reason to believe the government has strayed from the rule of law, the only non-partisan response is to pursue meaningful action in order to learn the full truth.⁹ That is why prominent individuals from both sides of the political spectrum, including some who sit here today, have joined the call for an independent commission. Indeed, by reaffirming the guiding principles and shared values of our nation, an independent commission may help bring Americans together.

The bottom line is that we owe it to ourselves and our country to learn the facts about our government's counter-terrorism policies. We know that abuses may have occurred, and that the perception of these abuses has undermined our standing in the world and our fight for the hearts and minds of those who could be persuaded to do us harm. We must not flinch from learning the truth. That is the only way to stay true to our principles, correct our course, and restore our moral standing in the eyes of the world. That, in turn, will make us safer and stronger. For, as has been true throughout our history, America is at its best when we "confront our mistakes and resolve not to repeat

⁹ In this case, learning the full truth would entail examining not only whether Bush administration policies violated the law, but also whether any unlawful policies pre-dated the Bush administration and/or have continued into the Obama administration. This would mirror the approach taken by the Church Committee and the 9-11 Commission, neither of which limited their inquiry to a single administration, and both of which found abuses or mistakes in administrations of both parties.

them. If we do not, we will decline. But, if we do, our future will be worthy of the best of our past.”¹⁰

¹⁰ *Interim Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, S. REP. NO. 94-465, at 285 (1975). While this thought was expressed in the Interim Report, it pervaded all of the Church Committee’s work.

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Appendix

SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND PROPERTY RIGHTS

“RESTORING THE RULE OF LAW”

Tuesday, September 16, 2008

Written Testimony of

Frederick A.O. Schwarz, Jr.
Senior Counsel

Urging Congress to establish a bipartisan, independent investigatory Commission to determine what has gone wrong with our policies and practices in confronting terrorism since September 11, 2001, and to adopt a series of specific reforms aimed at restoring checks and balances and the rule of law in order to reduce risk of repetition of recent abuses.

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Testimony of Frederick A.O. Schwarz, Jr.
Before the Hearing on “Restoring the Rule of Law”
By the Constitution Subcommittee of the Senate Judiciary
Committee of the United States Senate

September 16, 2008¹

Contents

	<u>Page</u>
I. Introduction.....	1
II. Create an Investigatory Commission to Conduct a Thorough Accounting of National Security Policy and Its Systemic Flaws	3
A. We Know Enough To Conclude There Is a Serious Problem.....	3
B. Although A Lot is Known, This Country Still Needs An In-Depth Investigation To Learn the Whole Truth, and To Decide What Needs To Be Done To Remain True to Our Values and Better Protect Ourselves.....	6
C. Essential Qualities of a Commission.....	8
III. Restoring Checks and Balances: Rectifying Recent Expansions of Executive Authority and Creating Laws to Prevent Repeated Abuse	10
A. Renounce the Unprecedented “Monarchial Presidency” Theory.....	10
B. Renounce the Use of Signing Statements to Circumvent the Law.	12
C. Enact a Law That Regulates the Invocation of Executive Privilege in Response to Congressional Requests for Information	14
D. Legislate To Limit the State Secrets Privilege.....	16
E. Strengthen Congressional Oversight of Intelligence Activities.....	18

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F. Strengthen the Inspector General System and Other Internal Checks and Balances21

G. Legislate To Reduce Excessive Secrecy and Over-Classification.....21

H. Disclose the Office of Legal Counsel’s Legal Opinions That Influence the Use of National Security Powers, and Consider Restructuring the Office23

I. Make It Clear: No More Torture, No More “Torture Lite”26

IV. Conclusion.27

I. Introduction.

The title of this hearing cuts to the heart of the matter. The current Administration has ignored, defied, and defiled the Rule of Law. In so doing, it has undermined America's greatest strength. And that has not only left Americans less free, it has also made us less safe. It is vital to our country's future that we do indeed restore the Rule of Law. In my testimony, I draw on my experience as Chief Counsel to the Church Committee to suggest how a new Congress and President in 2009 could start this immense and important task, especially in the context of counter-terrorism policy.

In the almost eight years that have passed under the current Administration, and especially in the seven years since the tragedy of 9/11, the White House arrogated to itself unprecedented powers of coercion, detention, and surveillance. All the while, it has tried to use a patina of legal and constitutional justifications to disguise the degree to which it has abandoned the core American values in whose defense these tactics have been deployed. The result has been a distortion of the Constitution, an evisceration of the rights and liberties of individuals, and a perversion of American values. All of this has done grave harm to our nation's reputation and has reduced our security here and abroad.

It is of the utmost importance to review our policies and practices, and to make changes where we find unseemly and illegal programs or inefficient and counterproductive policies. The time to act is at hand. The members of the 111th Congress will take their seats in early January, and a new administration will enter the White House on January 20, 2009. They, and the nation as a whole, have the opportunity to return to our values, check the overextension of the executive branch in recent years, and renew our national commitment to the constitutional framework under the rule of law.

The urgent need to restore checks and balances under the rule of law is far more important than the controversies that divide us. Instead, understanding the importance of righting the separation-of-powers imbalance and restoring respect for the rule of law should bring *all* Americans together. If today's President hails from one party and the congressional majority from another, in the future these affiliations will surely change. But the core principle—that the preservation of the Constitution's checks and balances, and respect for the rule of law, is essential to effective governance—endures regardless of what party controls either branch. If we turn a blind eye to this truth, the nation will feel the consequences far into the future.

Therefore, I am grateful to have the chance to share with you some thoughts on specific measures aimed at restoring the proper constitutional balance between the branches of government, reinvigorating the separation of powers, and restoring respect for American values.² Broadly speaking, I make two sorts of suggestions:

² Other thoughts are contained in *Unchecked and Unbalanced*, particularly in the addendum to the paperback revision (The New Press, 2008) and in the Brennan Center's publication, Aziz Huq, *Twelve Steps to Restore Checks and Balances*, available at http://www.brennancenter.org/content/resource/twelve_steps_to_restore_checks_and_balances.

(i) a bipartisan independent investigatory Commission should be established by the next Congress and President, first to determine what has gone wrong (and right) with our policies and practices in confronting terrorists since September 11, 2001, and then to recommend lasting solutions to address past mistakes (see pp 3 to 10 below); and

(ii) a series of specific reforms should be adopted aimed at reforming the executive branch and ensuring no repetition of recent abuses. Among the topics I touch on are the need for a clear rejection of the “monarchical” presidency theory; improved oversight and accountability mechanisms; responses to the pathological secrecy that today characterizes executive branch operations; and coercive interrogations (see pp 10 to 27 below).

We must resolve to confront our mistakes so that we do not repeat them. Throughout American history, in times of crisis, presidents have accumulated significant new powers, and the executive branch has often engaged in abusive conduct.³ Crisis always makes it tempting to ignore the wise restraints that both keep us free and reduce the likelihood of foolish mistakes. This nation has, at times, admirably set about correcting its course—realizing, as the dust settles, or as previously secret facts are revealed, that constitutional and legal norms have been breached, shaming and harming our nation.

One such moment, in which I was involved, came in 1975-1976, when an investigation conducted by a Senate Select Committee, known as the Church Committee for its Chair, Senator Frank Church of Idaho, revealed intelligence agencies’ excesses during the Cold War. The Church Committee’s investigation of the intelligence agencies, most importantly the FBI, the CIA, and the NSA and other components of the Defense Department, found that these agencies had exceeded their authority through abusive surveillance and disruption of political activity at home (e.g., trying to provoke Martin Luther King, Jr. to commit suicide), and unwise overseas covert action (e.g., hiring the Mafia to try to assassinate Cuba’s Fidel Castro, and supporting the overthrow of Chile’s democratically elected government). While men and women of the intelligence agencies directly committed abuses, the most serious breaches of duty were those of presidents and other senior executive branch officials who, the Church Committee determined, had the “responsib[ility] for controlling intelligence activities and generally failed to assure compliance with the law.”⁴

The Church Committee’s investigation illuminated what had been going wrong with our intelligence agencies. Exposing the truth strengthened both our democracy and our ability to defend the country without waste or abuse, confirming that America’s ability to self-correct is one of the great strengths of our democracy. It is time for such a searching assessment and self-correction again.

³ For an overview of past excesses, see *Unchecked and Unbalanced*, supra n. 1, at 3-5 (“Introduction”), chapter 2 21-49 (“Revelations of the Church Committee”). See also Geoffrey B. Stone, *Perilous Times: Free Speech in Wartime, From the Sedition Act of 1798 to the War on Terrorism* (2004).

⁴ *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book II*, 1 S. REP. NO. 94-755, at 137 (1976).

II. Create an Investigatory Commission to Conduct a Thorough Accounting of National Security Policy and Its Systemic Flaws.

The new Congress and new President should by law create an independent, bipartisan Investigatory Commission charged with determining what has gone wrong (and right) with our policies in confronting terrorism, and to recommend solutions.

This is my first and most fundamental recommendation. Without full knowledge of all the facts, we cannot know why wrong steps were taken. We cannot take the necessary steps to repair the damage. Even with a new Administration in January 2009, if we fail to understand fully what went wrong or why we strayed so far, we risk repetition. We will instead proceed in ignorance, blindly trusting claims about what has made us safer without really knowing what has worked and what has rather harmed our country.

I know from my Church Committee experience that making the case for reform requires full knowledge and responsible exposure of the facts. I also know that accountability is not easy. Plenty of those who have made mistakes will push to ensure their errors are never revealed. But without accountability, it is the nation's security and its liberties that will suffer.

A. We Know Enough To Conclude There Is a Serious Problem.

Based on what we know now—about torture, about extraordinary rendition to torture, about permanent detention, about warrantless wiretapping, and about the Administration's "monarchical" theory of presidential power—it seems clear that the course we have charted over the last seven years has in fact made us less safe, as well as less free:

- We have squandered one of our greatest assets—respect for our values.
- By abandoning our values and choosing instead to adopt tactics of the enemy, we have given enemy recruiters powerful tools to stir up passions in the Muslim world.⁵
- After the rush of support and emotional bonding with America immediately after 9/11, we are met with disappointment, caution and resistance even from our closest allies. We have lost much crucial support from our allies, as admiration and respect for America has dropped substantially. This is not a hypothetical risk. It is already happening with many nations, including our closest ally. Thus, the British Parliament's Intelligence and Security Committee undertook an investigation of "extraordinary

⁵ See, e.g., PEW GLOBAL ATTITUDES PROJECT, AMERICA'S IMAGE SLIPS, BUT ALLIES SHARE U.S. CONCERNS OVER IRAN, HAMAS (June 13, 2006), available at <http://pewglobal.org/reports/display.php?ReportID=252>. The Brennan Center is presently conducting empirical research in the United Kingdom and the United States about the effect of adopting such tactics on the success of domestic policing efforts.

rendition.” Its July 2007 report frankly describes British intelligence agencies’ increasing reluctance to share information with their American counterparts, due in large part to concerns that the U.S. will utilize such information in “extraordinary rendition” operations notwithstanding Britain’s “caveats” prohibiting such use. Among the “serious implications” for the relationship between the two nations is a “greater caution in working with the U.S., including withdrawing from some planned operations, following these cases.”⁶

Things have indeed gone awry. On the matter of torture alone:

- Former Secretary of State Colin Powell warned that “The world is beginning to doubt the moral basis of our fight against terrorism.”⁷ And, as Marine General P.X. Kelley and my co-panelist today Robert F. Turner have explained, torture has “compromised our national honor and ... place[d] at risk the welfare of captured American military forces for generations to come.”⁸
- President George W. Bush correctly states that “the values of this country are such that torture is not part of our soul and our being,” while at the same time he contradicts himself by insisting that the CIA should be permitted to use “enhanced interrogation techniques” that go far beyond what the American military believes is proper and which conflict with any fair reading of the torture treaties and laws to which we are subject.
- Attorney General Michael Mukasey cannot bring himself to prohibit as torture the practice of waterboarding—a torture measure that dates back to the medieval Inquisition,⁹ and Vice President Dick Cheney positively embraces it, even though the United States prosecuted Japanese soldiers as war criminals for using waterboarding on American soldiers in World War II.
- Similarly, President Bush and Secretary of State Condoleezza Rice defend “extraordinary rendition” to send prisoners to Egypt and Syria for questioning despite the fact that our State Department repeatedly issues human rights reports that condemn Egypt and Syria for regularly using torture on prisoners. The excuse of the President and the Secretary: they promised not to torture “our

⁶ See Intelligence and Security Committee, *Rendition*, 2007, Cm. 7171 and p.27; *British Panel Doubts U.S. on Torture*, N.Y. TIMES, July 21, 2008, at A11.

⁷ Letter from Colin S. Powell, Secretary of Defense and General, to John McCain, Senator from Arizona (Sept. 13, 2006).

⁸ P.X. Kelley & Robert F. Turner, *War Crimes and the White House. The Dishonor in a Tortured New 'Interpretation' of the Geneva Conventions*, WASH. POST, July 26, 2007, at A21.

⁹ Darius Rejali, *Torture and Democracy* 280 (2007).

prisoners.” Not believable. Particularly not believable given that there is proof that “our prisoners” have been tortured.¹⁰

For America to adopt tactics of the enemy—such as torture—saps our moral and public strength.¹¹ It is all the worse when our leaders’ public positions are manifestly hypocritical.

The Administration’s legal justification for its conduct is almost as troubling as the conduct itself. Other moments in history have seen abuse that cannot be squared with our values or traditions. But the constitutional and legal theory under which this Administration has acted is unprecedented because it purports to justify breaking the law and neutering checks and balances. Thus, the Administration presents a remarkably troubling theory of presidential power that flies in the face of our own Revolution’s core values, that is inconsistent with the language and history of our Constitution, and that ignores crucial Supreme Court decisions.

The Administration’s post-9/11 position is simply that the President—like a seventeenth century British monarch—is above the law when it comes to security. Surprisingly, this theory is not a post-9/11 beast. It was first raised twenty years ago by then-Congressman Dick Cheney when he dissented in 1987 from Congress’s Iran-Contra Report by saying the President will “on occasion feel duty-bound to assert monarchical notions of prerogative that will permit him to exceed the laws.”¹² The attacks of 9/11 allowed the Vice President—supported by compliant lawyers in the Justice Department’s Office of Legal Counsel—to put into effect this dangerous, erroneous and unprecedented reading of America’s history and America’s Constitution.¹³

¹⁰ NYU Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush* (2005) (“[E]xtraordinary renditions [by the CIA] have been carried out pursuant to a classified directive signed by President Bush a few days after September 11, 2001”); Scott Horton, *More on Maher Arar*, HARPER’S MAGAZINE, June 5, 2008.

¹¹ The law also has been perverted to justify the invasion of Americans’ constitutional privacy rights through warrantless surveillance, and possibly black bag searches or worse. Most importantly, the Constitution has been perverted by government lawyers so that they can advise the President that he need not comply with the law of the land.

¹² *Report of the Congressional Committees Investigating the Iran-Contra Affair, with Supplemental, Minority, and Additional Views*, S. REP. NO. 100-216; H. REP. NO. 100-433, at 465 (1987) [hereinafter “ ”]. Of course, President Nixon also had claimed that “when the President does it, that means that it is not illegal.” But when he said this, he was no longer in office. Nixon and his cohort all knew that the illegal acts they did or ordered in seeking to stay in office were illegal, and never pretended otherwise.

¹³ Chapter 7 (“Kings and Presidents”) of *Unchecked and Unbalanced*, *supra* n.1, debunks this monarchical theory. Chapter 8 (“The King’s Counsel”) exposes the irresponsibility of the lawyers in the Justice Department’s Office of Legal Counsel—although some other government lawyers (particularly in the military) have been exemplary in, for example, attempting to resist torture.

B. Although A Lot is Known, This Country Still Needs An In-Depth Investigation To Learn the Whole Truth, and To Decide What Needs To Be Done To Remain True to Our Values and Better Protect Ourselves.

To avoid repeating history requires understanding history. As the Framers recognized, openness and transparency in government are prerequisites to democratic legitimacy and lawful government. As James Madison famously observed:

“[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”¹⁴

While some of our recent history has dribbled or leaked out, the Administration itself has denied a free people knowledge of many of the actions it has taken in their name. Excessive secrecy smothers the popular judgment that gives life to democracy.

Many details of the programs we know about have been suppressed, or glossed over with generalities, or misrepresented. What are described as successes often turn out to be nothing of the kind. Still other programs remain unknown. In addition, we do not know the extent to which the Administration was told (or understood) that a departure from America’s ideals actually risked undermining the battle against terrorists.¹⁵ The executive branch insists the truth about what it has done—and how it decided what to do—must remain secret. But without access to these facts, even for those with security clearance, the public can never know the full story and judge whether the United States conducted itself appropriately.

The fundamental message of this part of my testimony is this: The abuses that have taken place must be accounted for. We need to know what went wrong, how it is that mistakes and illegal actions were allowed to occur, and how they have harmed us. When there are allegations that ultimately are proven wrong, they should be aired and names cleared. When the United States has conducted its anti-terrorism policy forthrightly and wisely, it should be commended for doing so. But given the ample evidence that the Administration’s unchecked policy is out of balance, it is far more likely that the greatest need is institutional repair and restoration of the rule of law.

¹⁴Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 1 *The Founders’ Constitution* 690 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹⁵Based upon its extensive review of CIA covert actions—for example to overthrow governments—the Church Committee found that the “cumulative effects of covert actions” were “rarely noted” in CIA presentations or “taken into account” by the responsible National Security Council reviewing officials. See *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book I*, 1 S. REP. NO. 94-755, at 156 (1976).

I should note that this is not about placing blame on those on the front lines. Too often, for example, illegal torture has been blamed on a “few bad apples” while those in political offices who directed and set conditions for the abuse have washed their hands of the matter. Accountability ultimately lies more with those elected officials and senior appointed officials than with the men and women on the front lines.

A Commission would serve several vital functions. It would reveal the many as-yet-unknown aspects of what our government has done and how it evaluated or rationalized its actions. And there is much we do not know. We still do not know, for example, the legal justifications advanced for the so-called “extraordinary rendition” or “terrorist surveillance” programs. We do not know with sufficient detail who was responsible for advocating and implementing the troubling policies based on these legal opinions. Nor do we know whether there are other secret programs that have not yet been revealed. But, as former Attorney General Nicholas deB. Katzenbach and I have argued elsewhere, in a country whose government is premised on the rule of law, there is never a justification for keeping binding legal decisions secret.¹⁶

Documenting violations of the public commitments that the United States has made also fulfills a moral imperative. Officially, our leaders have made statements that renounce the use of torture and degrading treatment.¹⁷ In practice, they have not lived up to this pledge. Indeed, they have recently sought new legal opinions from the OLC that allegedly would allow for new combinations and packages of torture.¹⁸ Renewing our commitment to the rule of law by confronting and acknowledging our recent failings gives substance to our national moral commitment, and thus can help begin to restore our international reputation.

The findings of a Commission also would play the important role of holding accountable those who are responsible for wrongdoing and for legal and constitutional violations. Justice is not served when our leaders piously wash their hands and blame those at the bottom. Democratic government demands that public officials—particularly those at the highest level—are held accountable for their actions. Aiming to avoid accountability, government officials who authorized and carried out improper or illegal actions attempt to ensure that their deeds remain forever secret. The public revelations made by a Commission would lodge accountability for those deeds where it belongs and serve as a warning to future government officials that they should take no action for which they would not like to be held publicly responsible.

¹⁶ Nicholas deB. Katzenbach & Frederick A.O. Schwarz Jr., *Release Justice's Secrets*, N.Y. TIMES, Nov. 20, 2007, at A23 (“Opinions that narrowly define what constitutes torture; or open the door to sending prisoners for questioning to Egypt and Syria, which regularly use torture; or rule the president has some ‘inherent power’ to ignore laws are all of concern to Congress and the public whether one agrees or disagrees with the legal analysis.”); see also Louis Fisher, *Why classify legal memos?*, NAT’L L.J., July 14, 2008.

¹⁷ E.g., Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100.20, 1465 U.N.T.S. 85; 18 U.S.C. §§ 2340-2340A.

¹⁸ Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

Finally, and indeed most importantly, the Commission's work would play an instrumental role in preventing future abuses. Its findings would form the factual basis for informed public debate on the role of governmental activities in a free society during an extended time of crisis. Charting a new course is impossible without knowing first how we found ourselves where we are now. Rather than dooming ourselves to the repetition of past mistakes, we must studiously commit ourselves to the avoidance of error and abuse. Determining what legislative and executive action is appropriate to prevent the recurrence of past abuses requires an understanding of how those abuses came about.

While the revelations of a new Commission charged with rooting out the truth of this most recent period of government failures might prove embarrassing to some individuals, and perhaps even to the country as a whole. That embarrassment is a price that must be paid. For, as the Church Committee concluded:

“We must remain a people who confront our mistakes and resolve not to repeat them. If we do not, we will decline; but if we do, our future will be worthy of the best of our past.”¹⁹

C. Essential Qualities of a Commission.²⁰

To accomplish this, I urge Congress and the next president to establish by law an Investigatory Commission that would document what went wrong—the abuses of power; the violations of law; the distortions of the constitutional structure, including the sweeping assertions of executive power and the undermining of checks and balances—as well as who was responsible, and how it has harmed us. The Commission should also make recommendations for reform within both the executive and legislative branches to prevent similar abuses in the future. An investigation should be as open as possible. And it must be comprehensive.

¹⁹ *Interim Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. REP. NO. 94-465, at 285 (1975). While this thought was in the Interim Report, it pervaded all the Church Committee's work.

²⁰ These thoughts are based on my experience as Chief Counsel of the Church Committee. The Committee conducted a comprehensive and non-partisan investigation into abuses carried out by the intelligence agencies during the Cold War era. It also covered the failures of presidential leadership in the six presidencies from Roosevelt through Nixon. (See also Loch Johnson, *A Season of Inquiry: The Senate Intelligence Investigation* (1985); Frank John Smist, *Congress Oversees the United States Intelligence Community, 1947-1994* 25-81 (1994); and LeRoy Ashby & Rod Gramer, *Fighting the Odds: The Life of Senator Frank Church* 453, 468-92 (1994); Schwarz & Huq, *supra* n.1, at Chapter 2 (“Revelations of the Church Committee”), at 21-49.

More recently, I have summarized some of the process lessons from the Church Committee in Chapter 3 (“The Church Committee Then and Now”) of *U.S. National Security, Intelligence and Democracy; From the Church Committee to the War on Terror* (Russell A. Miller, ed., 2008). (The relevant pages on how the Church Committee operated are pp. 27-31.)

I want to emphasize only three detailed points that are based on my experience with the Church Committee:

First, a successful Commission must be independent, bi-partisan in membership and non-partisan in approach. Its members should understand our Constitution and how our government works. They should know American history—including prior occasions when crisis made it tempting to ignore the wise restraints that keep us free.

Second, without detailed facts, oversight and investigation will necessarily be empty. Only with a record that is comprehensive and covers a wide range can one be sure that one understands patterns, be confident of conclusions, and make a powerful and convincing case for change. Without detailed facts, it is simply not possible to make a creditable case that something is wrong and needs fixing.

Testimony is important, often essential, and can be dramatic. Documents often provide the best key to the truth and to developing good testimony. A good investigatory commission involves much time and much hard work—to secure testimony and the necessary documents and to put a huge record together in a comprehensive and understandable fashion.

A Commission must therefore have the investigative tools—most importantly the power to subpoena—that are essential for an effective investigation. It must have access to all relevant information in all agencies and the White House—as well as that held by relevant private contractors. All of this information should be obtained by agreement if possible and by subpoena if necessary.

Third, investigating secret government programs requires access to secrets. It forces analysis of the overuse of secrecy stamps, and of the harm caused by excessive secrecy.²¹ All concerned within the intelligence community must understand and accept that those tasked with ensuring accountability are entitled to any and all secrets.

A Commission must handle secrecy issues responsibly. But ultimately, the investigation may require the describing and revealing of some secrets. Nonetheless, there are obviously also legitimate secrets. Oversight, or an investigation that is heedless of that, is doomed as well as irresponsible. But it is the responsibility of the investigators—and not the investigated—to decide (after a fair exchange of views) on what must remain hidden.

* * *

²¹ I know from my own experience with the Church Committee that secrecy stamps are often used to cover up and conceal embarrassment and illegality. As the experience of the recent 9/11 Commission and the Church Committee shows, responsible investigative committees or commissions handle secrecy issues appropriately.

Throughout the history of the nation, independent commissions have been used to serve these purposes. At the start, President Washington appointed a commission to investigate the causes of the Whiskey Rebellion in 1794.²² There have been many commissions since, some successful, some not so. The 9/11 Commission (which is largely reckoned to be a success) sought to determine how we found ourselves so unprepared for the events of that day and how to reduce the likelihood of recurrence.²³

The Church Committee's and the 9/11 Commission's investigations remain a model for how comprehensive investigations can clarify what has gone wrong and provide guidance going forward. One was a congressional committee, while the other was an independent entity created by statute. So long as an investigatory committee has the features I have listed above, I do not believe it is crucial whether Congress chooses to create an internal body (like the Church Committee), or an independent entity. In my view, however, an independent body such as the 9/11 Commission would be better suited at this moment in history.

Of course, if the newly elected president resists a commission, Congress should go ahead with its own investigation. In the past, in fact, I have suggested the value of such a congressional probe. Upon further reflection, I believe that an independent panel is preferable. Unlike the time when the Church Committee was established, we now have standing committees on intelligence (and longstanding committees such as Judiciary have been strengthened). Congress will have huge responsibilities in myriad policy areas, including relating to terrorism. There are many important subjects for legislation—including those I suggest below—that undoubtedly will take substantial time and thought. An independent commission would free up Congress from responsibility for an in-depth, time-consuming analysis of the past. An independent commission also may be more successful in navigating partisan divides. It is worth noting, too, that an independent panel would also be free to touch on Congress and its role in ways that might prove uncomfortable for a sitting committee.

III. Restoring Checks and Balances: Rectifying Recent Expansions of Executive Authority and Creating Laws to Prevent Repeated Abuse.

A. Renounce the Unprecedented "Monarchical Presidency" Theory.

The next president should reject the unprecedented "monarchical prerogative" asserted by the present Administration, thereby acknowledging once more the Framers' intended checks and balances. This Committee and the House Judiciary Committee should also continue to marshal expert testimony demonstrating that the theory flies in the face of the Constitution's origins, its text, subsequent history, and judicial interpretations.

²² Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1428 (2005).

²³ Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, xv (2004).

The theory—first enunciated by Congressman Dick Cheney in his Iran-Contra dissent²⁴—has been used by the Administration to justify breaking the law—laws, for example, that forbid torture and warrantless wiretapping. The theory that has been repeatedly put forward by the Justice Department’s Office of Legal Counsel cannot withstand any scrutiny.²⁵

Revealingly, the Administration has refused to release key OLC opinions that defend in full its monarchical theory. (To be sure, several of the opinions that have been released *rely* on this theory, but they do not explain it, or defend it fully or professionally.)

The next president should make it unequivocally clear that he rejects the unprecedented claim of a monarchical right to break the law—that he will keep faith with the original constitutional compact and in particular its curbs on executive power. The Constitution of 1787 was designed in conscious reaction to the British monarchy’s concentrated power. As designed, it prevents the accumulation of power in any one branch of government. This is evident from the text of the Constitution, which not only split power between three branches of government, but also left all three branches subject to check by the others. In matters of national security, including not only the awesome question of when and how the nation should go to war, but also detailed issues covering the standards of conduct for our armed forces, the Constitution gave Congress authority. The importance of limits on executive authority was eloquently and exhaustively expressed in the 1787 Philadelphia Convention and in all subsequent debates about the Constitution’s ratification. And the most recent scholarship echoes and confirms the Founding Era’s rejection of the notion of an unbridled executive.²⁶

The Framers, well acquainted with the follies and excesses of (British) monarchical power, divided and shared martial power between the branches because they knew that concentrating such authority risks harm to the nation. Their wisdom remains just as valid today. The contemporary White House insistence on unilateralism harms the country in two ways. First, it leaves the country with no effective national security policy-making mechanism. Presidential unilateralism provides no forum for comprehensive debate to air pros, cons, and flaws in any policy. Instead, it deprives government of effective means of identifying and correcting errors, and increases the likelihood that we spend precious resources on tough-sounding policies that in fact do little to promote security.

²⁴ See *Iran-Contra Report*, *supra* n. 12.

²⁵ See Schwarz & Huq, *supra* n. 1, at Chapter 7 (“Kings and Presidents”), at 153-86.

²⁶ See David Barron & Martin Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Louis Fisher, *Presidential War Power* (2004); Morton Halperin, Op-Ed., *Listening to Compromise*, N.Y. TIMES, July 8, 2008, at 21; Editorial, *Defeated in Court-Again*, WASH. POST, Aug. 1, 2008, at A16.

The result of presidential unilateralism has been policies that seriously undermine our credibility around the world, and provide terrorists with a powerful recruiting tool.²⁷ Today, America is often linked internationally to images of Guantánamo and Abu Ghraib more than to the ideals of liberty and equality. As even Bush Administration veterans acknowledge, these associations create an unacceptable “drag” on counterterrorism efforts.²⁸ As I have noted, even our closest allies in the United Kingdom now hesitate before cooperating with our intelligence services. In Germany, prosecutors investigating the rendition of its citizen Khalid El-Masri (who was ultimately released without charges, apparently after the CIA concluded that it had the wrong man), issued arrest warrants in 2007 for thirteen suspected CIA agents, and forwarded them to Interpol.²⁹ In Italy, a judge has issued indictments for twenty-six CIA officers and five members of the Italian secret service, all allegedly involved in the abduction and rendition to Egypt of Osama Moustafa Hassan Nasr, known as Abu Omar.³⁰ The judge called the case “a question of principle,” and declared, “Today, it’s Abu Omar. Tomorrow, it could be my daughter. These are fundamental human rights, and we have to respect them.”³¹

Restoring our flagging credibility depends on unambiguous renunciation of the monarchical prerogatives by those who will lead America starting on January 20, 2009. Repudiating the “monarchical prerogatives” that lie beneath the harmful policies of the current Administration is therefore the first and most important part of any course correction the next president can single-handedly take.

B. Renounce the Use of Signing Statements to Circumvent the Law.

The next president must commit to ending the way in which open-ended signing statements have been used to repudiate laws without justifying the law’s annulment or notifying the legislature. Congress can also do more to challenge signing statements.

Since the founding of the Republic, presidents have used signing statements. In and of themselves, signing statements are not harmful. The current Administration,

²⁷ According to a March 2007 Pew Global Attitudes Project poll, between 2002 and 2007, the proportion of people holding favorable views of the U.S. dropped from 75 percent to 56 percent in Great Britain and 63 percent to 39 percent in France. See Andrew Kohut, President, Pew Research Center, Testimony on America’s Image in the World: Findings from the Pew Global Attitudes Project before the Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs (Mar. 14, 2007), available at <http://pewglobal.org/commentary/display.php?AnalysisID=1019>. The Pew Trust explicitly singled out Abu Ghraib and Guantánamo as drivers in this trend.

²⁸ See Matthew Waxman, Op-Ed., *The Smart Way to Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B4; Colin Powell’s and P.X. Kelley’s and Robert F. Turner’s quotes at *supra* ns. 7 and 8.

²⁹ *Germany Issues Arrest Warrants for 13 CIA Agents in El-Masri Case*, SPIEGEL ONLINE, Jan. 31, 2007; Mark Lander, *German Court Confronts U.S. On Abduction*, N.Y. TIMES, Feb. 1, 2007; John Goetz, Marcel Rosenbach & Holger Stark, *CIA Arrest Warrants Strain US-German Ties*, SPIEGEL ONLINE, Jun. 25, 2007; Michael Isikoff & Mark Hosenball, *Hunting the Hunters*, NEWSWEEK, Mar. 29, 2007; *US Displeased over German Hunt for CIA Agents*, SPIEGEL ONLINE, Mar. 5, 2007.

³⁰ Georg Mascolo & Matthias Gebauer, *The CIA in the Dock*, SPIEGEL ONLINE, Jan. 10, 2007.

³¹ Ian Fisher & Elisabetta Povaledo, *Italy Braces for Legal Fight Over Secret C.I.A. Program*, N.Y. TIMES, June 7, 2007.

however, has employed the device in new, troubling ways, making them a tangible manifestation of its “monarchical” vision of the executive.³²

First, the Administration has used such statements to signal aggressive non-compliance with an unprecedented *range* of laws. In more than 200 years, presidents before George W. Bush challenged the constitutionality of 600 statutory provisions. By 2007, President Bush had used signing statements to challenge more than 1,100 provisions.³³ By signing an unprecedented number of signing statements, President Bush has bypassed congressional enactments that protect liberties, ban torture and “cruel, inhuman, and degrading treatment,” and that ensure disclosure and accountability.

Second, President Bush’s signing statements have been opaque about both the precise statutory provisions being repudiated and the exact constitutional theory being asserted to justify the signing statement.³⁴ This makes it impossible for Congress or the public to know exactly what is being complied with, and what is being defied. The result is the appearance of transparency without its substance.

Finally, the Administration has extended the use of signing statements by objecting to laws that require *reporting* executive noncompliance with the law.³⁵ That is, the President has declined to tell Congress and the people what laws he refuses to follow—and has used a signing statement to do so.

The next president must do better. He must abandon publicly the use of signing statements as a way to evade the law and to conceal such evasion from Congress and the people. Congress also must do better. It must challenge any improper use of signing statements. It must insist—by subpoena if necessary—that the president provide his reasons for each signing statement, as well as the specific statutory provisions to which it

³² See The Constitution Project, *Statement on Presidential Signing Statements By the Coalition to Defend Checks and Balances 1* (2006), available at http://www.constitutionproject.org/pdf/Statement_on_Presidential_Signing_Statement.pdf (noting that President Bush has “transformed” the use of signing statement); see also Schwarz & Huq, *supra* n. 1, at 91-92.

³³ Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* 228 (2007).

³⁴ See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 317 (2006) (noting the practice of simultaneously objecting to multiple provisions). For example, responding to an Amendment barring cruel, inhuman and degrading treatment, the President stated that “[t]he executive branch shall construe [the Amendment] in a manner consistent with the constitutional authority of the President ... as Commander in Chief.” President’s Statement on Signing H.R. 2683, the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006,” Dec. 30, 2006, available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>. This was a backhanded way of asserting monarchical powers without either saying what those powers were, or what precisely the scope of the objection was.

³⁵ See 28 U.S.C. § 530D (2006) (imposing reporting requirement in cases when the executive decides to contest affirmatively or to refrain from enforcing, applying, or administering any federal law).

applies. In short, the president must be required to justify publicly any determination that validly enacted legislation should not be enforced.

C. Enact a Law That Regulates the Invocation of Executive Privilege in Response to Congressional Requests for Information.

Congress should enact a statute to regulate and limit the use of executive privilege, particularly in cases involving potential wrongdoing within the executive branch.

Executive privilege is at the core of excessive governmental secrecy. It must be addressed and limited for there to be effective accountability in government.

Executive privilege is the president's claimed right to resist disclosure of documents and communications.³⁶ It can prevent the discovery of wrongdoing and error, preserve flawed and failing policies, and preclude accountability.³⁷ Excessive and inappropriate use of executive privilege is fundamentally destabilizing the constitutional architecture, and thus needs to be redressed.

Executive stonewalling of recent congressional efforts to secure crucial information in multiple ongoing oversight investigations—including investigations into allegations of politicization of prosecutorial decisions within the Justice Department, decisions regarding the hiring and firing of federal prosecutors, and EPA policy—illustrate this need for reform.³⁸ Currently, resolution of such disputes is abandoned to the give-and-take of the realm of power politics. Consequently, if the Executive chooses to block congressional access to information through a claim of executive privilege, there

³⁶ In fact, there are several kinds of privilege commonly referred to as executive privilege:

The [p]resident's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the [p]resident or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the [p]resident or his advisors (deliberative process privilege).

Exec. Order No. 13,233, reproduced at 44 U.S.C § 2204 note (2007); see also Gerald Wetlafer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 845 n.3 (1990). The focus of this section and the Brennan Center's forthcoming report is the "presidential communications" privilege and its application to congressional requests for information.

³⁷ After the November 2006 elections, the pace of congressional investigations picked up. See Thomas E. Mann, Molly Reynolds, & Peter Hoey, *A New Improved Congress?*, N.Y. TIMES, Aug. 26, 2007, at WK11 ("During the first seven months of 1995, Congressional oversight of the executive branch increased modestly in the Senate but not at all in the House. But this year Congress, especially the House, has intensified its oversight, following years of inattention and deference by its Republican predecessor."). Many of these congressional efforts to exercise oversight powers have been thwarted, however, by claims of executive privilege. E.g., Carl Hulse, *House Vote on Contempt is Expected Soon*, N.Y. TIMES, Feb. 13, 2007, available at <http://www.nytimes.com/2008/02/13/us/13contempt.html>.

³⁸ Del Quentin Wilber, *Judge Orders Miers to Testify*, WASH POST, Aug. 1, 2008, at A2 ("The Bush administration has increasingly invoked executive privilege in its battles with Congress over documents and testimony related to issues as diverse as greenhouse gas emissions and FBI interviews of Vice President Cheney about the controversial leak of a CIA officer's identity.").

is very little Congress can now do to access that information. The House of Representatives' recent success in the Washington, D.C. district court in Congress's suit against Harriet Miers and Josh Bolton is an outlying exception.³⁹

Moreover, presidents' aggressiveness in withholding information—and Congress's willingness to acquiesce—historically has varied depending on the political strength of the particular president, the prevailing political environment, the presence or absence of scandal (or the suspicion of scandal), and the Executive's theory of the scope of his power. As a result, the rules of executive privilege have remained undefined and contingent.

Executive privilege claims should be recognized for what they are—legal arguments over entitlement to information. As such, they each have a “right” and a “wrong” resolution. And whatever means are used to resolve them should be designed to bring about the “right” resolution in as many instances as possible, rather than having the result based on what political actors can get away with. The current mechanism—pure politics, with legal arguments used merely as bargaining chips—is not so designed.

The Brennan Center is working on a comprehensive report and proposed legislation to reform executive privilege. The report concludes that the current system for resolving executive privilege disputes between Congress and the President is irremediably flawed: What is revealed depends not on what should be disclosed according to the law, but on the happenstance of the balance of political forces at a given moment. And the absence of clear legal benchmarks, let alone the means to enforce them, leads to overprotection of secrecy.

But law, and not politics, should govern this vital question. The Brennan Center report will propose new legislation to facilitate quicker and more principled resolution of inter-branch information disputes. It includes a draft of legislation that would enable fair and speedy resolution of executive privilege claims in line with the Constitution as interpreted by the Supreme Court. The proposed legislation includes a cause of action for a House of Congress to enforce compliance with a duly issued subpoena, even if the subject of the subpoena is an executive-branch official. In addition, the statute defines categories of information over which the executive may assert executive privilege, as well as what Congress must do to overcome the privilege. Significantly, the statute provides that when there is credible evidence of executive malfeasance, misconduct, or illegality, executive privilege may not prevail in response to a congressional attempt to investigate. This would ensure necessary and appropriate congressional oversight and

³⁹ While the case has not yet succeeded in securing the information Congress seeks, the court soundly rejected the executive's argument that presidential aides are absolutely immune from testifying before Congress. *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 99 (D.D.C. 2008) (“[T]he asserted absolute immunity claim here is entirely unsupported by existing case law. In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisors do not enjoy absolute immunity. The Court therefore rejects the Executive's claim of absolute immunity for senior presidential aides.”)

lawmaking, while not allowing frivolous congressional fishing expeditions. (The report and proposed statute will be available before the end of the year.)

D. Legislate To Limit the State Secrets Privilege.

Congress should confirm the federal courts' power and duty to adjudicate cases in which the executive branch is alleged to have used national security powers to impinge on constitutional liberties or human rights by enacting legislation to regulate the invocation of the state secrets privilege.

The state secrets privilege is an “evidentiary rule that protects information from discovery when disclosure would be inimical to the national security.”⁴⁰ The Court first articulated a “state secrets” privilege in 1953.⁴¹ Between 1953 and 1976, the government invoked the privilege in four law suits; between 1977 and 2001, the courts were asked to adjudicate claims of “state secrets” 51 times.⁴² Since 2001, however, the government has invoked the privilege vigorously in cases said to concern national security in order to block judicial scrutiny of wrongdoing, to seek “blanket dismissal of cases challenging the constitutionality of specific, ongoing government programs,”⁴³ and to prevent oversight of allegations of civil liberties violations.⁴⁴ In two cases concerning the extraordinary rendition and subsequent torture of clearly innocent individuals, for example, the executive invoked the privilege to prevent the involved individuals from obtaining justice.⁴⁵ In another unprecedented invocation of “state secrets,” the government argued that a detainee at the Guantánamo Bay Naval Base should not be permitted access to his lawyers because he would divulge state secrets—namely, information about the

⁴⁰ *In re United States*, 872 F.2d 472, 474 (D.C. Cir.) cert. denied sub nom. *United States v. Albertson*, 493 U.S. 960 (1989). While some courts have suggested casually that the privilege can be traced back to the 1807 trial of Aaron Burr, that early precedent in fact offers no support for an absolute refusal by the government to share information with the courts. See Louis Fisher, *In the Name of National Security: Unchecked Presidential Power And The Reynolds Case* 218 (2006); see also Amanda Frost, *The State Secrets Privilege and the Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1938-51 (2007) (surveying evolution and recent cases). The phrase “state secrets privilege” first took form in a 1953 Supreme Court case where the government used it to shield an accident report from discovery in a tort suit. Only later was it discovered (by relatives of those who died in the accident) that the report contained no classified evidence—only evidence of the government’s negligence. See *United States v. Reynolds*, 345 U.S. 1 (1953); Fisher, *In the Name of National Security*, supra, at xi, 113, 181-82.

⁴¹ *United States v. Reynolds*, 345 U.S. 1 (1953).

⁴² See William G. Weaver & Robert M. Pallito, *State Secrets and Executive Power*, 120 *POL. SCI. Q.* 85, 101 (2005).

⁴³ Frost, supra n. 40, at 1939.

⁴⁴ See generally *id.* at 1938-51 (surveying evolution and recent cases).

⁴⁵ See *El Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006). For other examples of the state secrets privilege at work, see e.g., *American Civil Liberties Union v. National Security Agency*, Nos. 06-2095/05-2140, appeal decided (6th Cir. July 6, 2007); *Hepting v. AT&T Corp.*, Nos. 17132/17137 (9th Cir. argued Aug. 13, 2007); *Center for Constitutional Rights v. Bush*, 06-CV-313 (GEL) (S.D.N.Y.); *American Civil Liberties Union v. National Security Agency*, No. 06-CV-10204, opinion at 438 F. Supp. 2d 754 (E.D. Mich. 2006), rev’d Nos. 06-2095/06-2140, 2007 U.S. App. LEXIS 16149 (6th Cir. July 6, 2007).

“alternative interrogation methods” used to torture him.⁴⁶ By blocking plaintiffs from seeking judicial relief in national security-related litigation, the “state secrets” privilege undermines the judicial branch’s constitutional checking function.⁴⁷

Legislation is now needed to preserve courts’ essential functions as protectors of individual rights and as watchdogs against executive branch aggrandizement.⁴⁸ The federal courts have their own independent authority to limit and control the state secrets privilege, but they have been unduly wary of exercising this power. Congressional intervention must strengthen the resolve of judges facing a recalcitrant executive branch.⁴⁹

⁴⁶ Carol D. Leonnig & Eric Rich, *U.S. Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006, at A1. The detainee, Majid Khan, was allowed eventually to see a lawyer—who in turn was slapped with a gag order. See Gitanjali S. Gutierrez, *Going to See a Ghost*, WASH. POST, Oct. 15, 2007, at A15; see also Editorial, *Top Secret Torture*, WASH. POST, Nov. 21, 2006, at A26; Eric Rich & Dan Eggen, *From Baltimore Suburbs to a Secret CIA Prison*, WASH. POST, Sept. 10, 2006, at A8.

⁴⁷ Judicial oversight also provides an important supplement to Congress’s oversight function. This adjunct role is especially important in an era in which unilateral executive action is more common, and Congress finds it increasingly difficult to muster the supermajorities necessary to overcome the executive’s first-mover advantage. If the courts are taken out of the picture, the president will be able often to act unilaterally and then to block the majority will of both Houses with his veto power, or a signing statement. Without the courts to police strictly the executive’s compliance with legal limits, it becomes much more difficult for Congress to impose any effective check. Moreover, courts have a comparative advantage discerning violations of individual liberties because they are relatively insulated from political pressures and have more fine-grained tools for identifying specific rights violations. See Frost, *supra* n. 40, at 1952-53.

⁴⁸ The federal courts, as James Madison explained, are also “in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the [C]onstitution by the [D]eclaration of [R]ights.” 1 Annals of Cong. 457 (Joseph Gales ed., 1834); see also *Davis v. Passman*, 442 U.S. 228, 242 (1979) (“[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.”); *Bell v. Hood*, 327 U.S. 678, 684 (1946) (“[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.” (citations omitted)).

As the bipartisan Constitution Project has explained, “[u]nless claims about state secrets evidence are subjected to independent judicial scrutiny, the executive branch is at liberty to violate legal and constitutional rights with impunity and without the public scrutiny that ensures that the government is accountable for its actions.” The Constitution Project, *Reforming the State Secrets Privilege* i (2007) available at http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf.

⁴⁹ Even when vested with clear statutory authority to review claims of executive secrecy, however, courts tend to shirk this responsibility. Consider the courts’ response to Congress’s amendment of the Freedom of Information Act in 1974 to repudiate the Supreme Court’s ruling in *EPA v. Mink*, 410 U.S. 73 (1973). See Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561-64 (1974). Since that date, courts “have been friendly to the executive,” consistently deferring to executive judgments; “apparently, the judiciary is not excited by the idea of developing national security expertise.” Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 939-40 (2006); see also Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58

There are presently two bills pending in the House and Senate that would reform the state secrets privilege: (1) S. 2533, the “State Secrets Protection Act,” introduced by Senators Kennedy, Specter, and Leahy; and (2) H.R. 5607, the “State Secrets Protection Act of 2008,” introduced by Representatives Nadler, Petri, Conyers, and Delahunt. Both take important strides, but both could be strengthened so as to prevent the repetition of past abuses of the state secrets privilege. Both bills appropriately place in the hands of judges—not self-interested executive officials—the power to determine whether relevant evidence must be shielded from disclosure. Both also bar threshold dismissal on state secrets grounds, allowing parties an opportunity to make a preliminary case with non-classified evidence and requiring courts to let lawsuits proceed by directing the government to produce unclassified substitutes for secret evidence whenever possible.

These bills and other regulation of state secrets fall securely within Congress’s authority. Contrary to the assertion of Attorney General Michael Mukasey, they would neither represent an unconstitutional infringement on Article II powers nor compromise national security.⁵⁰ Congress regulates the Executive’s use and dissemination of information—including sensitive or even classified information—in numerous contexts. The Classified Information Procedures Act⁵¹ (“CIPA”), the Foreign Intelligence Surveillance Act⁵² (“FISA”), the Freedom of Information Act⁵³ (“FOIA”), and the Presidential Records Act⁵⁴ (“PRA”) all establish rules regarding information flow from and within the executive branch. Congress also has required the President to “establish procedures to govern access to classified information” and security clearances.⁵⁵ The National Security Act requires the Executive to disclose national-security-related information to the congressional intelligence committees.⁵⁶ No serious question has ever arisen as to the constitutionality of any of these statutes.

E. Strengthen Congressional Oversight of Intelligence Activities.

Congress should review and strengthen the present statutory disclosure and reporting requirements concerning intelligence and national security activities in order to enhance oversight.

The Constitution’s separation of powers assigns to Congress a necessary role conducting oversight of the activities of the executive branch. After all, when policies

ADMIN. L. REV. 162-67 (2006). For an example of excessive deference in the national security arena, see *Center for Nat’l Sec. Stud. v. Dep’t of Justice*, 331 F.3d 918, 927-28 (D.C. Cir. 2003).

⁵⁰ Letter from Michael Mukasey, Attorney General, U.S. Department of Justice, to Patrick J. Leahy, Senator and Chairman of the Judiciary Committee of the United States Senate 1 (Mar. 31, 2008).

⁵¹ 18 U.S.C. app. 3.

⁵² 50 U.S.C. § 1806(f).

⁵³ 5 U.S.C. § 552(a)(4)(B).

⁵⁴ 44 U.S.C. § 2201 et seq.

⁵⁵ *E.g.*, 50 U.S.C. § 435(a).

⁵⁶ 50 U.S.C. §§ 413(a), 413b(c).

are viewed by more than one person—or branch of government—erroneous facts, flawed reasoning, and accidental conclusions are more likely to be detected. Indeed, the Administration's decision to exclude key military officers and military lawyers from many pivotal discussions on detainee policy, including the use of torture, helped lead to errors that would have been avoided had more experienced voices been heard. Experience demonstrates this can be done even where there are issues of critical law enforcement or national security at stake. Indeed, it is precisely in those areas where mistakes in judgment owing to insufficient debate and discussion are most costly to the nation.

Experience also demonstrates that in the absence of congressional oversight, national security and law enforcement powers are often misused, either for partisan ends or in ways that harm U.S. residents and national security. As one longtime CIA general counsel explained at the time of the Church Committee, the absence of congressional oversight caused *problems* for that agency because “we became a little cocky about what we could do.”⁵⁷ On matters as diverse as political corruption and counterterrorism, Congress serves the nation best when it vigorously guarantees that federal law is applied in a fair, just, and effective manner. And that cannot be done if Congress is blinded.

Congress should strengthen reporting requirements for intelligence oversight.⁵⁸ Although the 1947 National Security Act regulates and mandates disclosures of intelligence activities to Congress,⁵⁹ its disclosure provisions contain loopholes and warrants legislative attention.⁶⁰

One area where Congress needs to focus is the work of its intelligence and related committees, which are supposed to facilitate accountability.⁶¹ Oversight by committee is

⁵⁷ Schwarz & Huq, *supra* n. 1, at 20. For source, see also Smist, *supra* n. 20, at 5, 9.

⁵⁸ Describing legislative oversight during the Cold War, former CIA director William Colby explained that “[t]he old tradition was that you don't ask. It was a consensus that intelligence was apart from the rules.” Loch Johnson, *A Season of Inquiry: Congress and Intelligence* 7 (1976). In the Cold War a “few members of Congress ... protected the CIA from public scrutiny through informal armed services and appropriations subcommittees.” Tim Weiner, *Legacy of Ashes: The History of the CIA* 105 (2007). In the current presidency, there has been a larger collapse of oversight. See Thomas E. Mann & Norman J. Ornstein, *The Broken Branch: How Congress is Failing American and How to Get It Back on Track* 151-53 (2006).

⁵⁹ See, e.g., 50 U.S.C. §§ 413(a) & 413b.

⁶⁰ For example, the law states that all disclosure must be “consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” 50 U.S.C. § 413(a). Although this statement seems relatively anodyne, it may be/[is] used to deny Congress vital information or to deprive it of all information concerning specific programs.

⁶¹ As Gov. Thomas Kean and Lee Hamilton recently reemphasized, this remains a pressing problem: “Three years ago, the 9/11 commission noted that the Department of Homeland Security reported to 88 congressional committees and subcommittees—a major drain on senior management and a source of contradictory guidance. After halfhearted reform, the number is now 86.” Thomas Kean & Lee Hamilton, *Are We Safer Today?*, WASH. POST, Sept. 9, 2007, at B1. The 9/11 Commission, however had “no staff team or hearing on congressional oversight,” and it is possible that further investigation would yield a conclusion different from their recommendation of “unity of effort.” Commission on Terrorist Attacks upon the United States, *supra* n. 23, at 287-88.

especially vital because Congress' other tools, such as spending power and impeachment authority, are too unwieldy to be effective as an ongoing guarantee for a full flow of information. Big guns simply cannot be wheeled out on every occasion. Limiting excessive classification and reining in executive privilege alone will not ensure that Congress gets the information it needs to fulfill its constitutional role.⁶² There must be an affirmative obligation on the executive branch to disclose information. Statutory disclosure obligations are especially important in the national security arena because Congress, particularly in the absence of leaks from executive officials to the press, will not always be aware of the existence of the information it needs.

Statutory disclosure obligations fulfill their function only if the congressional committees that receive the resulting disclosures work properly.⁶³ Congress should in particular reconsider and limit the use of "gang of eight" briefings, which create the impression of accountability without its substance.⁶⁴

Congress should further consider whether the weaknesses of congressional oversight bodies during periods of unified government (i.e., when the same party holds power on Capitol Hill and in the White House) suggests the need for more radical change. Congress should consider giving equal control of the intelligence committees' information-forcing powers to the party not in the Oval Office, whether or not they are in the majority in Congress.⁶⁵ Although this idea is at odds with a tradition of majority control in Congress, it has received serious attention from major legal scholars.⁶⁶

In any event, oversight need not be a partisan matter—as the Church Committee demonstrated by bringing together both Republicans and Democrats to pursue inquiries into Administrations of both parties.⁶⁷ Neither Republicans nor Democrats, for example, should want a government where prosecutors are fired on partisan grounds. Neither

⁶² Congress's power to investigate is "perhaps the most necessary of all the powers underlying the legislative function.... [It] provides the legislature with eyes and ears and a thinking mechanism." J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951); see also *McGrain v. Daugherty*, 252 U.S. 135, 174 (1927); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975) ("The scope of [Congress'] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.").

⁶³ The literature here is already exhaustive. See, e.g., Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655 (2006); Robert F. Blomquist, *Congressional Oversight of Counterterrorism and Its Reform* ROGER WILLIAMS U.L. REV. 1, 69-74 (2005).

⁶⁴ For example, the White House misleadingly claimed that it had disclosed the NSA program "to Congress" without stating it had only disclosed to the "gang of eight." See Dan Eggen & Walter Pincus, *Varied Rationales Muddle Issue of NSA Eavesdropping*, WASH. POST, Jan. 27, 2006, at A5.

⁶⁵ Aziz Huq, *Spy Watch: After Years of Neglect, Congress Must Intensify Oversight of Intelligence Agencies*, LEGAL TIMES, May 15, 2006 (suggesting that control of intelligence oversight be vested in the party not in possession of the White House).

⁶⁶ Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2342, 2347 (2006) (suggesting that the minority party could hold hearings); see Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1050-53 (2004).

⁶⁷ See Smist, *supra* n. 20, at 77-78 (1990).

should want the “national security” or the “executive privilege” label to be applied to obscure partisan goals or to hide abusive exercises of power. Oversight should be a shared responsibility. And before facts are fully aired, nobody should prejudge the matter.

F. Strengthen the Inspector General System and Other Internal Checks and Balances.

Congress should review and strengthen by law the “internal checks and balances” of the executive branch, in particular the system of inspectors general for agencies and departments engaged in national security policy, and the protections for internal whistleblowers.

Congress alone cannot ensure that the law is followed all the time. The federal government, and in particular the national security apparatus, has swollen far beyond anything envisaged by the Framers, and far beyond the capacity of Congress and the courts to supervise. As the current Administration acknowledges, there is a consequent need for “strong measures to improve compliance [with the law] in ... national security mechanisms.”⁶⁸ Such internal checks and balances and protections would “help the Congress to hold the [e]xecutive [b]ranch accountable by rooting out waste, fraud, and abuse, and by shedding light on issues in need of attention.”⁶⁹

Many internal investigative and oversight mechanisms are familiar: a stronger system of inspectors general (or “IGs,” the statutory office responsible for internal auditing of executive branch activity); better protection for whistleblowers; separate and overlapping cabinet officers to ensure that the president hears competing opinions; agency “stovepipes” to ensure that there are internal channels to raise challenges to actions of questionable legality; mandatory review of government action by different agencies; civil-service protections for agency workers; reporting requirements to Congress; and an impartial decision-maker to resolve inter-agency conflicts to replace the now compromised Office of Legal Counsel. Many of these internal institutions exist in some form today but are too weak to be wholly effective. They should be strengthened.

G. Legislate To Reduce Excessive Secrecy and Over-Classification.

Congress should hold hearings on the abuse of secrecy and enact comprehensive rules to guard against the misuse of security-related classification and declassification. It should strengthen internal mechanisms that control oversight of classification.

Excessive secrecy affects the Constitution’s checks and balances in three ways. First, it prevents Congress and the public from knowing what problems exist or how best

⁶⁸ See Letter from Alberto R. Gonzales, Attorney General, U.S. Department of Justice, & Robert S. Mueller III, Director, Federal Bureau of Investigation, to Hon. Richard B. Cheney, Vice President (July 13, 2007) (on file with Brennan Center for Justice).

⁶⁹ Project on Government Oversight, *POGO’s 2007 “Baker’s Dozen” of Suggested Congressional Oversight Priorities*, Jan. 3, 2007, available at <http://www.pogo.org/p/government/go-070101-bakersdozen.html>.

to regulate them. Second, it shifts power to the executive branch, which can, and does, selectively release classified information in order to promote its political or policy agenda. Third, excessive secrecy limits the flow of information *within* the Executive—in some instances handicapping inter-agency processes of policy formation and yielding bad decisions.⁷⁰ For these reasons, Congress must promptly address excessive secrecy and over-classification, which has become an immense problem.⁷¹

Secrecy increased at the start of the Bush Administration and dramatically escalated after 9/11. Classification doubled from 2001 to 2004 alone.⁷² “The problem of over-classification is apparent to nearly everyone who reviews classified information,” wrote Governor Thomas H. Kean and Lee H. Hamilton after chairing the 9/11 Commission: “The core of the problem is the fact that people in government can get in trouble for revealing something that is secret, but they cannot get in trouble for stamping SECRET on a document.”⁷³ Furthermore, in the national security arena, excessive secrecy hampers Congress’s ability to gather information and formulate informed responses.⁷⁴

Congress should carefully review the regulations that now structure classification and declassification efforts. Such reviews might be done in the first instance by an expert, non-partisan panel. Based on this review, Congress should enact a comprehensive law limiting classification and installing checks to guard against the political manipulation of either classification or declassification. (The House of Representatives attempted to address this problem through legislation passed last week. I

⁷⁰ National Security Advisor Condoleezza Rice, for example, only learned of the Department of Justice’s infamous August 2002 opinion on torture in June 2004—and then only from the *Washington Post*. Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, at A1.

⁷¹ According to J. William Leonard, Director of the Information Security Oversight Office, more than two million of the 20.5 million classification decisions made in 2006 were incorrect. This error rate, Leonard told Congress, “calls into question the propriety” of the initial classification decisions. Charles Pope, *Government is Overzealous with Secrecy, Reichert says*, SEATTLE POST-INTELLIGENCER, July 26, 2007, at B1. Other executive branch officials are even more concerned about excessive classification than Leonard. One official has estimated that “beyond 50%” of currently classified documents have been improperly kept from the public. *Emerging Threats: Classification and Pseudo-Classification Before the S. Comm. On Government Reform*, 109th Cong. (2005) (statement of Thomas S. Blanton, National Security Archive, George Washington University) available at <http://www.gwu.edu/~nsarchiv/news/20050302/index.htm>.

⁷² Fuchs, *supra* n. 49, at 131, 133. On March 25, 2003, the White House ratcheted up government secrecy by imposing a presumption of non-disclosure on all federal agencies. Secrecy extends to the practices of individual policy-makers. Vice President Cheney, for example, “declines to disclose the names or even the size of his staff, generally releases no public calendar and ordered the Secret Service to destroy his visitor logs.” Barton Gellman & Jo Becker, *A Different Understanding With the President*, WASH. POST, June 24, 2007, at A1.

⁷³ Commission on Terrorist Attacks upon the United States, *supra* n. 23, at 69; *see also* Mann & Ornstein, *supra* n. 58, at 158-62 (describing the Congress’s “tolerance of executive secrecy” even before 9/11); *see generally* Daniel Patrick Moynihan, *Secrecy: The American Experience* (1999); *cf.* Sessile Bok, *Secrets: On the Ethics of Concealment and Revelation* 109-10 (1983) (“Long-term group practices of secrecy... are likely to breed corruption and to spread.”).

⁷⁴ Most importantly, this includes the Governmental Accounting Office. The Congressional Research Services has access to less information on security issues when it compiles information for Congress.

urge the Senate also to focus on such legislation.) Further, Congress should strengthen both inter-branch and intrabranh oversight mechanisms. The General Accounting Office should be given a clear mandate over security agencies. Internal bodies such as the Information Security Oversight Office and the Public Interest Declassification Board should be strengthened and vested with greater disclosure-forcing powers, e.g., subpoena authority.⁷⁵

H. Disclose the Office of Legal Counsel's Legal Opinions That Influence the Use of National Security Powers, and Consider Restructuring the Office.

The next Administration should release to Congress and the public all relevant internal legal opinions and presidential authorizations, especially those that rely on a "monarchical prerogatives" theory of presidential authority, or that otherwise negate or narrow the application of national security laws enacted by Congress. Congress should legislate to strengthen the independence of the Office of Legal Counsel (OLC) by insulating it from improper White House influence. It also should legislate to ensure maximum transparency for OLC opinions.

The Justice Department's OLC provides written and oral legal opinions to others in the executive branch, including the president, the attorney general, and heads of departments. It stands at the front line of executive branch legal interpretation.⁷⁶ But it has recently played a central role in sanctioning the dangerous theory of monarchical executive power that has corroded the checks and balances of constitutional government. Congress should curb with legislation this deviation in the OLC's role and promote OLC's transparency.

In legal opinions sanctioning torture, rendition, and warrantless surveillance, the OLC failed to check—and instead enabled—flagrant governmental disregard of the law. Rather than fulfilling its "special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers," the OLC fell into an "advocacy model," i.e. simply signing off on what the White House wanted.⁷⁷ As a distinguished group of OLC alumni have explained: "The advocacy

⁷⁵ The Public Interest Declassification Board, established to reduce excessive classification, has been rendered ineffectual by White House control. Shaun Waterman, *Analysis: Secrecy board called 'toothless.'* UNITED PRESS INTER'L, Oct. 30, 2006.

⁷⁶ Schwarz & Huq, *supra*, n. 1, at Chapter 8 ("The King's Counsel"), at 187-199; Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH L. REV. 676, 710-11 (2005); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1309-10 (2000). The Office of Legal Counsel was created by statute in 1953; its head, an assistant attorney general, is subject to presidential appointment and Senate confirmation. See Reorganization Plan No. 2 of 1950, 64 Stat. 1261.

⁷⁷ Walter Dellinger et al., *Principles to Guide the Office of Legal Counsel 25*, (Dec. 21, 2004), available at http://www.acslaw.orefiles/2004%20programs_OLC%20inciples_white%20paper.pdf. It did so both by proffering the untenable theory of a "monarchical executive" to underwrite extraordinary new powers, and by interpreting statutes such as the September 2001 Authorization for the Use of Military Force, as a

model of lawyering, in which lawyers merely craft plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action."⁷⁸ Optimally, the OLC provides "thorough and forthright" advice that "reflect[s] all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power."⁷⁹

At the threshold, Congress should require transparency to promote integrity in OLC legal opinions. OLC opinions—past and future—should as much as feasible be disclosed to Congress and the public. These opinions have the force of law. In this country we should have no secret laws.

Since 9/11, OLC has issued legal memoranda—including the infamous "torture memo" of August 2002—that rely on a monarchical theory of presidential power to license torture, warrantless surveillance, and "extraordinary rendition."⁸⁰ Remarkably, the present Administration has refused to expose all its legal reasoning to the light of day—even as it continues to press its expansive vision of presidential power. To date, some legal opinions regarding compliance with international law, the detention of persons seized in Afghanistan in the course of Operation Enduring Freedom, and the use of coercive interrogation have been released or leaked. But others are known to exist and have been kept secret.⁸¹ The *current* Administration should release immediately all legal

wholesale repudiation of checks and balances in the national security field. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁷⁸ Dellinger et al., *supra* n. 77, at 1.

⁷⁹ *Id.* at 2; accord Jack Goldsmith, *The Terror Presidency: Law And Judgment Inside The Bush Administration* 35-37 (2007). In an age of increasing statutory and regulatory complexity, the OLC's role as an honest broker within the executive branch on legal issues is of paramount importance: Increasing numbers of legal questions never reach the courts, such that the executive functionally may have the last word on constitutional and statutory questions where vital human interests are at stake. See Pillard, *supra* n. 76, at 758.

⁸⁰ Many of these legal opinions provided internal legal justification, and hence "cover," for arguably illegal programs. In the absence of legal cover, illegal programs would not—and did not—continue. See, e.g., Dana Priest, *CIA Puts Harsh Tactics on Hold*, WASH. POST, June 27, 2004, at A1 (quoting one CIA official to the effect that the interrogation program "has been stopped until we sort out whether we are sure we're on legal ground").

⁸¹ These include—but are not limited to—the following:

- Memoranda dated October 4 and November 2, 2001, January 9, May 17, and October 11, 2002, February 25, 2003, March 15, May 6, and July 16, 2004, and February 4, 2005, concerning the so-called "Terrorist Surveillance Program" of the NSA. (Referenced in Letter to Patrick J. Leahy, Senator, from Shannon W. Coffin, Counsel to the Vice President, Aug. 20, 2007 (on file with Brennan Center for Justice).)
- Memorandum dated March 13, 2002, for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee Assistant Attorney General, Office of Legal Counsel, entitled "The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations," and undated memorandum concerning the President's authority to transfer terrorist suspects to other countries where they are likely to be tortured. (Although no record of this

opinions issued by the OLC that license policies of interrogation, detention, transfer, and surveillance. It seems likely that these opinions each rely in some measure on the presumption of monarchical prerogatives.⁸² If this Administration persists in its refusal to disclose these legal opinions, the next president should commit to doing so. If he refuses, Congress should subpoena them or legislate to require disclosure.

Congress should also address the OLCs institutional drift by strengthening its capacity to resist political pressures and to provide neutral and impartial advice that accounts for all relevant constitutional concerns.⁸³ Congress should also, among other things, require guidelines to ensure “appropriate executive branch respect for the coordinate branches of the federal government” and for individual constitutional and international human rights.⁸⁴ Congress should direct OLC to “seek the views of all affected agencies [as well as other] components of the Department of Justice before rendering final advice.”⁸⁵ To the maximum extent feasible, OLC opinions also should be made publicly available via an easily searchable public website.⁸⁶ Congress should also require that “absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, [the OLC] should publicly release a clear statement explaining its deviation.”⁸⁷

memorandum has surfaced, a law review article by a former OLC lawyer reads remarkably like an OLC memo; the same lawyer has published other articles that cribbed from his work at OLC. See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183 (2004); see also Schwarz & Huq, *supra* n. 1, at 163 (discussing article.)

- Memorandum dated spring 2005, signed by Steven Bradbury, concerning the legality of CIA enhanced interrogation techniques used either alone or in combination, and concluding that these did not amount to “cruel, inhuman, or degrading” treatment. See Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

These are the opinions we are fortunate enough to know about due to cross-references in other documents or press reports. There are likely others that we do not know exist, but that should be in the public domain.

⁸² Evidence for this derives from the fact that opinions that have been released do rely on extravagant theories of executive power. See, e.g., Memorandum from John Yoo, Deputy Assistant Attorney General, & Robert J. Delahunty, Special Counsel, for William J. Haynes II, “Application of Treaties and Laws to al Qaeda and Taliban Detainees,” Jan. 9, 2002; see also Robert Delahunty & John Yoo, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL’Y 487 (2002).

⁸³ To implement this, Professor Neal Kumar Katyal has suggested splitting the OLC into distinct adjudicative and advisory divisions. Katyal, *supra* n. 66, at 2335-40. Judge Patricia Wald and Professor Neil Kinkopf argue that OLC should shift to a wholly “judicial model” that is distinct from the “advocacy model.” Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer’s Essay*, 1 HARV. L. & POL’Y REV. 31, 57 (2007).

⁸⁴ Dellinger et al., *supra* n. 77, at 3. By authorizing internal guidelines aimed at a legislatively stipulated goal in lieu of regulating directly, Congress recognizes the leeway that the Department of Justice properly exercises in maintaining professional standards.

⁸⁵ *Id.* at 5.

⁸⁶ *Id.* at 4; see also Pillard, *supra* n. 76, at 750 (advocating for public database).

⁸⁷ Dellinger et al., *supra* n. 77, at 4.

I. Make It Clear: No More Torture, No More “Torture Lite.”

Recognizing the damage that abuse and rumors of abuse have done to America’s reputation since 9/11, Congress should enact legislation closing loopholes that the executive branch believes allow or decriminalize the use of coercive interrogation measures including (but not limited to) waterboarding, prolonged sleep deprivation, and stress positions.

American law clearly prohibits all torture and all lesser forms of coercive interrogation, commonly known as cruel, inhuman, and degrading treatment.⁸⁸ But, since 9/11, the current Administration has secured from the Justice Department legal opinions that seed ambiguity about these unequivocal legal limits and devise ways to evade what should be clear and impenetrable barriers. Even though federal law and international law—clearly, and without reservation or caveat—prohibit all forms of torture and cruel, inhuman, and degrading treatment, the Administration has found ways to sanction interrogation tactics—including waterboarding and prolonged sleep deprivation⁸⁹—which clearly constitute torture.

Congress should not have to clarify again the law against torture. But given the executive’s repeated evasions of that law, Congress must do so. In particular, Congress should specifically prohibit the “enhanced interrogation techniques” that the Administration reportedly uses, as well as the reported combinations of multiple

⁸⁸ See Schwarz & Huq, *supra* n. 1, at 67-69 (summarizing those laws).

⁸⁹ In confirmation hearings, Attorney General nominee Michael Mukasey was unable to state clearly that water-boarding constituted torture. See Attorney Transcript of Senate Judiciary Committee Hearing for Nomination of Judge Michael Mukasey as Attorney General, Day Two (Oct. 18, 2007), available at <http://www.washingtonpost.com>. But water-boarding has been considered torture since the Spanish Inquisition. There is no question of its tremendous pain-inducing power. See Rejali, *supra* n. 9, at 279-85.

Moreover, in July 2007, President Bush promulgated an executive order setting forth rules for CIA interrogations (the military being covered by a separate, and stringent, field manual on interrogation). The order listed a series of criminal statutes concerning torture and the McCain Amendment, and explained that these, along with religious and sexual abuses, defined the universe of the Geneva Conventions’ Common Article 3 violations. The order also stated that detainees would receive “the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.” See Executive Order Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency (July 20, 2007), available at <http://www.whitehouse.gov/news/releases/2007/07/print/20070720-4.html>.

Critically, the order did not specify which tactics the CIA would use. Further, it was carefully drafted to exclude several “enhanced” interrogation techniques allegedly already authorized for the CIA. Space remained, in short, for several of the harsher measures that had long been used against post-9/11 detainees. Certainly, that was how the order was read by the military’s lawyers, who expressed concern to the White House that interrogations pursuant to the order would likely violate the 1949 Geneva Conventions. See Karen DeYoung, *Bush Approves New CIA Methods*, WASH. POST, July 21, 2007, at A1; Katherine Shrader, *Bush Alters Rules for CIA Interrogations*, ASSOC. PRESS, July 21, 2007, available at <http://abcnews.go.com/Politics/wireStory?id=3399803>; see also Charlie Savage, *Military cites risk of abuse by CIA*, BOSTON GLOBE, Aug. 25, 2007, at A1.

“enhanced” interrogation measures.⁹⁰ These restrictions should not be exclusive, but given as examples of the larger category of prohibited conduct. (In addition, all interrogations conducted by the CIA or the military should be videotaped. The involvement of doctors in interrogations should be carefully examined.) Absolute prohibitions should apply to all agents, employees, and contractors of the federal government (regardless of whether they are inside or outside the United States) and to individuals who work alongside the federal government. Finally, Congress should prohibit, without caveat, the transfer of suspected terrorists to other countries known to use torture.⁹¹ Reliance on another country’s assurance that it will not torture—in the face of State Department reports that they regularly *do* torture—is patently hypocritical and inadequate.⁹²

IV. Conclusion.

Checks and balances need to be restored to the Framers’ original vision. From the outset, our nation has been strongest when our government formulates policies by deliberative and open processes. Without the clarity that informed criticism brings, our national security policy is much more likely to be ineffective, uninformed, flawed and possibly harmful to our citizens and our standing in the world. Effective checks and balances are a prerequisite to informed criticism and open deliberation. In their absence, novel and erroneous constitutional theories have led to conduct that is contrary to American values. We will spend many years remedying the harms, both foreign and domestic, that these ill-advised policies have caused.

Consequences, not motive, are key. Make the assumption that the conduct which has undermined our values and sapped our strength arose in the context of seeking to protect the country from further attacks. But also remember—as Justice Louis Brandeis warned in a somewhat different context—that at times “the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”⁹³ After 9/11, the most important lack of “understanding” was that America’s greatest strength lies in our adherence to the rule of law.

Again, the Church Committee’s words are as true today as they were three decades ago:

⁹⁰ In a recent report, Human Rights First and Physicians for Human Rights have demonstrated that all of these techniques are torture. HUMAN RIGHTS FIRST & PHYSICIANS FOR HUMAN RIGHTS, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY (2007), available at <http://www.humanrightsfirst.info/pdf/07801-etn-leave-no-marks.pdf>.

⁹¹ See generally Schwarz & Huq, *supra* n. 1, at 97-123. For an excellent overview of the international law issues, see Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

⁹² See HUMAN RIGHTS WATCH, STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE (2005) available at <http://hrw.org/reports/2005/eca0405/>.

⁹³ *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

“The United States must not adopt the tactics of the enemy. Means are as important as ends. Crisis makes it tempting to ignore the wise restraints that make [us] free. But each time we do so, each time the means we use are wrong, our inner strength, the strength which makes [us] free, is lessened.”⁹⁴

The United States will (as it should) continue to have a massive and powerful executive branch. This makes it particularly pressing to find effective ways to ensure that the powers of the presidency are used wisely and fairly. During the past eight years—and indeed for years before that—oversight of the executive branch, in particular its formidable national security powers, has withered. Now, as the public catalog of flawed, harmful, and unwise policies grows, the case for comprehensive reform is undeniable and urgent.

Bringing the checks and balances of constitutional government to national security policy does *not* exchange liberty for security. To establish accountability is to ensure that security powers are targeted correctly and sensibly. It is to ensure that government officials do not hide their mistakes, claim victory when none is at hand, or turn security into a partisan game. The Framers knew well the temptation to ignore our own errors, to presume ourselves infallible, and to stifle evidence to the contrary. That is why they installed constitutional checks and balances to resist such natural and human tendencies. We have forgotten the Framers’ wisdom. But, if we are to prevail in the “war of ideas” at the heart of contemporary counterterrorism, if we are to convince others that America stands on solid moral ground, and that America remains committed to the “inalienable rights” of all, then we must find our way back to the original wisdom of the Constitution, and to a government that follows the rule of law and welcomes checks and balances.

September 16, 2008

⁹⁴ S. REP. NO. 94-465, *supra* n. 19, at 285. At the dawn of America, George Washington similarly rejected using tactics of the enemy: “Treat them with humanity, and Let them have no reason to Complain of our Copying the brutal example of the British army in their Treatment of our unfortunate brethren.” Washington to Samuel Blachley Webb, New Jersey, Jan. 8, 1777, reprinted in 8 *The Papers of George Washington: Revolutionary War Series* 16 (W.W. Abbot ed., 1985).

Similarly, the code that President Lincoln approved in the Civil War forbade soldiers using “torture to extort confessions.” Instructions for the Government of Armies of the United States in the Field art. 16, Apr. 24, 1863, General Orders No. 100, *available at* <http://www.yale.edu/lawwcb/avalon/licber.htm>.

*Ambrose: The truth and the truth commission Scripps Howard News Service
February 19, 2009, Thursday 3:43 PM EST*

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February 19, 2009, Thursday 3:43 PM EST

SECTION: COMMENTARY

LENGTH: 648 words

HEADLINE: Ambrose: The truth and the **truth commission**

BYLINE: JAY AMBROSE, Scripps Howard News Service

BODY:

So here's Patrick **Leahy's** great, grand idea -- let's establish a **truth commission**, dig up all the dirt we possibly can on the Bush administration and convert our marvelous tradition of cordial transitions of power to one of crucify the old regime.

The Democratic senator from Vermont wouldn't put it quite that way, of course, saying instead that we really need to find out why we went to war in Iraq, get the details on Guantanamo torture and figure out the extent to which George Bush's buddies politicized Justice Department prosecutions.

Establish a commission appointed by President Obama and leaders in Congress, give it the power to grant witnesses immunity from prosecution as it pursues these questions and we can thereby rise up from the gory past without a lot of political hullabaloo, say **Leahy** and supporters of a similar idea in the House.

Excuse me, but this proposal is political from its snout to its tail, a vicious, fraudulent, constitutionally dubious scheme that starts, it has been noted, by comparing the Bush years to the apartheid years in South Africa. That's where the name comes from -- a **truth commission** established in that country to draw confessions from former, sometimes murderous oppressors after Nelson Mandela came to power.

Some dangers as spelled out by Republican lawyers in a Washington Post article could be an infringement on separation of powers and the undoing of due process, an invitation for international courts to prosecute President Bush and even setting Barack Obama up as a war criminal.

As the authors note, Obama has already said OK to attacks in Afghanistan, and if a commission figures that those enemies should be understood as civilians suspected of criminal activity, then he could be criminally liable under international law.

There are other dangers, such as revealing classified information important to national security, and the whole thing would be redundant -- congressional

Democrats have already studied all this stuff to death. If they think they didn't learn enough because Bush would not share some information they sought, all they need do is knock on the door of the new president and ask him, one Republican has been quoted as observing.

The truth about this **truth commission** is that it's an effort to set up Bush and others in his administration for even more virulent castigation than they've endured already, and that a next step could in fact be prosecution, even though the commission itself could not carry that out. What it would do is push us toward vengeance seeking even to the point of imprisonment against the losing party in elections.

That could obviously work both ways. Some Internet bloggers have been pointing out, for instance, how interesting it would have been in the Bush years for a commission to find out the extent to which laxity in the Clinton administration paved the way for the attacks on 9/11 among many other matters, some of them with legal overtones.

And how about getting at some interesting facts about **Leahy** himself, described by Jay Nordlinger in a National Review article a few years ago as "the meanest, most partisan, most ruthless Democrat in the Senate" in the opinion of Republican senators?

This man who is forever portraying himself as a saint in senator's clothing was once forced to resign from the Senate Intelligence Committee because of a couple of instances of leaking important classified information. Some bloggers theorize those leaks could have gotten people killed. I don't pretend to know, but maybe a **truth commission** could find out if the Republicans ever return to power and that's how we are henceforth going to conduct politics in America.

(Jay Ambrose, formerly Washington director of editorial policy for Scripps Howard newspapers and the editor of dailies in El Paso, Texas, and Denver, is a columnist living in Colorado. He can be reached at SpeaktoJay@aol.com.)

**Statement of William S. Sessions
Submitted to the
Senate Judiciary Committee
March 4, 2009**

I want to thank Chairman Leahy and the other members of the Judiciary Committee for holding this hearing because the creation of a nonpartisan commission to investigate the detention, treatment, and transfer of detainees after September 11, 2001 is a critical step in the restoration of the rule of law. We need a commission to uncover the full truth about our treatment of detainees through a comprehensive investigation of the policies and actions of the military, intelligence services, the Department of Justice. We need to understand how they worked with each other and with any other relevant actors. We must first learn and understand these facts about what happened in the past before we can begin to restore the rule of law for the future.

As a former Director of the FBI, I understand that adherence to and respect for the law is not only a foundational principle of our democracy, it is essential to our national security. I have devoted much of my career to serving our nation, promoting the rule of law, and protecting public safety through my work in the federal judiciary and law enforcement. I served as Chief of the Government Operations Section at the United States Department of Justice, as United States Attorney, and as a United States District Court Judge and Chief Judge of the United States District Court for the Western District of Texas. I was then appointed by President Ronald Reagan to serve as the Director of the Federal Bureau of Investigation, a position I continued to hold under Presidents George H.W. Bush and William J. Clinton.

It is this experience in law enforcement that informs my call for a commission. When an agent joins the FBI, he or she is inculcated with the idea of selfless service—duty, loyalty, honor, and respect for the law. What we have learned thus far about actions of government officials at Abu Ghraib, Guantanamo Bay, and an undetermined number of “black sites” around the globe has already revealed conduct that violates our nation’s values and those of the men and women who serve our country in law enforcement and in the armed services. It also puts our men and women in uniform at greater risk of torture and abuse if they are captured by our enemies; when we lower our standards of treatment of detainees, others may do the same. These practices, which can serve as a recruiting tool to create new enemies and justify the rally of old enemies, may put us all at greater risk.

Until we have a full and accurate picture of the policies and practices that led to detainee abuses, which include those we know about and potentially some that have yet to be disclosed, we cannot ensure that we are truly leaving the past behind.

Many of us have been calling for an in-depth inquiry for several years. As a member of the Constitution Project's Liberty and Security Committee, I joined a broad group of Republicans and Democrats in a call for a government-wide investigation into detainee abuse allegations in 2005. The urgency of this call has only increased over the past four years. As we explained in our statement at that time, I we "recognize the complexity of the tasks faced by those charged with defending our nation's security in an age of global terror." And this very complexity and urgency creates the need for a commission dedicated to examining and providing a comprehensive report on policies and actions related to the detention, treatment, and transfer of detainees after 9/11 and the consequences of those actions.

In order to learn the truth, it is critical that this commission be nonpartisan. Its members must be known for their commitment to truth above commitment to party. A commission empowered to engage in credible, far-reaching fact-finding will help our policy makers propose effective reforms that garner support from both the executive and legislative branches, as well as the public. We must remember that the rule of law is not a Republican or a Democratic ideal; it is our shared constitutional obligation.

The Honorable Patrick J. Leahy
United States Senate
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter
United States Senate
Ranking Member, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter,

As former leaders of the U.S. Intelligence Community, we are writing to express concern about what has been termed a Truth Commission inquiring into certain counterterrorism policies and practices used by U.S. intelligence agencies during the Bush administration.

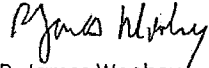
A review that could have the potential to lead to prosecution of intelligence officers who conducted counterterrorism activities under the law as it was set out to them at the time could set a dangerous precedent and potentially jeopardize future intelligence efforts. Director of National Intelligence Admiral Dennis Blair said during his confirmation hearing, "I'm hesitating to set a standard here which will put in jeopardy some of the dedicated intelligence officers who checked to see that what they were doing was legal and then did what they were told to do." We urge you to consider the wisdom of this statement by our top intelligence official before proceeding down the commission path of inquiry.

A commission of this nature could also endanger the apolitical environment in which intelligence officers are meant to operate. The Intelligence Community is entrusted to conduct its activities in an unbiased and apolitical manner despite changes in the legal and policy landscape, and the intelligence oversight committees of the House and Senate have ample authority to protect the public's interest. Attorney General Eric Holder Jr. concurred with the notion that members of the Intelligence Community should not be put at risk by a change in the political environment when he said that the administration does not want to "criminalize policy differences that might exist between the outgoing administration and the administration that is about to take over."

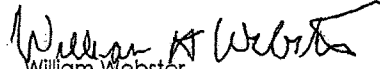
We urge you to consider seriously the advice of Admiral Blair and Attorney General Holder, as well as that of the President himself, on this point. The President said recently, "you've got extraordinarily talented people who are working very hard to keep Americans safe. I don't want them to suddenly feel like they've got to spend all their time looking over their shoulders and lawyering [up]." We agree.

We urge that those in and out of government, of both parties, work together to give our intelligence specialists the tools and support they need to keep this country and her people safe.

Sincerely,



R. James Woolsey
Director of Central Intelligence
1993-1995



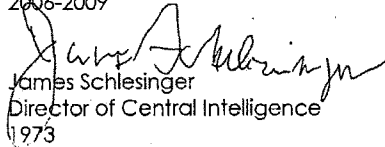
William Webster
Director of Central Intelligence
1987-1991



Michael Hayden
Director, Central Intelligence Agency
2006-2009

/s/

John Deutch
Director of Central Intelligence
1995-1996



James Schlesinger
Director of Central Intelligence
1973

Investigate Bush? U.S. has bigger woes to worry about USA TODAY February 17, 2009 Tuesday

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HEADLINE: Investigate Bush? U.S. has bigger woes to worry about

BODY:

It's hardly surprising that some Democrats are eager to investigate what they call the "excesses" of the Bush White House. The administration's treatment of terror suspects, its warrantless wiretapping program and its politicization of the Justice Department led to bitter disputes and battered the nation's reputation. Much is known about what went on, but much remains secret.

To get to the bottom, House Judiciary Committee Chairman John Conyers, D-Mich., has proposed a bipartisan commission, with subpoena powers and an initial budget of \$3 million, to look at an assortment of the Bush White House's most controversial acts. Senate Judiciary Committee Chairman Patrick **Leahy**, D-Vt., wants a "**truth commission**," modeled in part after one in post-apartheid South Africa, that would find "out what happened, so we can make sure it does not happen again."

Should the nation go down this road? President Obama is cool to the idea, signaling last week that he'd rather look forward than backward. Despite our criticism of George W. Bush on each of those issues, we agree.

The U.S. faces huge difficulties in rescuing the economy, controlling its exploding debt, fighting two wars and fixing other pressing problems. A long, wide-open investigation into all the alleged misdeeds of the past eight years would be a divisive distraction.

Any Democratic-initiated probe into a Republican administration would inevitably be politically polarizing at a time when bipartisanship is on life support. As unhappy experience with special prosecutors has shown, investigations lacking narrow focus tend to mutate and linger for years.

The fact is the Bush administration's excesses are already well-documented, thanks largely to journalists, historians and Democrats who took charge of congressional oversight after 2006. If Congress wants to provide a useful role, it could require quicker declassification of records.

The most effective investigations -- Watergate or the 9/11 Commission, to name two

-- have involved an incumbent administration or have been narrowly focused. The Conyers-**Leahy** proposals would be neither. At best, the nation might benefit from a carefully targeted, non-partisan inquiry into one or two key unresolved questions, such as whether torture actually produced information that saved lives.

Then there is the question of motive. Unlike Richard Nixon, whose subversion of the Constitution was meant to perpetuate his power, Bush's post-9/11 decisions were simply his best judgment about how to keep the nation safe. If Democrats think he erred, they now have the power to change course. In fact, Obama has already disavowed torture and vowed to close the prison camp at Guantanamo Bay, Cuba.

Further judgment is best left to history. When President Ford pardoned Nixon, so many people were outraged that it might have cost Ford the 1976 election. But time has shown that the nation benefited from moving on and being spared the spectacle of an ex-president on trial.

At this point, too, Congress' attention is better devoted to solving problems than to exacting retribution.

Wide mandate

Rep. John Conyers, chairman of the House Judiciary Committee, wants to create a commission that would investigate a "broad range" of Bush administration policies, including:

- *Detentions of terror suspects
- *"Enhanced interrogation techniques"
- *Warrantless wiretapping
- *Efforts to conceal the identity of detainees
- *Transfer of prisoners to other countries for detention and interrogation
- * "Other policies that the commission may determine to be relevant"

Source: H.R. 104

joan walsh

THURSDAY MARCH 5, 2009 06:35 EST

Republicans battle a truth commission-Salon.com

Republicans rolled out their arguments against a "Truth Commission" to investigate Bush-era interrogation and detention issues at a Senate Judiciary Committee hearing today. They're pretty predictable.

Sen. Arlen Specter, R-Pa., insists the Justice Department can handle the job of investigating Bush-era abuses -- ignoring the fact that, so far, the Obama administration hasn't seemed anxious for the job, and taking his prerogatives as a senator unusually lightly. Specter also worried a truth commission would become a "fishing expedition." Sen. John Cornyn insisted Congress has already investigated all these allegations and a commission would be "an indictment of congressional oversight responsibilities." Yes, Sen. Cornyn, it would be.

Reagan-era Justice Department official David Rivkin insisted a commission amounted to "outsourcing" law-enforcement responsibilities to political appointees. I later debated Rivkin on "Hardball," and I pointed out that the commission is envisioned as a fact-finding enterprise, not as a law-enforcement endeavor, but he dismissed me with something along the lines of "if it walks like a duck ..." That's a point of law I'm not familiar with, not being a lawyer myself.

Rivkin is an interesting figure: He's never met a Bush power grab or anti-terror policy he couldn't defend. As Glenn Greenwald recently wrote, Rivkin has consistently opposed international efforts to prosecute Americans for war crimes like the International Criminal Court, or an Italian court's decision to indict CIA agents who kidnapped a Muslim cleric in Milan and rendered him to Egypt. He has insisted only U.S. officials can prosecute such abuses, but he's lobbied against such prosecution. "Obama and the Democratic Congress are entitled to revise and reject any or all of the Bush administration's policies," he wrote recently in the Washington Post. "But no one is entitled to hound political opponents with criminal prosecution, whether directly or through the device of a commission, and those who support such efforts now may someday regret the precedent it sets."

So according to Rivkin, other countries can't prosecute such abuses, only we can. But we shouldn't. Got it.

He made much the same point in his testimony today: At today's hearing, Rivkin opposed any kind of investigation or prosecution: "Attempting to prosecute your political opponents at home, or facilitating their prosecution abroad, is like pouring acid on the machinery of democracy," he told the Leahy hearing. But later, on "Hardball," he made a little news, because he said he would prefer a Justice Department investigation and prosecution, if warranted, of Bush administration abuses, rather than a private citizens or congressional investigation.

"I have nothing against a preliminary investigation driven by career investigators in the Justice Department," he told me and Chris Matthews. "If career people decide to prosecute, it's regrettable, but I see no moral problem with that." I would likewise prefer a criminal investigation and prosecution to a truth commission, but I'm not sure they're mutually exclusive -- and I'm not sure the Obama Justice Department has the stomach to lead with a prosecutorial approach.

Two-thirds of the American people want to see some kind of investigation (a plurality prefer a criminal probe to a mere fact-finding commission). The Democrats can't get away with doing nothing after this lawless eight years. They can't let stand Bush officials' claims to be above the law. That conception of the absolute power of the presidency to violate human rights and break the law was rejected last November. I think Leahy is looking to start with what he can get. We'll see how far this crusade goes.

-- Joan Walsh

The New York Times

March 4, 2009

EDITORIAL

The Tortured Memos

We had two powerful reactions this week after the C.I.A. admitted to destroying 92 videotapes of interrogations that may involve torture and the Justice Department released several of the legal manifestos that former President George W. Bush used to justify mangling the Constitution after Sept. 11, 2001.

We were horrified to be reminded that the nation still has not plumbed the depths of the Bush administration's abuses. At the same time, it was a relief to see President Obama beginning to make good on his promise of greater transparency.

While the C.I.A.'s admission was made in legal proceedings, the government voluntarily released the Justice Department memos. A lot more transparency is needed. The documents do not include memos justifying harsh interrogations nor those justifying Mr. Bush's decision to authorize illegal eavesdropping on Americans.

The Bush administration admitted last year that the chief of the spy agency's clandestine service had ordered the destruction of tapes showing the interrogations of two Al Qaeda suspects, who may have been subject to the torture technique known as waterboarding.

But the Central Intelligence Agency redacted the number of tapes destroyed when it provided an accounting for a federal lawsuit that seeks release of its interrogation records. On Monday, the Justice Department said there were 92 — a stunning amount of evidence-shredding that needs further scrutiny.

The released memos were written by the Justice Department's Office of Legal Counsel, which is supposed to ensure policies comply with the Constitution and the law. They make it chillingly clear how quickly that office was rededicated to finding ways for Mr. Bush to evade, twist or ignore both. Some low points:

- In an Oct. 23, 2001, memo, John C. Yoo, then a Justice Department lawyer, explained how Mr. Bush could ignore the Fourth Amendment and the Posse Comitatus Act and deploy the military within the United States in "anti-terrorist operations." In the same memo, Mr. Yoo argued that Mr. Bush could also suspend First Amendment rights to free speech and a free press.
- On March 13, 2002, Jay Bybee, the head of the office at the time, wrote that Mr. Bush could ignore the Geneva Conventions and the anti-torture treaty. Mr. Bybee, who now has a lifetime seat as a judge on a federal court, said Mr. Bush was free to send prisoners to countries known to employ torture — a practice known as extraordinary rendition — as long as there was no agreement to do the torturing.
- On Jan. 15, 2009, five days before Mr. Bush left office, Steven G. Bradbury, the head of the counsel's office in Mr. Bush's second term, repudiated the earlier memos and tried to excuse them by saying they were made "in a time of great danger and under extraordinary time pressure." They were, but that should have led honest lawyers to exercise extra prudence, not to rush into sweeping away this country's most cherished rights.

The Justice Department's internal ethics office is reviewing these and other memos and trying to decide whether political appointees knowingly twisted their interpretations of the law to provide legal cover for decisions made by the White

House. At least two Congressional committees are, quite rightly, also looking into these issues.

Patrick Leahy, chairman of the Senate Judiciary Committee, is holding a hearing on Wednesday into the creation of a bipartisan inquiry into the range of Mr. Bush's abuses and has raised the possibility of granting immunity to witnesses. We are skeptical about immunity, but we are looking forward to hearing a careful debate about how to proceed toward the essential goal: providing Americans with as much truth and accountability as possible about their government's actions.

March 2, 2009, 12:24 pm

A Truth Commission for the Bush Era?

First, Find Out What Happened



David Cole, a professor at Georgetown University Law Center, is the author, most recently, of "Justice At War: The Men and Ideas That Shaped America's 'War on Terror.'"

Why are so many so afraid of the truth? Senator Patrick Leahy's proposal that a nonpartisan truth commission be appointed to investigate possible crimes committed in the "war on terror" has sparked criticism from a wide range of Republicans, all of whom urge us to look forward, not backward. But in the face of credible evidence that high-level Bush administration officials authorized torture, a crime against humanity, the least we should do is undertake a serious, independent investigation.

As a legal matter, we are compelled to investigate by the Convention Against Torture, a binding treaty, that requires its signatories to investigate and refer for possible prosecution credible evidence of torture under their jurisdiction.

It may have been wrong, but not criminal, to rely on flawed legal advice from the Justice Department's Office of Legal Counsel.

That obligation has been triggered by, among other things, the admissions that C.I.A. interrogators used waterboarding on at least three suspects with the express approval of Vice President Dick Cheney and other Cabinet officials, and by the finding of Susan Crawford, head of military prosecutions at Guantanamo, that interrogators there, acting under orders of then Defense Secretary Donald Rumsfeld, tortured Mohammed al-Qahtani. If we do not investigate such evidence, foreign courts have the right to pursue torture prosecutions of U.S. officials under the principle of "universal jurisdiction."

As a moral matter, investigation is also the right thing to do. The United States has committed grave wrongs in past security crises, most infamously when we interned over 110,000 Japanese and Japanese Americans during World War II. It took us more than 40 years to do it, but the United States eventually acknowledged its wrong in 1988, when Congress officially apologized and paid reparations to the surviving internees. We should not wait 40 years to admit our mistakes this time around.

Some complain that a truth commission is not enough — and that crimes require criminal prosecutions. Depending on what the evidence shows, prosecution may be the appropriate response in the long run, but for the moment, it is not yet obvious.

For example, it may have been wrong, but not criminal, to rely on flawed legal advice from the Justice Department's Office of Legal Counsel that waterboarding was not torture; the legal advice itself may have been morally repugnant and professionally incompetent without necessarily being criminal. At this point, it is too early to conclude that prosecution is either required or ruled out. But it is too late to deny that a serious independent investigation is necessary.

Washington Post 02/12/2009

Public Supports Investigations of Bush Misdeeds

Jill Lawrence writes for USA Today: "The Bush administration's anti-terror policies have generated controversies, lawsuits and indelible images such as those of abuses at Abu Ghraib prison in Iraq.

"They've also given rise to multiple opinions on whether to investigate, prosecute or just move on."

President Obama showed no appetite on Monday night for Sen. Patrick Leahy's proposed truth and reconciliation commission to investigate Bush administration misdeeds. Obama said he'd rather look forward than backward. But the public appears to believe we can do both at the same time.

In a separate story, Lawrence writes: "Even as Americans struggle with two wars and an economy in tatters, a USA Today/Gallup Poll finds majorities in favor of investigating some of the thorniest unfinished business from the Bush administration: Whether its tactics in the "war on terror" broke the law.

"Close to two-thirds of those surveyed said there should be investigations into allegations that the Bush team used torture to interrogate terrorism suspects and its program of wiretapping U.S. citizens without getting warrants. Almost four in 10 favor criminal investigations and about a quarter want investigations without criminal charges. One-third said they want nothing to be done.

"Even more people want action on alleged attempts by the Bush team to use the Justice Department for political purposes. Four in 10 favored a criminal probe, three in 10 an independent panel, and 25% neither."

joan walsh

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-- Joan Walsh

Former FBI Director, Army General, And Others Call for Commission to Investigate Post 9/11 Detainee Treatment Policies

Published on Feb 19, 2009 - 9:16:26 AM

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By: Constitution Project

Washington, D.C. Feb. 19, 2009 - Leaders from across the political spectrum, including a former FBI director, an Army general who investigated detainee abuse at Abu Ghraib, and a former Under Secretary of State, today called upon President Obama to appoint a non-partisan commission to examine policies related to the detention, treatment, and transfer of detainees following the September 11 terrorist attacks. The commission would investigate the government's alleged detainee abuse and related constitutional and legal violations.

Here is the full statement:

"We urge President Obama to appoint a non-partisan commission of distinguished Americans to examine, and provide a comprehensive report on, policies and actions related to the detention, treatment, and transfer of detainees after 9/11 and the consequences of those actions, and to make recommendations for future policy in this area.

We believe all members of the commission must have reputations for putting the truth and the respect for our nation's founding principles ahead of any partisan advantage. Members should be persons of irreproachable integrity, credibility, and independence. Leading academics, retired judges and government officials, retired military officers and intelligence officials and human rights experts are examples of the types of profiles that should be sought. The President should solicit recommendations from the majority and minority leaders in both houses in the process of choosing commission members."

There has been growing bipartisan support for the proposal of an investigatory commission to account for the policies of the last eight years. House Judiciary Chairman John Conyers (D-Mich.) introduced legislation, co-sponsored by Representative Walter Jones (R-N.C.), to establish a commission to investigate former President Bush's abuse of war powers and civil liberties. Senate Judiciary Chairman Patrick Leahy (D-V.T.) called for a commission to investigate the policies related to the detention and treatment of detainees and other practices in a speech at Georgetown University.

"The Constitution Project believes that an investigative commission is a critical step in reaffirming our nation's commitment to the rule of law," said Policy Counsel Becky Monroe. "We need a full understanding of the failures of the recent past in order to avoid making the same mistakes in the future. A non-partisan commission, removed from the influence of politics, is the best way to accomplish this goal."

Signatories to the statement include: Juan E. Mendez, President of the International Center for Transitional Justice; Thomas Pickering, former Under Secretary of State for Political Affairs; William S. Sessions, former federal judge and Director of the Federal Bureau of Investigations; Major General Antonio M. Taguba, USA (Ret.); and Rev. Dr. John H. Thomas, General Minister and President of the United Church of Christ. Eighteen organizations have also signed on to the letter, including the Constitution Project. A full list is available here: http://www.constitutionproject.org/pdf/accountability_statement.pdf

According to Ms. Monroe, "A commission will help both the President and Congress develop sound policies that defend constitutional safeguards and promote national security as we move forward."

In 2005, the Constitution Project's Liberty and Security Committee called for an investigation into detainee abuse allegations. The statement spoke of the "need for a high-level, broad-gauged panel to assess the national security, foreign policy and human rights implications of the issue."

Today's Choice Stories | Mar. 5th, 2009

In Support of Leahy's "Truth Commission"

[The Exception Editorial](#)

By Exception Staff | February 16, 2009

We the people of the United States, have never given the government the right to torture anyone. Just to be sure there would never be any confusion, a specific Amendment to our Constitution, the Eighth, explicitly forbids the practice:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

George W. Bush took an oath to preserve, protect and defend the Constitution of the United States. There is mounting evidence that Mr. Bush and members of his administration are guilty of high crimes such as torture, suspending the right to a fair trial and wiretapping without warrants. Mr. Bush may have escaped impeachment while in office, but that does not mean he should escape justice.

Americans of all political affiliations should fully support an investigation into the alleged crimes of the Bush regime.

The "truth commission" proposed recently by Senator Patrick Leahy of Vermont is a start in the right direction. The panel, which we hope would be nonpartisan, would have subpoena power although it would not criminally charge anyone. Some say the panel does not have enough

power, although if evidence of criminal activity is uncovered, there could be charges brought afterwards.

Bush defenders claim that by showing no American is above the law, we would inspire Al-Qaeda. But Usama bin Laden is not sitting in a cave taking his cues from C-Span, as some Bush supporters now argue. If the Bush administration has tortured suspected terrorists, Al-Qaeda already knows it; if they have not, then the Bush administration's lackeys should have nothing to fear. If anything, bringing Mr. Bush to justice weakens the terrorist's hands by demonstrating the superiority of our democratic form of government.

The idea that political elites may make an exception to the law, to defend their view of State security, extends back to the Roman dictatorships and finds its purest expression in the rise and rule of Adolf Hitler.

And we all know what happens once the people give their consent to this type of political perversion. The Republic dies and liberty is lost forever.

Editorial: Truth commission to investigate Bush-era wrongdoings needed

By: Editorial Board | Minnesota Daily (U. Minnesota)

Posted: 2/11/09

The compulsory cleansing of the Bush era so far has been seen in real policy. The closure of Guantanamo Bay Prison and the stimulus bill working its way through Congress are examples. But secondary to policy, there needs to be a consensus that the transgressions of the Bush administration were not acceptable. The nation needs closure.

Sen. Patrick Leahy, D-Vt., recently proposed in a speech a truth commission that has the potential to establish that consensus. Leahy said that the commission would look into the political moves at the Justice Department, the abuse of detainees and authorization of warrantless wiretapping. Moreover, Leahy, the chairman of the Judiciary Committee, stated the commission wouldn't have the power of criminal prosecution, but rather would hold subpoena authority.

U-WIRERepublicans have predictably balked at his suggestion - the leading Republican on the panel, Rep. Lamar Smith from Texas called it a political scheme. So goes the rhetoric of a politically battered party that would rather sweep away its numerous transgressions than hold them up to any sort of proper and independent scrutiny.

Truth is an adversary of the guilty. And truth sets precedent.

That's been the purpose of truth commissions the world over, from South Africa to Chile. If nothing else, Leahy's commission would send a message to future administrations that torture, spying on American citizens without warrant, suspending habeas corpus and keeping innocent prisoners locked up for years will not go unnoticed. History might repeat itself. But if it's accurately recorded, it can at least serve as an indication of the reach of unchecked power.

*A Truth Commission?; The Danger in Democrats' Rush to Investigate The
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HEADLINE: A Truth Commission?
The Danger in Democrats' Rush to Investigate

BYLINE: David B. Rivkin Jr. and Lee A. Casey

BODY:

A growing chorus of critics is demanding the creation of a special commission to "investigate" the Bush administration's alleged abuses of power, especially prosecution of the war on terrorism. Senate Judiciary Committee Chairman Patrick **Leahy** called for a "truth commission" last week, and House Judiciary Committee Chairman John Conyers Jr. has introduced legislation to establish a National Commission on Presidential War Powers and Civil Liberties.

For his part, President Obama has reacted coolly to calls to investigate Bush officials. Obama is right to be skeptical; this is a profoundly bad idea -- for policy and, depending on how such a commission were organized and operated, for legal and constitutional reasons.

There is nothing new about "blue ribbon" commissions. Notable examples are the Warren Commission, established by President Lyndon Johnson to review the circumstances of President John F. Kennedy's assassination, and the Sept. 11 commission, organized by Congress to consider the intelligence and security failures surrounding the events of that day in 2001.

Because of their unique organizations, these commissions often exist outside of the Constitution's three branches of government -- as would be the case with Conyers's proposed National Commission on Presidential War Powers and Civil Liberties. Under that proposal, introduced in the House as H.R. 104, there would be nine members, one selected by the president and the others appointed by the congressional

leadership. Its charge would be to "investigate relevant facts, circumstances and law surrounding" various Bush administration policies, including the use of enhanced interrogation methods and domestic "warrantless" electronic surveillance, and report its conclusions and recommendations to Congress and the president.

The Constitution requires that anyone exercising significant authority under federal law be appointed by the president with the Senate's advice and consent, or by department heads or the courts in the case of lower-level officials. So the commission would be unlawful if it served anything but an advisory role. The separation of powers also requires that officials exercising executive authority, such as the power to investigate potential violations of federal law with a view toward prosecution, be subject to presidential removal -- at least for good cause. A commission designed to investigate alleged criminal conduct by particular individuals -- especially a commission with subpoena power -- also raises serious concerns about due process that could render it unconstitutional.

On its face, Conyers's proposed commission appears advisory, but many of its advocates clearly expect more than suggestions in the way of results. Conyers himself has suggested that the statutes of limitations applicable to criminal offenses for "torture" and "war crimes" be extended as part of his effort to rein in the imperial presidency. Leahy's model would be even more questionable, since that body would have the power to offer participants immunity from prosecution -- usually an executive or congressional function. Clearly, much depends on how any such commission would operate and on the nature of its conclusions and recommendations.

In particular, any effort to determine individual criminal responsibility may undercut a commission's "advisory" nature because of the offenses at issue. At least some of these would also be violations of international law and, as such, arguably subject to claims of universal jurisdiction by foreign states. A determination of criminal conduct -- especially if it is the only "authoritative" statement on the subject by a U.S. governmental body -- could serve as a pretext for the international prosecution of individuals. Doubtless, many advocates of such a commission, who also have been among the most vociferous Bush critics throughout the war on terrorism, hope for exactly that result.

They should think twice. Attempting to prosecute political opponents at home or facilitating their prosecution abroad, however much one disagrees with their policy choices while in office, is like pouring acid into our democratic machinery. As the history of the late, unlamented independent counsel statute taught, once a Pandora's box is opened, its contents can wreak havoc equally across the political and party spectrum. If, for example, al-Qaeda is nothing more than a criminal conspiracy -- as some have claimed for many years -- President Obama's charge sheet has already been started. By authorizing continued Predator missile attacks against al-Qaeda leaders in Afghanistan and Pakistan, he has directly targeted those "civilians" with deadly force. That is a war crime.

Obama and the Democratic Congress are entitled to revise and reject any or all of the Bush administration's policies. But no one is entitled to hound political opponents with criminal prosecution, whether directly or through the device of a commission, and those who support such efforts now may someday regret the precedent it sets. Claims that the Bush administration abused presidential powers have been thoroughly reviewed by several congressional committees, and the Justice

Department is capable of considering whether any criminal charges are appropriate. If H.R. 104 or a similar bill is passed by Congress, Obama should nip in the bud this recipe for a continuing political vendetta and veto the legislation.

The writers are Washington lawyers who served in the Justice Department during the administrations of Ronald Reagan and George H.W. Bush.

No New Torture Probes

By Jack Goldsmith

Wednesday, November 26, 2008; Page A13

There has been much speculation about how the Obama administration will deal with what many view as the Bush administration's harsh, abusive and illegal interrogation program. Some have called for an investigation by Congress or the Justice Department, possibly leading to criminal sanctions. Others think such investigations are infeasible or would smack of political retribution, proposing instead that a bipartisan commission look into the matter.

These are all bad ideas. They would bring little benefit, and they would further weaken the Justice Department and the CIA in ways that would compromise our security. (I worked at the Justice Department from 2003 to 2004 on issues that probably would be subject to new investigations, so readers should consider my views accordingly.)

To begin with, all of the relevant facts -- who approved what, what the legal opinions say and what actually happened -- are well known inside the government. The interrogation and related programs have been extensively scrutinized in public sessions of Congress, in many classified sessions by congressional intelligence committees, in several investigations by the CIA inspector general and the Justice Department's Office of Professional Responsibility and by the special prosecutor investigating the destruction of interrogation tapes.

These investigations were politically necessary, and the Obama administration should let them continue. When they are complete, the administration should disclose the facts and documents (including legal opinions) that can be made public without jeopardizing national security. To be credible, the disclosures should include information on the assenting role of congressional leadership as well as Clinton-era actions and legal opinions on issues such as rendition and targeted killing that were precursors to what the Bush administration did.

But we should also recognize the costs of these investigations. Second-guessing lawyers' wartime decisions under threat of criminal and ethical sanctions may sound like a good idea to those who believe those lawyers went too far in the fearful days after Sept. 11, 2001. But the greater danger now is that lawyers will become excessively cautious in giving advice and will substitute predictions of political palatability for careful legal judgment.

This was a serious problem before Sept. 11, and many believe it led to governmental structures and attitudes that precluded detection of the Sept. 11 plot. "I know from my work on this committee for the past 10 years that lawyers at CIA sometimes have displayed a risk aversion in the advice they give their clients," Democratic Sen. Bob Graham said during 2002 Senate intelligence committee hearings. Graham was typical then in complaining about "cautious lawyering" and in noting that "we are not living in times in which lawyers can say no to an operation just to play it safe."

The investigations and public recriminations of the past few years have led many government lawyers to be more risk-averse and politically sensitive than ever. They have also had a harmful effect on the lawyers' clients, especially in the CIA. In response to the many investigations, CIA officials are "lawyered up" and are drawing down their legal liability insurance. None of these officials are likely to go to jail. But the ordeal of answering subpoenas, consulting lawyers, digging up and explaining old documents, and racking one's memory to avoid inadvertent perjury is draining, not to mention distracting, for those we ask to keep the country safe.

And worse, it has spooked the intelligence community. When the CIA was asked to engage in aggressive tactics early in the Bush administration, it knew from bitter experience that the political winds would change and that it might be subject to "retroactive discipline." And so it sought approval from the president and his Cabinet, informed congressional leadership many times about what it was doing and got what it thought were airtight legal opinions from the Justice Department.

But these safeguards failed, and the CIA is once again mired in investigation and controversy. The lesson learned by many at the agency is that politically sensitive counterterrorism actions should be avoided, even if they are deemed legal and even if they have the express approval of political officials. We are going to be living with this skittishness for a long time, to the detriment of our security.

Yet another round of investigations during the Obama administration, even by a bipartisan commission, would exacerbate this problem. It would also bring little benefit. The people in government who made mistakes or who acted in ways that seemed reasonable at the time but now seem inappropriate have been held publicly accountable by severe criticism, suffering enormous reputational and, in some instances, financial losses. Little will be achieved by further retribution.

The best way for the Obama administration to establish a record of what happened under President Bush without further debilitating our national security system is simply to let the many current investigations run their course.

Jack Goldsmith, a Harvard Law School professor, is the author of "The Terror Presidency" and a member of the Hoover Institution Task Force on National Security and Law. From 2003 to 2004, he served as assistant attorney general in the Justice Department's Office of Legal Counsel.

'Truth commission' duplicity? The Washington Times March 3, 2009 Tuesday

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BYLINE: By P.X. Kelley, Oliver Revell and Robert Turner, SPECIAL TO THE WASHINGTON TIMES

BODY:

There is an ongoing debate at the highest levels of government about what to do about alleged illegal conduct of the Bush administration. House Speaker Nancy Pelosi favors prosecutions, the Senate Judiciary Committee will hold a hearing Tuesday on Chairman Patrick **Leahy's** plan to establish a South African-style "**truth commission**," and President Obama has spoken variously about prosecuting "instances of wrongdoing" or "moving forward" by putting past mistakes behind us.

A truly independent and non-partisan inquiry might prove interesting, as many of the most controversial positions of the Bush administration appear to have already been embraced by the Obama team. During confirmation hearings, both Attorney General Eric Holder and Solicitor General nominee Elena Kagan testified that America is at "war" and al Qaeda suspects captured far from the battlefield may be lawfully detained for the duration of hostilities without trial. The Justice Department declared last month that detainees outside U.S. territory have no right of access to American courts.

CIA Director Leon Panetta said during his confirmation hearing that the agency might continue "extraordinary rendition" practices in which terrorist suspects are seized abroad and transferred to third countries for interrogation; and if the interrogation techniques permitted by the president's Jan. 21 executive order are "not sufficient" to get information from a detained terrorist about a future attack, Mr. Panetta said he would seek "additional authority."

Some may honestly believe that "lies" by the Bush administration deceived a reluctant Congress into supporting the removal of Saddam Hussein from power; but a competent inquiry would reveal that - years before President Bush left the governor's mansion in Texas for the White House - the Senate unanimously approved the "Iraq Liberation Act" calling for the replacement of Saddam by a democratic regime.

Even the hated "presidential signing statements" once denounced as unconstitutional by the American Bar Association, might not be behind us, as Professor Dawn

Johnsen, nominated to head the Justice Department's important Office of Legal Counsel, acknowledged in a 2007 law review article that "Presidents do have the authority to refuse to comply with statutes," giving as an example the more than 500 legislative vetoes that have been enacted by Congress since the Supreme Court declared them unconstitutional in 1983. "Consistent with *Chadha*," she wrote, "presidents view such provisions as unconstitutional and do not comply with them. ..." This was, of course, the most frequent reason for signing statements in each of the past four presidential administrations

As fun as such an inquiry might be, there were things in Sen. **Leahy's** Feb. 9 Georgetown University remarks in which he first proposed the "**truth commission**" that raise concerns about whether we would likely wind up with an Independent, nonpartisan inquiry. To begin with, comparing the alleged legal shortcomings of the Bush administration with the brutal torture and murder of an estimated 20,000 South Africans - many of them burned alive - is absurd. Mistakes were made, but this is hardly a national crisis.

Far more troubling was Mr. **Leahy's** other example of what he has in mind: the 1975-76 Church Committee that investigated illegal activities by the CIA and FBI. We remember it well. Headline-hunting senators on both sides of the aisle competed to see who could make the most sensational claims to get their names on the front pages; and when it was over the public was left with a very misleading image of our intelligence community and the fine men and women who serve therein.

We are not suggesting there were not serious mistakes made that were addressed during the Church hearings. But many of the allegations were greatly overstated. An article in the current issue of the Indiana Law Journal, based on an examination of more than 700 pages of recently declassified CIA "family jewels" documents, concludes that but a single activity - the secret testing of LSD on unconsenting Americans - was clearly unlawful at the time. That program was terminated during the Kennedy administration, a dozen years before the Church inquiry.

To mention perhaps the most egregious overstatement, it was repeatedly asserted during the Church hearings that the CIA had been "assassinating" people around the world - a theme Hollywood perpetuates today. One had to struggle through reams of reports to learn that, in the end, the Church Committee could not find a single instance in which the CIA had ever "assassinated" anyone - and CIA directors had years earlier issued directives prohibiting any CIA involvement with assassination. It is true that, pursuant to orders from President Kennedy, the CIA repeatedly attempted to assassinate Fidel Castro; but Castro's blatant efforts to overthrow other governments in Latin America arguably made him a lawful target for lethal measures of collective self-defense.

When the Carter administration took office following the Church hearings it decided to prosecute two senior FBI officials who - following procedures approved by presidents and attorneys general since FDR - authorized warrantless searches (against targets not connected to a foreign power) in an effort to prevent a major terrorist attack on a U.S. military base. Both were convicted of felonies. In the years that followed, it was extremely difficult to get FBI agents to volunteer for counterterrorism assignments. (One of us spent 11 years supervising FBI counterterrorism and counterintelligence efforts and observed this reluctance personally.) The risk-avoidance culture and excessive restrictions on gathering intelligence that resulted from the Church hearings and other congressional attacks on the intelligence

community were major factors in our failure to prevent the Sept. 11 attacks.

The Foreign Intelligence Surveillance Court of Review noted in 2002 that every court to decide the issue held the president has independent constitutional power to authorize warrantless foreign intelligence surveillance, adding that Congress "could not encroach on the president's constitutional power" by mere statute. Just last August, this same court reaffirmed the existence of a foreign intelligence exception to the Fourth Amendment's warrant requirement. Candidly, these legal issues are far more complex than some critics would have us believe, and a new Church Committee-like public inquiry might easily have a similar chilling effect on our ability to recruit good people for future counterterrorism activities.

Were mistakes made during the last administration in the struggle against al Qaeda? Certainly. But rather than risking a partisan witch hunt that could weaken our ability to defend America against future terrorist attacks, we believe President Obama was correct when he declared America should focus on the future. And speaking of mistakes, after leaving the Department of Justice, Griffin Bell remarked to one of us that his biggest regret from his service as Carter administration attorney general was having approved the prosecution of those FBI officials.

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