

Testimony of
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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.