

Testimony of
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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.