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Before The

COMMITTEE ON THE JUDICIARY

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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.