

Testimony of
Thomas Pickering

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Before the Senate Committee on the Judiciary
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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 Congress last week with regard to the pressing economic situation, we must assess the policies that led us to our current position 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 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 purpose 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 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 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 might 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 in a 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, the 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 appointment 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 commissions 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.