



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 prerequisite 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.

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