

A STATEMENT BY ELISA MASSIMINO
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BEFORE THE SENATE JUDICIARY COMMITTEE

HEARING ON
“GETTING TO THE TRUTH THROUGH A NONPARTISAN
COMMISSION OF INQUIRY”

MARCH 4, 2009

We are pleased to submit this testimony on behalf of Human Rights First. Human Rights First works in the United States and abroad to promote a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights law and principles are enforced in the United States and abroad. Human Rights First applauds the Committee for holding this hearing to examine the need for a nonpartisan inquiry into detention, interrogation and rendition policies that violated fundamental humanitarian and human rights standards.

On January 22, 2009, his second full day in office, President Obama issued executive orders putting an end to policies authorizing torture and abuse and shuttering secret prisons.¹ By taking this action, the new Administration took a significant step toward reclaiming America’s role as a champion of human rights and realigning our values and interests.

Work remains to be done to ensure that this administration and future administrations do not repeat past mistakes. Providing policymakers and the public with a clear picture of the past policies and practices and their consequences for national security is essential to fortifying humane treatment standards moving forward. Moreover, a full understanding of how policies of torture and abuse came to be authorized at even the highest levels of government is vital to forging responsible forward looking policies. As Chairman Patrick Leahy stated in a presentation at Georgetown University, “We need to be able to read the page before we turn the page.”

A prompt, open and comprehensive accounting of past abuses and their strategic consequences is also needed to allow the United States to move beyond the highly criticized prisoner treatment policies and practices of the past administration. If a public inquiry is not launched, classified information about the secret detention program and the use of cruel interrogations will continue to slowly surface—through the media, litigation, and victim accounts. The trickling out of new information could go on for years, generating a constant stream of headlines and cover-up accusations that would damage

the world's perception of the United States and remind the American public of past abuses. This would clearly undermine the efforts of the Administration and the Congress to demonstrate fundamental changes to U.S. policy. An independent commission could preempt repeated waves of public backlash by releasing information at one time, while recognizing that mistakes that were made and making recommendations for reform.

There's debate about whether and how a commission evaluating past policies should be formed.ⁱⁱ Congressman Conyers has introduced legislation calling for the establishment of a National Commission on Presidential War Powers and Civil Liberties, and Chairman Leahy has called for a truth commission. Over sixty percent of Americans favor an inquiry of some sort into torture and the abuse of detainees.ⁱⁱⁱ However, in his first White House press conference, President Obama responded to a question on Senator Leahy's call for a commission by saying that he was "more interested in looking forward than I am in looking backwards."^{iv}

Human Rights First, in our blueprint *How to End Torture and Cruel Treatment*, recommended that in his first six months in office the President should support the establishment of a nonpartisan commission, modeled on the 9/11 Commission, to examine the facts and circumstances relating to U.S. government detention and interrogation operations since September 11, 2001; assess the strategic impact of these operations; identify lessons learned; make recommendations to avoid future abuses; and make its findings public. A detailed strategy for setting up such a commission follows below.

Summary

- **Forming a Commission**
- **Appointing Commissioners**
- **Timeline**
- **Scope of the Commission**
- **Authority of the Commission**
- **Reporting**

Details

Forming a Commission. The United States has a long history of employing investigative commissions. Commissions can be established by the President, through a Congressional resolution, or via legislation.^v We reiterate our call for the President to initiate the establishment of an independent nonpartisan commission to examine the facts and circumstances relating to U.S. government detention, interrogation, and prisoner transfer operations since September 11, 2001 and to assess the strategic impact of these operations. We also call on Congress to support the establishment of such a Commission including with legislation to provide commissioners with the authority and resources they need to successfully fulfill their mandate.

Preserving documents. In order to guarantee the commission will have access to all documents relating to detention and interrogation of terrorist suspects, the President should immediately require all agencies to identify and preserve all documentation relating to actions or policies in these areas. After these documents are examined by the commission, they should be preserved for examination by scholars, students, and the public.

Appointing Commissioners. The success of the commission and the acceptance of its findings by the public will hinge on its independence and the identity and reputation of the commissioners. The commission should be comprised of universally respected experts, including individuals who have familiarity with interpreting intelligence information and with military operations. The President should announce a process by which commissioners will be chosen that guarantees representation from both political parties, and the selection of distinguished individuals noted for their knowledge and experience in fields relevant to the issue, including former intelligence officials and retired military officers. Once chosen, commissioners should be given prompt, high-level clearance permitting them access to relevant classified information.

Timeline. Within two months of being initiated the 9/11 Commission had convened; within four months it held its first public hearing; within eight months it issued its interim report; and within 20 months it completed its final 567 page report. To assist in promptly moving the nation beyond past abuses, the new Commission also must be given the mandate and resources to be able to begin its work without delay and to report on its findings within a limited timeframe.

Defining the Scope of the Commission.

Fact Finding. Despite multiple congressional hearings on interrogation policies, internal Justice Department investigations, and military investigations in the aftermath of Abu Ghraib, the information currently available to Congress and the public on U.S. detention and interrogation practices since September 11, 2001, is fragmented and incomplete. An independent, impartial and thorough examination of U.S. detention and interrogation policies and practices in Iraq, Afghanistan, Guantanamo Bay and secret U.S. prison facilities, as well as rendition practices, including how and why such practices and policies were authorized must be a primary aim of the Commission.

Effective Interrogation Policy. Experienced interrogators maintain that abuse is ineffective in gaining actionable intelligence.^{vi} Commissioners and their staff must have access to the record on individual cases to establish whether abusive techniques resulted in accurate and/or actionable intelligence and to assess whether information could have been gained from non-abusive techniques.

An Analysis of Strategic Consequences. An assessment of strategic gains (such as attacks provably averted) and strategic losses (such as failure to gain reliable information or encourage cooperation by detainees as a result of coercive interrogations; undermining of the rule of law, both domestically and abroad; and harm to U.S. counterterrorism

efforts, including through diminished cooperation by allies) due to these policies and practices should be a major focus of the Commission's work.

Foreign Policy Consequences. The United States' embrace of torture harmed relationships with our allies and our influence with the world at large. Incidents where the United States' foreign policy and national security interests were undermined due to other nations' reaction to U.S. interrogation policies should be catalogued and assessed.

Operational Consequences. Alberto Mora, the former General Counsel of the Navy, maintained in testimony before the Senate Armed Services Committee that the operational consequences of policies of torture included the following:

First, there are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq – as judged by their effectiveness in recruiting insurgent fighters into combat – are, respectively the symbols of Abu Ghraib and Guantanamo. And there are other senior officers who are convinced that the proximate cause of Abu Ghraib was the legal advice authorizing abusive treatment of detainees that issued from the Department of Justice's Office of Legal Counsel in 2002.

Second, allied nations reportedly hesitated on occasion to participate in combat operations if there was the possibility that, as a result, individuals captured during the operation could be abused by U.S. or other forces.

Third, allied nations have refused on occasion to train with us in joint detainee capture and handling operations because of concerns about U.S. detainee policies.

And fourth, senior NATO officers in Afghanistan have been reported to have left the room when issues of detainee treatment have been raised by U.S. officials out of fear that they may become complicit in detainee abuse.

The Commission should examine these negative operational consequences in making their assessment of the costs of policies of abuse.

Defining the Authority of the Commission.

Subpoena Power. The Commission should be equipped with subpoena power to secure access to all relevant and necessary information and to call witnesses, including former government officials to testify. Difficulties in acquiring subpoena power from Congress should not, however, prevent the establishment of a Commission. There is much that a Commission could accomplish even without subpoena power with the full support of the President.

No Blanket Immunity. Chairman Leahy has proposed immunity for everything except perjury in his proposal for a Truth Commission^{vii} while the Speaker of the House, Nancy Pelosi, has said she is hesitant to embrace a proposal that would include immunity and block the possibility of criminal prosecutions.^{viii} Human Rights First believes that the Commission should not offer blanket immunity. The work of the Commission should not interfere with efforts of the Department of Justice to investigate past crimes, including crimes of torture which the U.S. government has an obligation to investigate under the Convention against Torture.^{ix} Moreover, the experiences of past commissions of inquiry indicate that immunity does not significantly contribute to fact finding nor does it motivate implicated individuals to disclose information.^x

Transparency

Public Proceedings. The Commission should be instructed to conduct its proceedings in as public a manner as possible, consistent with legitimate national security interests. Specifically, the Commission should hold a series of public hearings, issue public updates on progress made, and make public the documents upon which it bases its conclusion.

Reporting. In addition to conducting its proceedings in public, the Commission should issue an in-depth report on past abuses, which also includes forward looking recommendations. This report should be declassified to the greatest extent possible consistent with legitimate national security interests. In making classification determinations, officials should give significant weight to the benefits of voluntarily releasing such information through the commission process.

Conclusion

It is imperative that the public and Congress have a full understanding of the faulty reasoning that was used to circumvent humane treatment standards so that these standards can be effectively fortified. A nonpartisan commission of inquiry, if sufficiently independent and properly resourced, will allow the U.S. government to determine how it can best guard against future abuses and restore its moral authority as a global leader in advancing human rights.

Endnotes

ⁱ Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009); Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

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- ⁱⁱ Jill Lawrence, *Even reversed, Bush policies divided*, USA TODAY, February 12, 2009, available at http://www.usatoday.com/news/washington/2009-02-11-investigation-side_N.htm.
- ⁱⁱⁱ Jeffrey M. Jones, "No Mandate for Criminal Probes of Bush Administration," *Gallup*, February 12, 2009, <http://www.gallup.com/poll/114580/No-Mandate-Criminal-Probes-Bush-Administration.aspx>.
- ^{iv} White House press conference with President Barack H. Obama (February 9, 2009), available at http://www.whitehouse.gov/the_press_office/PressConferencebythePresident/.
- ^v LISA MAGARRELL, POLICY BRIEF: U.S. INQUIRY INTO HUMAN RIGHTS ABUSES IN THE "WAR ON TERROR", INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (November 2008), http://www.ictj.org/static/Americas/ICTJ_Commission_of_Inquiry_Policy_Brief_rev1_07_Jan_09.pdf.
- ^{vi} Press Release, Human Rights First, Top Interrogators Declare Torture Ineffective in Intelligence Gathering, (Jun. 24, 2008), <http://www.humanrightsfirst.org/media/usls/2007/statement/313/index.htm>.
- ^{vii} Senator Patrick Leahy, Take Action: Support a Truth & Reconciliation Commission, Leahy for U.S. Senator Committee petition website, http://ga3.org/campaign/btcpetition?qp_source=btc_dk.
- ^{viii} Interview with Nancy Pelosi, Speaker of the House of Representatives, on MSNBC's Rachel Maddow Show (February 25, 2009), <http://www.msnbc.msn.com/id/29394872/>.
- ^{ix} Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 12, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85., http://www.unhchr.ch/html/menu3/b/h_cat39.htm.
- ^x MAGARRELL, *supra* note v.