



Statement of the Constitution Project
Submitted to the
Senate Judiciary Committee

Hearing on "Getting to the Truth Through a Nonpartisan Commission of Inquiry"

March 4, 2009

The Constitution Project submits this statement for the Committee's hearing on "Getting to the Truth Through a Nonpartisan Commission of Inquiry." The Constitution Project is an independent think tank that promotes and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to encourage constructive dialogue and to promote consensus solutions to pressing constitutional issues. Thomas R. Pickering, one of the witnesses testifying before this Committee today, is a member of our Liberty and Security Committee. William S. Sessions, who has submitted written testimony, is a member of our Liberty and Security, Death Penalty, and Right to Counsel Committees, as well as Co-Chair of our Courts Committee. The Constitution Project has earned wide-ranging respect for its expertise and reports, including practical, accessible material designed to make constitutional issues a part of ordinary political debate.

The Constitution Project has called upon President Obama to form a non-partisan commission to examine and report on policies related to the detention, treatment, and transfer of detainees after September 11, 2001. The purpose of this commission would be to provide a full and comprehensive understanding of our past and to make sure mistakes are not repeated in the future. This commission would be entirely consistent with President Obama's pledge to move the country forward and establish a firm foundation for doing so.

The Constitution Project believes that creating an investigative commission is a critical step in reaffirming our nation's commitment to the rule of law. The purpose of such a commission should be to learn all of the relevant facts about our detention policies and practices after September 11, not to seek criminal prosecutions. Therefore, the commission would neither promote nor preclude prosecution, but would leave that decision to federal prosecutors in the Justice Department.

We need a full understanding of what happened, including policy failures in the recent past in order to restore the rule of law and avoid making the same mistakes in the future. To fulfill its mandate, the commission should be established under procedures that guarantee independence and provide protection from undue political influence. This is not a partisan issue. Members of the commission, therefore, should be persons of irreproachable integrity who command public confidence. The commission must be empowered to issue subpoenas in order to uncover the entire truth. And it is imperative that this commission be able to execute its mandate in a timely and efficient manner so that both the American people and our policymakers can learn the truth and move forward into a new era of accountability.

We recognize that several government investigations and oversight efforts into related matters have recently been completed. While they represent meaningful steps in the right direction, the full extent

of our detainee policies and their consequences still remain unknown. Prior efforts have not been government-wide and have encountered unprecedented levels of government secrecy. They have not assessed the ways that the different agencies and government officials worked (or failed to work) together. No single congressional committee has jurisdiction over all of the agencies and officials involved to conduct a comprehensive assessment of the way our policies and practices were developed and implemented. A thorough investigation of detainee policies and practices is therefore necessary to enable the President and Congress to develop policies that preserve constitutional safeguards and promote national security as we move forward.

Our nation has a strong tradition of forming commissions that have led to important policy changes. Past experience—most recently the 9/11 commission—demonstrates that an effective fact-finding mission can generate proposals for reforms that garner support from both the executive and the legislature. A commission report would serve as a basis of cooperation for the two branches as we continue to confront difficult detainee policy issues. The widespread positive reaction to the 9/11 commission report also suggests that a report would inspire public support for any necessary changes in detainee policy.

Further, an investigative commission would be an important step in reaffirming our nation's commitment to the Constitution. Detainee policies after September 11 have shifted the balance of powers away from the system of checks and balances that is so fundamental to our system of government. Expansive claims of executive power have engendered policies that damaged individual rights and constitutional principles. Without a clear repudiation of these legal theories, dangerous precedents would remain, leaving the door open for future abuses. A commission would help restore institutional limits and ensure accountability for future administrations, Democratic or Republican.

Just as importantly, an independent, non-partisan commission would go a long way to restoring trust at home and abroad. Post 9/11 detainee policies have undermined shared values, shaken the foundations of democracy and compromised the public's faith in our government. Collectively, the American people have a right to know what actions were committed in their names. Likewise, countries from around the world have a strong interest in learning the truth. Detainee policies have eroded our international reputation and diminished our moral standing. A commission would send a clear signal to our allies that America is committed to understanding the truth, making necessary changes to restore the rule of law and to re-engage with the international community once more.

It is certainly tempting to move on without investigating what happened and to ignore this chapter of American history. We do not suggest that this process will be easy; uncovering hard truths never is. But we cannot allow these detainee policies to become an indelible mark of shame on our democracy. Our obligation to reveal the truth should not be seen as a distraction from the serious challenges our country currently faces. Understanding our past is a crucial step to building a better future free of these same mistakes.

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