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**Policy Brief:  
U.S. inquiry into human rights abuses in  
the “war on terror”**

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### **I. The policy question**

This policy brief addresses the need for a concerted and coherent effort by the U.S. government to investigate the full dimension, nature and underlying features of violations of U.S. law, international human rights and international humanitarian law standards by its agents in connection with counterterrorism policy and actions since September 11, 2001. Reports and inquiries to date leave no doubt that U.S. agents have committed or tolerated abuses. Likewise, available information indicates that accountability has been focused mostly on the lowest levels of responsibility and pursued unevenly.

This lack of respect for human rights by the U.S. government and its agents has occurred in the context of government policies of secrecy and denial. The democratic principle that openness in government can act as an important check against the possibility of government abuse has been steadily undermined. A critical information gap, only partially addressed through fragmented investigative efforts within and outside government, leaves important questions unanswered, such as how and by whom abuse has been authorized and carried out, on what scale and with what human and policy consequences.

The first important steps in righting U.S. policy in connection to the “war on terror” must be to ensure that abuses cease, that instructions to avoid future abuses are clear and unequivocal, and that the government’s commitment to international treaties such as the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment are fully honored. This is a topic on which a number of human rights groups and other advocates have already developed helpful policy briefings. Likewise, renouncing past government policies of secrecy and denial and developing a stronger, more explicit human rights policy is necessary to mark a new era in human rights and in the U.S. approach to conflict and terrorism. Important guidelines also have been developed on these issues. A new national security policy that moves past the deceptive, all-encompassing “war on terror” language should start to set a new framework for discussing national security and human rights. All of these issues are urgent and necessary. However, it would be inadequate to engage these forward-looking issues only in light of information uncovered to date, and it would be difficult to chart a rights-

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respecting course for the medium- and long-term without a clear, thorough and honest understanding of what has gone before.

This policy brief aims to bring to that task the insights drawn from past U.S. inquiries and ICTJ’s extensive international experience in the realm of broad, special commissions of inquiry (truth commissions) following periods of disregard for human rights, abuses of power and failures of accountability. Part II of this brief examines why such an inquiry is necessary and what function it could serve in the present context. An analysis follows in Part III of the characteristics that have proven influential in past successful inquiries in the United States and around the world. Part IV shifts the focus to the current U.S. context; it explores the current political dynamics as they relate to commissioning an inquiry and offers guidance on navigating political risks. Policy options for the United States are reviewed (Part V). Finally, recommendations for further action in the immediate, short- and medium-term are set out (Part VI).

## II. The value and urgency of a special inquiry

An investigative body, special investigative committee, or commission of inquiry (hereafter generically called an inquiry) should be established to examine the causes, nature, extent and effects of gross or systematic violations of U.S. law and applicable international human rights and humanitarian law standards that may have been committed in relation to the “war on terror.” A number of important policy reasons exist for commissioning such an inquiry, including at the very least:

1. **Ensuring ongoing accountability** for government security policies and practices and preventing future abuses. Systematic torture and cruel treatment, arbitrary detention and disappearances are less likely to occur when accountability mechanisms exist to bring abuses to the public’s attention. In this regard, international law also recognizes that linked to a state’s duty to ensure respect for human rights is a collective “right to know” that aims to inform the broader public and serve as a preventive measure against recurrence of violations.
2. **Providing a solid basis for determining new, rights-respecting policies.** A commission of inquiry is uniquely adapted to this aim by its capacity to identify underlying causes for serious human rights abuses and explain failures of accountability. On this basis, an inquiry can aid in identifying those areas where legislation or executive action is necessary to change policy and formulate concrete recommendations to prevent future abuses.
3. **Helping to restore citizens’ faith and credibility in U.S. democracy** by ensuring that people have access to sufficient, transparent information about the federal government’s activities that help them understand and question policies, and by reinstating or strengthening constitutional checks and balances. A timely inquiry also could create a more efficient, proactive reclassification of information than through individual Freedom of Information Act (FOIA) requests or litigation alone.
4. **Rebuilding the United States’ reputation** as a leading democracy and protector of human rights through an explicit commitment by the new administration to review past abuses and to bring change. An inquiry can also make it possible for other

governments to investigate effectively their own agents' misconduct in connection with unlawful detentions and mistreatment of detainees in the global dimension of the "war on terror."

5. **Recognizing the humanity and experience of all affected individuals**, thus making them less vulnerable to future abuses and reinforcing the United States' commitment to the rule of law. This also means that when the United States demands that other nations comply with international standards, it does so without hypocrisy.

### III. Features of an effective investigative process

Past experience demonstrates that certain key features of a commission of inquiry help to successfully develop an accurate picture of the machinery of systemic abuse, ensure that the investigation's conclusions are known and contribute to change, and recommend appropriate steps to follow. These include:

1. **Legitimacy of authority:** For an inquiry to be effective, the source of its mandate and investigative authority must convey legitimacy, credibility and capacity. Regardless of which branch of government creates the commission, its motivation should be explicit and convey an unimpeachable commitment to allow the investigation to follow the facts where they may lead.
2. **Mandate and scope of the inquiry:** An effective mandate must guide the investigation's focus without creating a straitjacket. Defining the mandate and scope of inquiry in clear and objective terms, including period of time, types of violations and relevant context, is crucial. Topics excluded from an investigation's core but relevant to the big picture might be dealt with serially, incorporated as background or complementary studies to an inquiry, or addressed through other avenues of investigation and accountability.
3. **Powers granted to an inquiry:** Investing a commission of inquiry with the power to issue subpoenas and to protect witnesses and information contributes to its effectiveness. Even if such powers are not actually used, their potential use can provide leverage in obtaining information and safeguarding sources. A strong inquiry that lacks these powers can still be successful and may even benefit from a less procedurally complex process. However, when access to government files is denied or limited, these powers are critical.
4. **Composition and selection process:** The legitimacy, credibility and public support of a commission depends in large part on the selection of commissioners. An open and inclusive selection process is beneficial. Commissioners should be respected individuals who are known for their integrity; they should be sought out for their objectivity rather than to evenly allocate bias or facilitate a partisan quid pro quo. Even when efforts have been made to include a broad political spectrum, the emphasis should be on individual integrity, not political loyalties. Commissioners should collectively have a baseline of expertise required by the nature of the inquiry. Although carefully vetted expert staffing can complement this expertise, commissioners should be actively engaged in the substance and oversight of the process rather than sit as figureheads.

5. **Independence:** In order to arrive at the truth and make appropriate recommendations, commissions of inquiry ought to be scrupulously independent. Where an inquiry's independence is compromised, conduct is more likely to be (or appear to be) biased, undermining the accuracy of reporting and diminishing public confidence. Independence can be guaranteed by appropriate selection of commissioners, by establishing the fiscal and institutional autonomy of the inquiry, and by immunizing commissioners from liability in connection with their work.
6. **Comprehensive and accessible report:** A successful commission of inquiry documents its findings in an accessible manner that can be a resource for further investigations or other occasions requiring detailed information about what happened, why and who was responsible. An accessible report, or a readable executive summary of a lengthier document, can become a valuable tool for education, making policy and future accountability. A public archive of declassified materials, other documents and testimony can also serve both academic and practical purposes.
7. **Public engagement:** Encouraging public interest in the investigative process and outcomes can make people more invested in the government's response and aware of the reasons for change; additionally public engagement could generate real debate in government and society in general about the underlying issues. Public hearings and other means of providing timely, transparent and accessible information about the process, information gathered and conclusions are critical during the life of an inquiry and afterward.
8. **Relation to other accountability policies:** Commissions of inquiry that are initiated as a means to sidestep accountability rather than to deepen it will fail on many levels, but perhaps most importantly will result in increased skepticism about government capacity and commitment to hold its policymakers and agents accountable in the future. A commission of inquiry should not close doors to other avenues of accountability, future reforms or eventual reparations, and should instead contribute to these. Likewise, urgent steps in these areas should not be held hostage to an inquiry's timeline.

#### IV. Strategic policy considerations

The context in which the new U.S. administration addresses this policy issue also has an enormous impact on strategy and on any commission of inquiry's eventual success. Inquiries perceived as a means to target political opponents lack credibility; those that do not follow a clear break with past policy can founder over ongoing abuses; and inquiries seen as a salve to impunity are counter-productive. Moreover, sensitive issues cannot be addressed forthrightly in a commission of inquiry unless steps are taken to minimize real security concerns. The following are some of the key points that must be considered in the U.S. context as President-elect Barack Obama assumes office in January 2009:

1. **Overcoming political risks:** The new administration has incentive and momentum to take groundbreaking steps toward overcoming and redirecting past policies. Simultaneously, the Democratic shift in the balance of power combined with a focus on past abuses that occurred during a two-term Republican administration could open up the new government to criticisms of partisan motivation rather than concern for

the substantial issues at stake. While President-elect Obama brings solid political capital to the White House, a badly managed inquiry could risk a divisive backlash from constituencies not won over in the electoral process, as well as from the military or from some members of his own party. The momentum should not be lost, and risks should be minimized through:

- Careful selection of nonpartisan commissioners of recognized integrity;
- Cultivating bipartisan support for the process through consultation on the mandate, selection process and adequate guarantees of legitimacy and independence, recognizing that any report and recommendations of a commission will require serious attention and debate;
- Ensuring that the mandate is not defined in political terms;
- Including in the mandate consideration of precedents for abuses that may have been set prior to 2001 and concluding the period under scrutiny only *after* ordering measures to cease any identified abuses rather than at the end of the prior administration;
- Grounding the commissioning of an inquiry in existing, credible information and on the recommendations of respected national and international opinion leaders. Where real abuses have occurred, politics should not be used to trump the new administration's obligation to uncover the truth and foster accountability.

2. **Timing and scope of an inquiry with troops on the ground:** The fact of the ongoing armed conflicts in Afghanistan and Iraq could shift an inquiry's focus from past events to ongoing situations or complicate the reach and effectiveness of the investigation. An inquiry during conflict can raise questions about interference with military and intelligence capabilities and present real difficulties in accessing credible information about what has happened – particularly from victims' perspectives – in those theaters of combat. Extending the inquiry to certain crimes or leaving the period under review without a clear end date also could reduce the incentive for authorities within the new administration to oversee the conduct of military and civilian personnel currently. Investigations of events such as detentions, renditions, and torture or mistreatment, whether in the United States, Iraq, Afghanistan, Guantánamo or elsewhere, may not entail undue risks or difficulty, while other events, such as combat operations that may have resulted in violations of international humanitarian law, require a very specialized approach (or a stable post-conflict setting) for the inquiry to be successful and relatively secure for investigators and witnesses. These risks can be managed by:

- The design of safeguards such as the exceptional use of closed sessions in relation to sensitive intelligence information;
- Facilitating commissioners' and witnesses' travel to safe locations;
- Limiting the temporal scope of the commission to past abuses after a clear break with the past has been accomplished;
- Giving careful consideration to the substantive scope of the commission, taking into account what realistically can be investigated while troops remain on the ground and the specialized methodologies required for investigating specific types of abuses;

- Demanding that military and civilian justice systems, as appropriate, carry out serious investigations of any new allegations of abuse, and leaving no doubt that the executive expects oversight of officials’ conduct and responsibility to be robust and effective;
  - Ensuring that full, accurate documentation of events occurs in order to ensure accountability, and that unresolved allegations or inadequate investigations of past abuses are reviewed and reported on by incoming authorities.
- 3. Timing and sequencing of accountability policies:** A thorough, wide-reaching commission of inquiry takes time, and in the meantime there must be an accompanying capacity to deal quickly with the urgent, present-day legacy of these problems. Steps that must be taken and that could ameliorate this risk include:
- Immediately ordering cessation of abuses based on what is already known;
  - Taking the step short-term, by means of an executive order, to ensure that documents are not destroyed and that each agency of government begins to catalog its portfolio of allegations of wrongdoing and harm, investigations and/or reports relevant to the subject. Agencies should review document classifications and declassify these to the maximum extent;
  - Ensuring that a commission of inquiry does not hold up any prosecutorial initiatives, especially where statutes of limitation are at issue. Avoid allowing a commission of inquiry to serve as a substitute for criminal accountability by refusing to endorse any sweeping pardons or immunities;
  - Using the commission to examine the broader picture and systemic problems rather than as a mechanism to resolve (or worse, postpone) urgent decisions.
- 4. Public interest in and demand for the truth:** The U.S. public is substantially uncomfortable with torture, cruel or inhumane treatment, and secret detention, and there is widespread support for shoring up U.S. values, legal standards, and adherence to international law. The public’s greatest concerns – the safety and well being of U.S. troops and more generally, national security – have been used to cultivate fear and dehumanize victims who are not citizens. The public may prefer to avoid an inquiry that addresses the human suffering of such victims or implies that U.S. troops may have played a role in abusive practices. Similarly, some may argue that there is no appetite to risk dividing opinion or pointing the finger at responsible parties, whether individuals or institutions. Democrats may well share these views and, in Congress, be reluctant to review their own actions or failures to act with regard to known abuses. Nevertheless, the new administration can and should use its political capital and early momentum to ask U.S. citizens and political leaders for their support to do the right thing. The government can take several steps to build popular consensus on the need for and value of an inquiry:
- Draw on documented abuses by credible sources to point to the need to know more;
  - Be very clear about the principled reasons for conducting the inquiry, linking this step not only to returning to the fundamental standards and rule of law that the U.S. democracy holds dear, but also as a way to ensure that when the United

States demands respect by other nations and groups for the rights of its military personnel, agents and citizens in general, it is on firm ethical grounds;

- Recognize that there is demand for the truth and reform in terms of recommendations put forward in existing congressional, Department of Justice and some Department of Defense inquiries into specific events or patterns of conduct; in statements by military personnel interested in restoring the reputation of the U.S. military; and in calls for truth and accountability from a broad array of U.S. rights groups, as well as the international community;
- Consider that commissions of inquiry often build public interest through the course of their operation. As information is shared and a more complete narrative emerges, public interest and demand for the truth are likely to coalesce.

- 5. Linking truth and justice policies:** Establishing a commission of inquiry by itself should not be seen as a sufficient measure to achieve accountability for alleged U.S. abuses committed in relation to the “war on terror.” Revelations of abuse without concrete steps toward some prosecutions are unlikely to encourage responsibility in government or public confidence about the government’s will to hold its policymakers and agents accountable in the future. Rather, such a policy would reinforce existing and future expectations of impunity. For that matter, given the constraints of the trial process, prosecutions alone would likely be insufficient to fully disclose the patterns and policies underlying criminal acts or to encompass all serious crimes. Understanding the truth *and* prosecuting individuals responsible for serious violations of U.S. law (and the applicable international human rights and humanitarian law norms incorporated therein) are necessary elements of a policy to reestablish accountability and the rule of law in regard to security policy.

A misconception exists that a broad pardon or amnesty would improve access to information needed to gain a full understanding of the truth of U.S. abuses in the “war on terror.” International experience demonstrates that removing the threat of prosecution through a prior pardon or amnesty does not motivate planners and perpetrators of abuse to disclose information voluntarily. Even conditioning individual grants of amnesty (or use immunity) on first disclosing the truth about events – as in the case of the much-referenced South African Truth and Reconciliation Commission – has not been proven to be a particularly successful way of ensuring disclosure of the truth. In fact, commissions of inquiry can serve the aims of justice by collecting leads, organizing information and determining the underlying systems at work; prosecutors could later use this information to build cases and prosecute them more effectively. Past experience in the United States indicates that a commission of inquiry can be followed by successful prosecutions. The fear that unresolved questions of future prosecution can stymie an inquiry can be ameliorated by taking into account the following factors:

- Prosecutions should focus on those of high levels of responsibility. Enough people at lower levels of responsibility and even some higher military officials are often willing to speak, and they can give information on decisions made at higher levels;
- Intelligence and military strategy decisions tend to be heavily documented in the United States, so access to and thorough analysis of such documents may make a

significant inroad in unveiling the truth about abuses and failures of accountability;

- The judicious and exceptional use of conditional, individual grants of use immunity for lower ranking personnel, where strictly necessary in order to compel full, honest testimony, can help uncover the truth if conditions are rigorously enforced, the measure is applied in a very limited manner and solely for the purpose of obtaining information that is unavailable through other means, and perjury charges are brought to bear as necessary. However, lessons from the United States and elsewhere suggest that where this approach is used liberally, for political reasons or arbitrarily, it can be counter-productive. In other words, it should relate clearly to the objective of achieving optimum levels of accountability;
- A commission of inquiry can travel and meet with victims and other witnesses in confidential or public settings, by video link, or otherwise, as appropriate;
- Often commissions of inquiry generate their own “pull factor” in which people seek to testify publicly, even against their own interests, to be sure their point of view is represented;
- Political will in favor of disclosure at the level of the executive can make an enormous difference, by setting a positive example and sending a consistent message on disclosure;
- At the very least, an inquiry should not preclude criminal prosecutions at some point in the future. Consideration should be given as to how an inquiry’s information-gathering activities and analysis could be useful to future prosecutorial efforts. For instance, a commission could map violations in such a way as to contribute to a future prosecutorial strategy. It could also undertake valuable steps to preserve and organize evidence. A commission of inquiry should have the power to recommend further investigations or prosecutions on the basis of its findings.

## V. Policy options

Several policy options exist that could address the need for the kind of comprehensive, coherent investigation discussed in this document. Before addressing the main forms of commissions of inquiry that might be adopted and discussing the strengths and weaknesses of each, it is important to consider whether lesser measures or the status quo might be equally satisfactory:

1. **Continued reliance on congressional and executive agency investigations:** Both houses of Congress have contributed substantially to the pool of information that is currently available, through numerous hearings, topical inquiries and requests for documents and interrogatories to officials. However, these numerous and sometimes overlapping forays into the topic do not provide a big picture and in fact tend to fragment information further. The Office of the Inspector General of the Department of Justice, for example, in conducting an important review of the FBI’s role in detainee abuse and/or failures to report abuse, found widespread use of torture or cruel treatment. However, this investigation was carried out with a limited mandate.

The Department of Defense has undertaken numerous reviews of the treatment of detainees, particularly in the wake of revelations about Abu Ghraib, but these often remain internal, can be self-protective, and are fragmented, incident-specific and developed separately from one another. As a result, conclusions about systemic problems generally have been lacking.

- These reports would be critical sources of information for a commission of inquiry but cannot substitute for a more comprehensive, independent and objective review;
- Efforts should be undertaken to collect the information gathered to date to identify existing gaps and lay the groundwork for a more sustained, coherent inquiry.

## **2. Continued reliance on investigative journalism and use of FOIA by NGOs:**

NGOs' use of existing legislation to uncover information and encourage declassification of key reports, alongside efforts by journalists and other writers to explore hidden truths about alleged U.S. abuses in the course of the "war on terror," have been indispensable in expanding the information available to the public to date. (For example, the ACLU has catalogued a substantial amount of information gathered through FOIA requests and litigation.) This should be encouraged by policies that return to the principles of presumed government openness that underlie the Freedom of Information Act and that overcome the recent tendency toward excessive government secrecy. However, these are isolated, piecemeal approaches to the issues that together provide meaningful insights into U.S. actions and their consequences but fail to investigate in an organized, coherent and comprehensive way that can lead to a deeper understanding of events. Moreover, by themselves these efforts do not represent a government commitment to seeking the truth and responding to findings.

- Such efforts should be encouraged and facilitated, and the material obtained by these investigative efforts, as well as their analysis, should be reviewed carefully as an important source of information for a commission of inquiry;
- Immediate steps could be taken to create a unified, cross-referenced catalog of publicly available information; stimulate publication of this and any additional data; and, where necessary, create trustworthy means to convey confidential information that makes sure witnesses and whistleblowers are protected from retribution.

The following describes the various forms that a more broadly focused commission of inquiry might take, and discusses the strengths and weaknesses of each model. All of these are models that have been previously used in the U.S. There is a clear trend among U.S. accountability advocates to call for an independent, nonpartisan commission of inquiry that focuses on detentions, renditions, torture and related serious abuses. However, views differ on how such a body should be created and where it would operate most effectively. Different approaches to the scope of inquiry also could be adopted. All of the following policy options must be considered carefully to determine where the greatest political weight could be gathered in support of an inquiry and yet still ensure that the inquiry is imbued with legitimacy and credibility.

- 3. Congressional select committees or investigative commissions:** Created by resolution in either of the houses of Congress or jointly, this form of inquiry is endowed with congressional powers, including subpoena power and the power to offer witnesses limited forms of immunity. It can take advantage of some members' pre-existing access to secret documents and would operate outside of the orbit of the executive. Such independence can be a particular benefit when executive branch agencies such as Justice, Defense or Homeland Security are at the heart of an inquiry, although this can be less of a problem when a new government takes the helm with a pledge to adopt significant changes. More importantly, this model could help restore the appropriate and robust oversight role of Congress with regard to executive power and policy. Given the ongoing and prior congressional inquiries to date and recent subpoenas for documents, Congress could take advantage of existing information and momentum toward informing the public and government, and holding those responsible accountable. Within the model of a congressional-led investigation, a select committee may be the best approach since key committees that have been working on these issues for several years could remain involved and could join together to tackle a comprehensive mandate with the aid of outside expert staff. Some of the risks and weaknesses inherent in this approach include:
- It is impossible for such an inquiry to fully rise above partisan politics even when organized in an even-handed, bipartisan way. Partisan divides tend to be particularly intense in relation to national security issues and ongoing conflict;
  - Congress is unlikely to have any real enthusiasm for investigating its own past failings in respect of its oversight and legislative function;
  - There is a question whether Congress can deal with the sheer scale of the investigation required to produce a coherent view of past systematic abuses and failures of accountability in relation to the “war on terror,” while dealing with two wars, a severe economic crisis and President-elect Obama’s ambitious agenda. Such demands for attention might mean that investigations continue for years without concluding;
  - While Democratic control in both houses could allow the majority party to push a resolution through for a congressional inquiry, it is uncertain how much active opposition could affect the inquiry or its ability to move swiftly. Conversely, situating the investigation in Congress and including Republicans in a minority role may be one way to overcome criticisms of a political witch-hunt. Seeking a common approach to the issues through discussion “across the aisle” could help neutralize concerns and misconceptions; but it might also lower the bar substantially in terms of the breadth and depth of the inquiry.
  - A congressional commission is likely to be seen as at risk for politicizing the inquiry. If such a model were adopted, it would need to ensure maximum transparency and openness through public hearings and other means.
- 4. Presidential commissions:** Presidents have created advisory commissions or commissions of inquiry by means of an executive order. These can be particularly useful when there is a strong commitment in the executive branch, but weak consensus in Congress. Where much of the relevant information resides in executive branch agencies, a president can effectively and efficiently marshal cooperation

without the need for subpoena power. Moreover, presidential commissions of inquiry can be nonpartisan and can select from a broad range of potential commissioners, which strengthens the commission’s legitimacy, credibility and relevant expertise. However, some of the weaknesses and traditional usage of such commissions should be considered:

- Presidential commissions do not have subpoena power or the authority to grant and seek enforcement of immunity. In theory the president could invoke his pardon power to condition freedom from prosecution upon a truthful accounting of events and responsibilities. Since passage of immunity legislation, however, this use of the pardon is rarely - if ever - used. Further, the president cannot obligate a witness to accept a pardon.
- The president can seek a congressional resolution delegating subpoena powers to such a commission. While this could be simpler than passing legislation to create a statutory commission, it would require marshalling sufficient support in Congress;
- Presidential commissions have been created typically in response to public pressure and concern, in both the best and the worst sense. In the latter case, they can carry a connotation of self-protective motives, lack of independence or tokenism. However, if invoked by an incoming president to address an inherited set of problems, this policy choice may be seen as a wise, objective way to investigate and generate recommendations without politicizing the issue further;
- Presidential commissions may be seen as too closely identified with the executive and thus lacking in independence. This might be avoided through a very transparent selection process for commissioners, a clear mandate, a firm commitment to independence, and public release of the report;
- Expending a new president’s political capital on such an investigation may pose risks, but a presidential commission could also be a good way of asserting a new, decisive direction in security policy. It also ensures that whatever changes are brought to the critical issues of the conduct of U.S. agents in the “war on terror” and to accountability in the future will be serious and well founded;
- A presidential commission could work rapidly to develop the information needed to guide the president’s policy decisions in key areas such as prosecutions, institutional reform and approaches to military and intelligence operations. However, short time frames have severely hampered previous presidential investigations of this type, so sufficient time for effective investigation would need to be allotted to the process.

5. **Legislatively mandated commissions:** A commission of inquiry created by legislation shares the flexibility of one created by executive order because it can devise a nonpartisan selection process and commission that has the autonomy and independence that other models may lack in practice or appearance. It can be granted the broader powers of a congressional commission. This kind of commission can be protected from failing political will if its investigation starts to threaten interests of an individual, political party or branch of government. It may be the best type of commission to press for when there is strong initial consensus in government that such a commission is needed and a commitment to allow it to work unencumbered

and with government’s full collaboration. A strategic assessment needs to be made whether such a commission would enjoy more or less legitimacy and political weight because of its potential place outside of government. Other potential weaknesses include:

- In the negotiation process, important aspects of the commission’s mandate may be compromised in order to gain passage, or it may be created as a sub-part of another piece of legislation that contains adverse provisions.
- The same problem of dilution can occur in regard to the selection of members, where trade-offs may create a partisan or bi-partisan commission protective of certain interests.
- Where there is a lack of political will to support a commission, it can have difficulty in obtaining cooperation from government agencies in such things as the production of documents;

## VI. Recommended policy steps:

### 1. For President-elect Obama’s Transition Team:

- **Assess the potential to initiate an inquiry**, including examining the options of a congressional select committee, a presidential commission of inquiry or legislative enactment of a commission. The transition team should make sure the inquiry is a priority on the agenda and build consensus toward a strong, independent and nonpartisan approach.
- **Consider the potential for a special task force in the attorney general’s office or the appointment of an independent prosecutor** if needed to address crimes that may have occurred and may continue to occur, particularly if statute of limitations issues are at stake. Likewise, consider how a commission of inquiry could best complement such an approach. If a specific prosecution policy on these issues is not planned for the early days of the new administration, then the team should take care to avoid foreclosing future criminal investigations.
- **Review other policy briefs regarding the need for institutional reform** to prevent future abuses and to make a clear break from policies that may have fostered abuses or failed to ensure accountability. This sets the basis for a legitimate, effective inquiry.

### 2. Immediately upon taking office:

- **Issue executive order(s) to set the stage for an inquiry:**
  - **Renounce torture:** The president should renounce the use of torture and cruel, inhuman and degrading treatment, and break from prior policies, practices and/or legal opinions that implicitly or explicitly condoned such practices.
  - **Safeguard documentary evidence:** The president should require all agencies with any jurisdiction over the United States’ pursuit, detention and/or treatment of alleged terrorists and/or over related military, intelligence, political policy and actions in the “war on terror” to identify and preserve all documentation of actions and decisions, information and

investigations, and submit an inventory of classified and non-classified documents to the president within 30 days.

- **Ensure thorough and serious investigations of alleged abuses going forward:** The president should make a clear statement that U.S. law, including federal criminal law, the Uniform Code of Military Justice, and guidance from the revised Army Field Manual, governs the behavior of all agents of the United States and will be strictly enforced. Military and civilian prosecutors are expected to take swift action in the event of allegations of serious abuse within their respective realms. The president should require ongoing reports on the results of such investigations.
- **Announce presidential support and preparatory steps for an investigation of past abuses.**
  - **The president should announce his intention to promote a thorough, independent examination of abuses** that may have been committed by U.S. officials or agents in connection with the U.S. response to the events of September 11, 2001, or in relation to alleged acts or threats against national security.
  - **The president should identify and assemble staff and advisers who can draft a policy statement** clearly explaining the motivations for a commission of inquiry. This group should consult with political, military and human rights groups, as well as journalists and other civil society sectors well versed on the issues regarding the inquiry’s proposed objectives, scope and form. It should also advise the president on whether to initiate legislation, issue an executive order creating a presidential commission, or promote a congressional initiative.

### 3. Within the first 100 days of the new administration, the president should:

- **Develop a proposed mandate and appointment process:** The preparatory committee should develop a draft mandate that draws on best practices in the United States and elsewhere, take steps to ensure that sufficient resources are forthcoming, and determine an appointment process for commissioners that ensures the credibility, integrity and independence of the process. This committee should also work to build political and public awareness and consensus in support of the initiative.
- **Appoint a commission of inquiry and ensure its independent operation:** An independent, legitimate and credible commission of inquiry should be appointed as early as possible with a clear mandate and the resources required to undertake its investigation. The mandate should extend to the investigation of serious violations of U.S. law and applicable international human rights and humanitarian law standards, as well as failures of accountability, in connection with the U.S. response to the events of September 11, 2001, and/or in relation to alleged acts or threats against national security (the “war on terror”). The mandate should encompass, at a minimum, detentions, renditions, treatment of detainees and related acts or omissions. The mandate should include adequate powers of investigation and the expectation that the commission issues findings, conclusions, and then formulates recommendations to the president, Congress and

others as appropriate, including forward-looking measures to ensure respect for the rule of law while adequately addressing national security concerns.

- **A fully operational commission of inquiry:** By the end of this period the inquiry should be fully operational.

4. **Within the first 18 months the commission of inquiry should:**

- **Submit a progress report by the 2010 State of the Union Address:** The commission should have made significant progress and be capable of producing an interim report.
- **Submit a final report by no later than July 2010:** A full report and recommendations should be submitted to government and made public to the fullest extent possible by no later than July 2010; however, the mandate could provide for an extension of up to six months upon a reasonable showing that more time is required to complete its work.