

The Rise and Permanence of Quasi-Legislative Independent Commissions

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Disclaimer[±]

ABSTRACT

This article explores Congress's recent trend of creating quasi-legislative independent commissions to augment its own investigations, and determines what factors may enhance the chance that a commission will prove successful. Although Congress has never been the lone forum for investigations, since 2001 the legislature has been empanelling entities of outside experts to investigate the most significant economic and national security issues. This Article begins with a history of governmental investigations in America, highlighting activity by Congress, independent agencies, and presidential commissions. Next, it describes the modern political, communications, and scheduling strains on Congress that have created an opportunity for new types of investigations, and offers case studies of three quasi-legislative independent commissions – the Commission on Terrorist Attacks Upon the United States, the Commission on Wartime Contracting in Iraq and Afghanistan, and the Financial Crisis Inquiry Commission. Then, this Article scrutinizes these case studies and concludes that a quasi-legislative independent commission is most likely to be successful where it has a limited scope and investigative flexibility, features members seen as free from political pressures, uses discretion in compelling information, and ties its mission to larger legislative reform. Finally, this Article concludes by offering advice to practitioners on how to best represent clients before quasi-legislative independent commissions.

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Introduction

The history of America, in many ways, is a history of governmental investigations. Beginning with the Constitutional Convention in 1787, and continuing throughout the nation's history, leaders in government have conducted public policy in part by using all manners of investigation and inquiry.¹ Former Senator Sam Ervin (D-NC) remarked that investigations “can be the catalyst that spurs Congress and the public to support vital reforms in our nation's laws.”² Senator Ervin cautioned, however, that investigations may also “afford a platform for demagogues and the rankest partisans.”³

At various times, these investigations have been concentrated in independent commissions, the halls of Congress, and the executive branch. In recent years, Capitol Hill has been the locus of much of the nation's investigative activity. Members of Congress from both parties have allocated additional time to oversight and investigations, and have all but mastered the art of using investigations to further political goals, develop policy agendas, and drive legislative activity.⁴ If the pundits are right, congressional investigations, it seems, have become the alpha and omega of the modern Congress. Increased congressional activity in the investigations space, however, is augmented by independent commissions, which have been called the “fifth arm of government.”⁵ Due in part to schedule, resource, and topical constraints, Congress has conducted major investigations by empanelling quasi-legislative independent

¹ U.S. SENATE: A HISTORY OF NOTABLE SENATE INVESTIGATIONS, <http://senate.gov/artandhistory/history/common/briefing/Investigations.htm> (last visited Sept. 6, 2011) (describing investigations as “a critical tool for legislators to formulate laws and inform public opinion”).

² *Id.*

³ *Id.*

⁴ See, e.g., Brian Friel, Raise Your Right Hand, NAT'L J., Jan. 19, 2008; Peter Nicholas & Christi Parsons, With GOP Leaders Preparing To Regain Subpoena Power, the White House Ponders Adding Legal Staff, LOS ANGELES TIMES, Oct. 21, 2010, at A1; Farah Stockman, Democrats May Use Probes To Force Policy Shifts, BOSTON GLOBE, Nov. 11, 2006, at A1.

⁵ Colton Campbell, Creating an Angel: Congressional Delegation to Ad Hoc Commissions, 25 CONG. & THE PRESIDENCY 161, 2 & n.1 (1998). The media is often called the fourth branch of government. Steven S. Neff, The United States Military vs. The Media: Constitutional Friction, 46 MERCER L. REV. 977, 980 (1995).

commissions – first with the Commission on Terrorist Attacks Upon the United States (9/11 Commission), then with the Commission on Wartime Contracting In Iraq and Afghanistan (CWC) and finally with the Financial Crisis Inquiry Commission (FCIC). With the CWC and FCIC just recently closing their respective investigations and issuing their final reports, the time is ripe for a deeper look at the development, conduct, and effectiveness of quasi-legislative independent commissions.

Three characteristics define quasi-legislative independent commissions. First, such commissions are entities established by legislation passed by Congress and signed by the President, rather than created by the President alone.⁶ In any event, the commissioners can be appointed by the legislature, the executive, or both.⁷ Second, the entities are charged by Congress to investigate for a limited period, within a particular scope, and are empowered to use a variety of means to carry out the investigation.⁸ Third, the entities are not comprised solely of sitting Members of Congress.⁹

Although the features of each quasi-legislative independent commission are unique, such commissions arise for reasons similar to many other entities created to conduct investigations.

⁶ LANCE COLE & STANLEY M. BRAND, CONGRESSIONAL INVESTIGATIONS AND OVERSIGHT: CASE STUDIES AND ANALYSIS 458 (2011). See generally M. NELSON MCGEARY, THE DEVELOPMENTS OF CONGRESSIONAL INVESTIGATIVE POWER (Octagon Books 1966). This paper's working definition of a quasi-legislative independent commission is not dependent on the location where Congress places the commission in the government's organizational chart. Cf. PETER L. STRAUSS, ET AL., ADMINISTRATIVE LAW (rev. 10th ed. 2003) (explaining that government agencies may be organized under any or no branch of government).

⁷ See, e.g., *infra* notes 183, 185, 188 (describing methods for appointing commissioners).

⁸ See, e.g., LOUIS FISHER, THE POLITICS OF SHARED POWER 153 (1998) (identifying that commissions have been delegated policymaking, judicial, and administrative powers). A permanent independent commission is not quasi-legislative. See *infra* note 10 and accompanying text.

⁹ An entity comprised of Members of Congress is a congressional committee, rather than an independent commission. See OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ACTIVITIES, http://clerk.house.gov/committee_info/commfaq.aspx (last visited Aug. 25, 2011); COLTON C. CAMPBELL, DISCHARGING CONGRESS: GOVERNMENT BY COMMISSION 21 n.3 (2002) (recognizing that an independent commission is made of up "civilians," whereas select or special committees are comprised of members of Congress); see also NAT'L ARCHIVES, RECORDS OF JOINT COMMITTEES OF CONGRESS, <http://www.archives.gov/research/guide-fed-records/groups/128.html> (last visited Sept. 6, 2011) ("Joint committees are those whose membership is drawn from both the Senate and the House of Representatives.).

Like other creatures within the investigations taxonomy, including permanent independent regulatory commissions¹⁰ and blue-ribbon advisory policy commissions,¹¹ quasi-legislative independent commissions can be “created to conduct a factual investigation of a specific event, report findings to the government and public, and offer solutions to resolve complex policy problems.”¹² Additionally, quasi-legislative independent commissions can be characterized as “specific event inquiry commissions” when they arise from the aftermath of a single event, or as “boards of inquiry” when they seek to uncover wrongdoing and assign blame more generally.¹³ Irrespective of the catalyst for the creation of such quasi-legislative independent commissions, these entities seem to be rising in prominence and prevalence in the modern investigative landscape.¹⁴

While volumes of scholarship have discussed the creation and conduct of a variety of investigative and advisory commissions, relatively few words have been devoted to the phenomena of quasi-legislative independent commissions.¹⁵ This article focuses on such

¹⁰ See, e.g., U.S. SEC. AND EXCHANGE COMM’N, HOW THE SEC PROTECTS INVESTORS, MAINTAINS MARKET INTEGRITY, AND FACILITATES CAPITAL FORMATION, <http://sec.gov/about/whatwedo.shtml> (last visited Aug. 30, 2010); FED. COMM’NS COMM’N, WHAT WE DO, <http://www.fcc.gov/what-we-do> (last visited Aug. 30, 2010).

¹¹ See, e.g., Press Release, Iraq Study Group, Bipartisan Study Group to Assess Situation in Iraq (Mar. 15, 2006); Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, 347 (codified as amended at 42 U.S.C. § 1395b (2010)) (creating the National Bipartisan Commission on the Future of Medicare); Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808, 1808-12 (codified at 10 U.S.C. § 2687 note (2010)) (empanelling the Defense Base Closure and Realignment Commission).

¹² See COLE & BRAND, *supra* note 6, at 457; Campbell, *supra* note 5, at 2 (noting that Congress creates a commission for the “general purpose of obtaining advice, developing common sense recommendations on complex policy issues, and finding broadly acceptable solutions to contentious problems.”); Carl E. Singley, The MOVE Commission: The Use of Public Inquiry Commissions to Investigate Government Misconduct and Other Matters of Vital Importance, 59 TEMP. L. Q. 303, 304-05 (1986).

¹³ COLE & BRAND, *supra* note 6, at 457-58; CARL MARCY, PRESIDENTIAL COMMISSIONS 89 (Da Capo Press ed. 1973).

¹⁴ Lance Cole, Special National Investigative Commissions: Essential Powers and Procedures (Some Lessons from the Pearl Harbor, Warren Commission, and 9/11 Commission Investigations), 41 MCGEORGE L. REV. 1, 5-6 (2009).

¹⁵ See Samuel Patterson, 31 PERSPECTIVES ON POL. SCI. Book Rev., 2002, at 249 (reviewing Discharging Congress: Government by Commission (2000)) (describing independent commissions as a topic “neglected” by scholars). Relatively little has also been written about presidential commissions. See THOMAS R. WOLANIN, PRESIDENTIAL ADVISORY COMMISSIONS: TRUMAN TO NIXON 5 (1975); Steve Schwalbe, Independent Commissions: Their History, Utilization and Effectiveness, 5 PI ALPHA ALPHA HONOR SOC’Y ONLINE J., available at http://www.naspaa.org/initiatives/paa/pdf/Steve_Schwalbe.pdf (“Despite their common occurrence and the great

commissions in search of the factors that predict a positive result from the commission's investigation. In Part I, this article describes the use of investigative commissions throughout American history, outlining past practices of congressional investigators and the historical basis for modern trends in such investigations. Next, Part II highlights the rise of quasi-legislative independent commissions, focusing on the political, communications, and resource explanations for their use (offering the 9/11 Commission, CWC, and FCIC as examples of such commissions conducting high-profile investigations). Part III compares the genesis, development, and characteristics of past quasi-legislative independent commissions to determine the combination of predictive factors that enhance the likelihood that a commission's investigation will be highly regarded and its conclusions adopted by Congress. Finally, Part IV counsels practitioners of congressional investigations on how to best represent clients before quasi-legislative independent commissions, and provides a practical roadmap for such representations.

I. Tracing Investigations Through the Ages

Since the early days of the United States, Congress has utilized a variety of models to conduct investigations. Building on the work of the founding fathers,¹⁶ Congress in its early years primarily relied on joint committees and independent agencies to investigate. By the twentieth century, however, the members and committees of Congress were conducting the majority of its inquiries, especially in the economic and national security arenas. This tradition would largely continue until 2001, when Congress expanded its investigative arsenal by creating numerous quasi-legislative independent commissions to conduct major investigations.

public interest shown in many of their reports, there is only a very scanty popular and social science literature discussing independent presidential advisory commissions as political institutions.”).

¹⁶ Susan F. Rasky, Congress Says: A Commission Made Us Do It, N.Y. TIMES, Jan. 29, 1989, at E4.

A. *The Nineteenth Century Featured Investigations by Legislative, Independent, and Executive Branch Entities.*

It took Congress a mere three years to initiate its first investigation. In 1792, the House of Representatives passed a resolution directing a committee of seven members to investigate the failed military expedition by Major General St. Clair. The House rejected an executive inquiry into the matter, and instead “empowered an investigatory committee . . . to summon witnesses, inspect records, and report back findings.”¹⁷ The investigation was completed and the conclusions returned in a mere 42 days.¹⁸ However, the investigation was unable to determine who was at fault for the debacle and Congress failed to take action on the report.¹⁹ As a result, “St. Clair was left accused but unjudged; the tensions generated by the issue persisted, and prevented even acts of simple justice”²⁰ The outcome of Congress’s first investigation highlighted the challenges inherent in resolving such issues, riddled as they are with complex political and policy implications.

Undaunted by the St. Clair matter, Congress continued to establish committees to conduct investigations. During the early 1800’s, Congress established joint committees to investigate, among other things, the burning of Washington and Andrew Jackson’s invasion of Florida.²¹ In 1861, for example, Congress established a bicameral Joint Committee on the Conduct of the War to investigate trade with Confederate states, treatment of union soldiers, military contracts, and

¹⁷See 2 ANNALS OF CONG. 490 (1792); TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 22-24 (Simon & Schuster 1955) (describing the St. Clair investigation and outcome).

¹⁸ TAYLOR, *supra* note 17, at 22-24.

¹⁹ *Id.* at 27-29.

²⁰ *Id.*

²¹ See Herman J. Viola, The Burning of Washington, 1814 in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, at 247, 247-63 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975); Herman J. Viola, Andrew Jackson’s Invasion of Florida, 1818, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 21, at 335, 335-65.

battle losses.²² The Committee “gathered evidence and made reports on private claims, for the use of the courts, executive officers, and Congress itself.”²³ This served as a model for similar entities, such as the Joint Committee on Reconstruction, which studied the readmission of the Confederate states to the Union and developed the Fourteenth Amendment.²⁴ By the mid-nineteenth century, investigations had become a significant portion of congressional activity.

Responding to Congress’s increased investigative activity, the Supreme Court, in Kilbourn v. Thompson,²⁵ defined the scope of congressional investigative authority. The case arose after Kilbourn appeared, pursuant to a subpoena, before a special committee of the House of Representatives investigating the bankruptcy of Jay Cooke and Company.²⁶ After Kilbourn refused to answer the committee’s questions and failed to provide requested documents, the House resolved him in contempt and directed the Sergeant-at-Arms to take him into custody.²⁷ Acting on Kilbourn’s writ of habeas corpus, the Court held that the House had the power to investigate where it had a valid legislative interest.²⁸ The Court noted, however, that the House could not punish a contumacious witness where it lacked sufficient investigative authority.²⁹ As a result, Congress’s power to investigate had been ratified, but the scope of such investigations had, in theory, been circumscribed.

²² See Elizabeth Joan Doyle, The Conduct of the War, 1861, in 2 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, supra note 21, at 1197, 1200-03; see generally BRUCE TAP, OVER LINCOLN’S SHOULDER: THE COMMITTEE ON THE CONDUCT OF THE WAR (1998).

²³ Doyle, supra note 22.

²⁴ See COLE & BRAND, supra note 6, at 3; W. Allan Wilbur, Joint Committee on Reconstruction, 1865, in 2 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, supra note 21, at 11361, 1384-87; see also NAT’L ARCHIVES: GUIDE TO HOUSE RECORDS, <http://www.archives.gov/legislative/guide/house/chapter-23-overview-of-committees.html#CivilWar> (last visited Sept. 6, 2011) (chronicling the 1871 Joint Committee to Inquire into the Condition of the Late Insurrectionary States).

²⁵ 103 U.S. (13 Otto) 168 (1880).

²⁶ Id. at 193-94.

²⁷ Id. at 196-97.

²⁸ Id. at 189-90.

²⁹ Id. at 190.

Beginning in the late-nineteenth century, Congress began augmenting the investigative efforts of special and joint committees by establishing permanent independent commissions to conduct investigations. In 1887, one year after the Supreme Court struck down state regulation of railroad commerce,³⁰ Congress created the Pacific Railway Commission and the Interstate Commerce Commission (ICC) to investigate and regulate transcontinental railroads.³¹ Then, in the first part of the twentieth century, Congress created the Federal Trade Commission to regulate commerce and investigate corporate malfeasance.³² Congress also established a veritable alphabet soup of entities, including the Securities and Exchange Commission, the Federal Communications Commission, and the Federal Power Commission.³³ These entities were meant to operate as perpetual, independent government agencies.³⁴ Led by professional expert commissioners, often serving limited terms after presidential appointment and Senate confirmation,³⁵ the agencies were armed with investigative tools, including subpoena power in many cases.³⁶

The courts, however, were initially uncomfortable with Congressional delegation of investigative power to independent commissions. Justice Field, riding circuit, limited the scope of investigations by such commissions by applying Kilbourn to independent commissions,³⁷ and

³⁰ See Wabash, St. Louis & Pac. Rwy. Co. v. Illinois, 118 U.S. 557, 575 (1886) (rejecting direct state burdens on interstate commerce); but see Munn v. Illinois, 94 U.S. (4 Otto) 113, 135-36 (1877) (permitting state regulation of businesses, including railroads, within state borders).

³¹ TAYLOR, supra note 17, at 52; Schwalbe, supra note 15.

³² FED. TRADE COMM'N, A HISTORY, <http://www.ftc.gov/ftc/history/ftchistory.shtm> (last visited Apr. 25, 2011).

³³ See, e.g., FISHER, supra note 8, at 146-47.

³⁴ See Robert L. Rabin, Federal Regulation in Historical Perspective, 38 STAN. L. REV. 1189, 1207-08, 1222-24 (1986); see also WILSON DOYLE, INDEPENDENT COMMISSIONS IN THE FEDERAL GOVERNMENT 4 (1939) (describing the need for independent commissions to regulate industry).

³⁵ See, e.g., Securities Exchange Act of 1934, Pub. L. No. 73-291, § 4, 48 Stat. 881, 885 (codified as amended at 15 U.S.C. § 78d (2010)); Communications Act of 1934, Pub. L. No. 73-416, § 4, 48 Stat. 1064, 1066-68 (codified as amended at 47 U.S.C. § 154 (2010)).

³⁶ See, e.g., Securities Exchange Act of 1934 § 21(b) (codified as amended at 15 U.S.C. §§ 78u(a)-(b)); Communications Act of 1934 § 4 (codified as amended at 47 U.S.C. § 154).

³⁷ See In re Pac. Rwy. Comm'n, 32 Fed. 241, 265-68 (C.C.N.D. Cal. 1887) (noting that an independent commission cannot validly investigate an individual's private affairs).

further restricted such commissions from utilizing the federal courts to advance their investigations.³⁸ Accordingly, the court viewed the power of independent entities as coextensive with Congress and limited the scope of independent commission investigations.³⁹ Ultimately, however, the Supreme Court upheld independent commission requests for testimony and documents where those requests furthered the purposes of a commission's authorizing statute.⁴⁰ This confirmed that Congress could establish independent commissions and empower such entities to conduct significant but defined investigations.

Beginning at the dawn of the twentieth century, the executive branch began establishing presidential commissions to conduct investigations. Presidents predominately created such commissions through executive order or by public announcement, rather than through congressional enactment.⁴¹ Such commissions were often located in the executive branch, reliant on presidential funding streams, and led by members appointed by the President alone (without being subject to confirmation by the Senate).⁴² Although Congress generally did not approve the members of presidential commissions, it nonetheless could decide whether to grant such committees subpoena power.⁴³ President Theodore Roosevelt utilized presidential commissions to advance policy and government reform, earning him acclaim as the “modern-day father of the

³⁸ See In re Pac. Rwy. Comm'n, 32 Fed. 241, 258 (C.C.N.D. Cal. 1887) (reasoning that federal courts lacked jurisdiction to “be made the aids to any investigation by a commission”).

³⁹ See id. at 251-54; see also FTC v. Am. Tobacco Co., 264 U.S. 298, 306 (1921) (restricting investigative “fishing expeditions”); Harriman v. ICC, 211 U.S. 407, 417 (1908) (limiting scope of investigations of railroad activity); ICC v. Brimson, 154 U.S. 447, 468, 489 (1897) (considering the ICC as an investigative agent of Congress).

⁴⁰ See Harriman, 211 U.S. at 411; TAYLOR, supra note 17, at 52.

⁴¹ See MARCY, supra note 13, at 92-93 (noting that ostensibly independent commissions were created by Executive Order and were located within the executive branch); WOLANIN, supra note 15, at 62-64 (cataloging that from 1945-1974, twenty-nine commissions were created by executive order, sixty-one by announcement, and nine by statute).

⁴² See DAVID LINOWES, CREATING PUBLIC POLICY: THE CHAIRMAN'S MEMOIRS OF FOUR PRESIDENTIAL COMMISSIONS 8 (1998); WOLANIN, supra note 15, at 62-64 (explaining that presidential commissions were funded through the Emergency Fund for the President or the Special Projects Fund); Schwalbe, supra note 15.

⁴³ See, e.g., Pub. L. No. 88-202, 77 Stat. 3623 (1963) (granting subpoena power to the Warren Commission to investigate the assassination of President John F. Kennedy); LINOWES, supra note 42, at 10.

presidential commission.”⁴⁴ Although executive commissions had been used in both England and early America, turn-of-the-century reliance on them was “basically a product of the dramatic enlargement of the federal government in the twentieth century.”⁴⁵ The use of such commissions “steadily increased” in later administrations as presidents from both parties created an average of three commissions per year to analyze policies, respond to crises, manage complex issues, and bring attention to specific matters.⁴⁶ As a result, in 1972 Congress enacted the Federal Advisory Committee Act,⁴⁷ which restricted the creation of new commissions, limited their powers and duration, and reaffirmed congressional oversight of such entities.⁴⁸ Still, by 1993, empanelling executive commissions had become so commonplace that President Bill Clinton endeavored to eliminate unnecessary commissions and discourage the creation of new ones.⁴⁹ By 1998, one scholar found that executive branch entities comprised ninety percent of independent commissions.⁵⁰ Nonetheless, the use of such commissions has continued into the twenty-first century,⁵¹ as presidents have sought to utilize such commissions to augment investigations conducted by independent agencies and congressional committees.

⁴⁴ MICHAEL A. GENOVESE, *ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY* 8, 109 (2010); see KATHLEEN DALTON, *THEODORE ROOSEVELT: A STRENUOUS LIFE* 210 (2004) (noting creation of the National Conservation Commission, Inland Waterways Commission, Keep Commission, and Homes Commission); Richard D. White, Jr., *Executive Reorganization, Theodore Roosevelt and the Keep Commission*, 24 *ADMIN. THEORY & PRACTICE* 507 (2002) (chronicling attempts to reform government through presidential commissions).

⁴⁵ WOLANIN, *supra* note 15, at 5; see COLE & BRAND, *supra* note 6, at 456-57 & nn.3-4; see also JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 21 (1990) (recognizing that Congress ceded to the executive branch much control over the growing federal bureaucracy).

⁴⁶ COLE & BRAND, *supra* note 6, at 457; see also MARCY, *supra* note 13; WOLANIN, *supra* note 15, at 5-6, 13-24, 29-31.

⁴⁷ Pub. L. No. 92-463, 86 Stat. 770 (codified as amended at 5 U.S.C. App. 2 §§ 1-16 (2010)).

⁴⁸ *Id.* Both the Commission on Terrorist Attacks Upon the United States (9/11 Commission) and Financial Crisis Inquiry Commission (FCIC), which are studied in Part II.B, were exempt from the Federal Advisory Committee Act. See Intelligence Authorization Act for Fiscal Year 2003 (IAA), Pub. L. No. 107-306 §606, 116 Stat. 2383, 2412 (codified at 6 U.S.C. § 101 note (2010)); Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 5(g), 123 Stat. 1625, 1630 (codified at 18 U.S.C. § 1 note (2010)).

⁴⁹ Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 10, 1993) (terminating one-third of existing federal advisory committees and limiting creation of such entities).

⁵⁰ LINOWES, *supra* note 42, at 8.

⁵¹ See, e.g., Exec. Order No. 13,227, 67 Fed. Reg. 6157 (Feb. 6, 2002) (empanelling the President’s Commission on Excellence in Special Education); Exec. Order No. 13,521, 74 Fed. Reg. 62671 (Nov. 24, 2009) (establishing the

B. Throughout the Twentieth Century, Congress and Its Committees Dominated the Investigations Arena.

Although both independent and presidential investigative bodies were simultaneously active, Congress and its committees conducted most of the twentieth century's significant investigations.⁵² The Supreme Court set the stage for expansive congressional action by consistently recognizing Congress's broad inquisitorial powers. As a result, House and Senate committees served as the fora for investigations that focused on the major issues of the day, including economic unrest and national security. Through the years, "[i]n most instances national problems and events of great national interest and concern [were] investigated, and then addressed legislatively, if necessary, through the congressional hearing and investigative process."⁵³

1. The Supreme Court Gave Congress a Green Light To Investigate.

The Supreme Court facilitated expansive congressional investigations by finding that the Constitution empowered Congress to conduct such activity. Expanding on Kilbourn, in McGrain v. Daugherty,⁵⁴ the Court read the necessary and proper clause to grant Congress plenary investigative authority and broad subpoena power to compel testimony and documents pursuant to that authority.⁵⁵ Recognizing the importance of subpoena power, the Court reasoned that without it the target of an investigation would either ignore an information request or voluntarily

Presidential Commission for the Study of Bioethical Issues); see also Louis Jacobson, Obama Flip-Flops On Use Of Presidential Commissions, ST. PETERSBURG TIMES' POLITIFACT BLOG (July 1, 2010 4:55 PM), <http://www.politifact.com/truth-o-meter/statements/2010/jul/01/barack-obama/obama-flip-flops-use-presidential-commissions/> (quoting Prof. Paul Light predicting President Obama "will end up with 16 to 20 [commissions] if he wins a second term").

⁵² ABERBACH, supra note 45, at 46; JAMES HAMILTON, THE POWER TO PROBE 6-12 (1976) ("The legislative investigation . . . found its heyday in the present century."); TAYLOR, supra note 17, at 53 (highlighting major congressional investigations before World War II).

⁵³ Cole, supra note 14, at 3.

⁵⁴ 273 U.S. 135 (1927).

⁵⁵ Id. at 173-74.

provide only benign information.⁵⁶ Then, in Watkins v. United States,⁵⁷ the Court articulated the breadth of Congress’s investigative power as follows:

It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes . . . to expose corruption, inefficiency or waste.⁵⁸

However, the Court did note that an investigation must be “related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to ‘punish’ those investigated are indefensible.”⁵⁹ Since then, the Court has found that Congress’s investigative power in many cases trumps asserted constitutional rights.⁶⁰ And Congress put its broad authority to work in the areas of economic and national security affairs.

2. Congress Conducted Major Economic Investigations.

During the twentieth century, Congress conducted exacting investigations into economic turmoil. For example, amid allegations that a group of Wall Street financiers controlled the nation’s economy, Congress in 1912 authorized Representative Arsène Pujo (D-LA) to lead an investigation through a subcommittee of the House Committee on Banking and Currency.⁶¹ This so-called “Money Trust” investigation ultimately uncovered dramatic industry consolidation and

⁵⁶ Id. at 174-75.

⁵⁷ 354 U.S. 178 (1957).

⁵⁸ Id. at 187.

⁵⁹ Id. See generally COLE & BRAND, supra note 6, at 87-90 (recounting the significance of the Watkins decision).

⁶⁰ See, e.g., Eastland v. United States Servicemen’s Fund, 421 U.S. 491 (1975) (holding that the First Amendment did not restrict Congress’s power to seek a non-profit organization’s bank and membership records); Hutcheson v. United States, 369 U.S. 599 (1962) (rejecting due process challenge where the answers to a congressional inquiry could be used in a state criminal action); Barenblatt v. United States, 360 U.S. 109 (1959) (upholding a congressional request for information related to alleged communists). But see McGrain, 354 U.S. at 215 (finding a congressional inquiry violated a witness’s right to due process).

⁶¹ See Richard N. Sheldon, The Pujo Committee, 1912, in 3 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, supra note 21, at 2251, 2251-2273; TAYLOR, supra note 17, at 63-65. Pujo served on the National Monetary Commission before taking the subcommittee’s helm. See JAMES CARROLL BEAM, THE PUBLIC CAREER OF ARSÈNE P. PUJO: LOUISIANA CONGRESSMAN, 1903–1913 (1963), available at <http://library.mcneese.edu/depts/archive/FTBooks/beam.htm>.

inspired passage of new antitrust laws.⁶² Similarly, the Senate Committee on Banking and Currency in 1932 began investigating the stock market losses of 1929.⁶³ Dubbed the Pecora Commission, after the committee's chief counsel Ferdinand Pecora, the investigation included dramatic hearings into the activities of J.P. Morgan and others, and "uncovered widespread fraud and abuse on Wall Street, including self-dealing and market manipulation among investment banks and their securities affiliates."⁶⁴ The investigation was widely considered the impetus for enacting a comprehensive banking and securities regulatory regime.⁶⁵ In more modern times, Congress has inquired into such issues as failures at savings and loan associations,⁶⁶ historic bankruptcies at companies like Enron and WorldCom,⁶⁷ and reports of corporate malfeasance. Throughout the twentieth century, Congress consistently demonstrated and refined its investigations prowess in economic affairs.

3. Congress Conducted Major Investigations Into Military and National Security Affairs.

Congress also conducted major investigations in response to the outbreak and in the aftermath of two world wars.⁶⁸ After World War I, Senator Gerald P. Nye (R-ND) chaired the

⁶² Sheldon, supra note 61, at 2272.

⁶³ See JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 1 (2003). See generally Donald A. Ritchie, The Pecora Wall Street Expose, 1934, in 4 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, supra note 21, at 2555, 2555-78.

⁶⁴ SEC Chair Mary L. Schapiro, Testimony Concerning the State of the Financial Crisis Before the Financial Crisis Inquiry Commission (Jan. 14, 2010), available at <http://www.sec.gov/news/testimony/2010/ts011410mls.htm>.

⁶⁵ See SELIGMAN, supra note 63, at 13, 38 (crediting Pecora's investigation with leading to the Glass-Steagall Banking Act of 1933, Securities Act of 1933, and the Securities Exchange Act of 1934).

⁶⁶ See, e.g., CAMPBELL, supra note 9, at 95-112; Investigation of Lincoln Savings & Loan Assn.: Hearing Before the H. Comm. on Banking, Fin. & Urban Affs., 101st Cong., 1st Sess. (Nov. 14, 1989).

⁶⁷ See, e.g., Roberta S. Karmel, Realizing the Dream of William O. Douglas: The Securities and Exchange Commission Takes Charge of Corporate Governance, 30 DEL. J. CORP. L. 79, 144 n.120 (2005) (noting that a combined 248 Members of Congress served on the eleven committees that investigated Enron); Susan Pulliam, WorldCom Is Denounced at Hearing: Congressmen Say Executives Mismanaged Company, WALL ST. J., July 9, 2002, at A3. But see Joshua Ruby, Note, Sound and Fury, Confused Alarms, and Oversight: Congress, Delegation, and Effective Responses to Financial Crises, 47 HARV. J. ON LEGIS. 209, 237-39 (2010) (opining on Congress's "questionable record of responding to investigative and reform needs following financial and business crises").

⁶⁸ TAYLOR, supra note 17, at 70; see also MCGEARY, supra note 6, at 21-22 (noting that during this period the Senate more frequently conducted investigations than the House).

Special Senate Committee Investigating the Munitions Industry, which held “widely publicized hearings on war profiteering.”⁶⁹ Following Senator Nye’s lead, in 1941 then-Senator Harry S. Truman (D-MO) spearheaded the creation of a special subcommittee to investigate the national defense program and root out waste and fraud in military procurement.⁷⁰ The committee had “nearly unlimited authority to review the war effort—covering ‘almost all aspects of the war program except strategy and tactics,’” including mobilization, supply shortages, facilities, and military contractors.⁷¹ Despite broad investigative authority, Senator Truman often held private sessions in his “dog house” with key stakeholders to facilitate witness candor and to get results.⁷² Additionally, Congress created the Joint Committee on the Investigation of the Pearl Harbor Attack after it was dissatisfied with the investigation into Pearl Harbor by the Roberts Commission, an executive branch entity chaired by Chief Justice Owen Roberts.⁷³ Because the Roberts Commission had taken just over one month to conduct an investigation that was criticized for its narrow scope, off-the-record and unsworn interviews, and reliance on military officers,⁷⁴ the Joint Committee’s members were directed to “make a full and complete investigation” of the attack.⁷⁵ Ultimately, the Joint Committee reviewed the findings of the Roberts Commission and others, conducted six months of hearings, and returned with a

⁶⁹ TAYLOR, *supra* note 17, at 67. See generally John Edward Wiltz, *The Nye Munitions Committee, 1934*, in 4 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 21, at 2735, 2735-67.

⁷⁰ See S. Res. 71 (Mar. 1, 1941); U.S. SENATE, 1941-1963: THE TRUMAN COMM., http://www.senate.gov/artandhistory/history/minute/The_Truman_Committee.htm (last visited Apr. 11, 2011). See generally Theodore Wilson, *The Truman Committee, 1941*, in 4 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 21, at 3115.

⁷¹ Senator Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-first Century*, 2007 HARV. L. & POL. REV. 3, 14-16 (quoting DONALD H. RIDDLE, *THE TRUMAN COMMITTEE: A STUDY IN CONGRESSIONAL RESPONSIBILITY* 141-42 (1964)).

⁷² COLE & BRAND, *supra* note 6, at 47.

⁷³ Wayne Thompson, *The Pearl Harbor Inquiry, 1945*, in 5 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 21, at 3265, 3292-93.

⁷⁴ COLE & BRAND, *supra* note 6, at 461-63.

⁷⁵ S.Con.Res. 27 (Sept. 11, 1945).

bipartisan majority report.⁷⁶ Congress also used its investigative authority during the Cold War, however regrettably, through the House Un-American Activities Committee⁷⁷ and the Senate Permanent Subcommittee on Investigations, led by Senator Joseph McCarthy (R-WI).⁷⁸ More recently, Congress investigated the Iran-Contra affair and domestic intelligence gathering by the FBI and CIA.⁷⁹ Over time, Congress has demonstrated its ability to conduct exacting national security investigations.

4. Congress Institutionalized Its Investigative Authority.

Over the years, Congress institutionalized its increased reliance on oversight and investigations. Beginning with the Legislative Reorganization Act of 1946,⁸⁰ Congress expanded staff, clarified committee jurisdiction, and “provided the first formal congressional endorsement of oversight, [which directed] the committees to maintain ‘continuous watchfulness’ over the activities of the executive agencies.”⁸¹ This rooted power in standing committees, which were given subpoena authority,⁸² and reduced the need for empanelling the special committees that had characterized the nineteenth century.⁸³ For example, the Senate

⁷⁶ Thompson, *supra* note 73.

⁷⁷ TAYLOR, *supra* note 17, at 71-79; Michael Wreszin, *The Dies Committee, 1938*, in 4 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 21, at 2923.

⁷⁸ TAYLOR, *supra* note 17, at 71-79; H. Lew Wallace, *The McCarthy Era, 1954*, in 5 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 21, at 3729, 3746.

⁷⁹ *See, e.g.*, U.S. SENATE, CHURCH COMMITTEE CREATED, http://www.senate.gov/artandhistory/history/minute/Church_Committee_Created.htm (last visited Sept. 6, 2011); Schumer, *supra* note 71, at 7.

⁸⁰ Pub. L. No. 79-601, 60 Stat. 812, 814-31 (1946).

⁸¹ WOLANIN, *supra* note 15, at 13-24, 29-31.

⁸² TAYLOR, *supra* note 17, at 232.

⁸³ ABERBACH, *supra* note 45, at 24; COLE & BRAND, *supra* note 6, at 58-59 (describing the elevation of the House Un-American Activities Committee to standing committee status). Despite this, Members of Congress still call for and create special committees. *See, e.g.*, Budget Control Act of 2011, Pub. L. No. 112-25, § 401, 125 Stat. 240, 259-63 (codified as amended at 2 U.S.C. § 900 note (2010)) (creating debt “super committee”); H.R. 2835, 112th Cong. (2011) (proposing to establish a joint select committee of Congress to report findings and propose legislation to restore full employment); H.Con.Res. 201, 111th Cong. § 1 (2009) (attempting to create the Joint Select Committee on Earmark Reform); H.Con.Res. 22, 111th Cong. §§ 1-4 (2009) (proposing the Joint Select Committee on Reorganization and Reform of Foreign Assistance Agencies and Programs); 155 CONG. REC. S4549-50 (daily ed. Apr. 22, 2009) (statement of Sen. Dorgan) (citing history of successful select committees in seeking one to examine the financial crisis).

created the storied Permanent Subcommittee on Investigations (PSI) and gave it the jurisdiction of Truman's special committee.⁸⁴ Since then, PSI has served as a platform for in-depth investigations into a wide range of topics⁸⁵ and has earned praise for the quality of its work.⁸⁶ In 1970, Congress went further to institutionalize its investigative prerogative by increasing committee funding and requiring committees to submit biennial reports of oversight activity.⁸⁷ In sum, these reforms set the stage for investigations to become an ever more prominent aspect of congressional affairs.

In recent years, Congress has heightened its focus on investigations. Political scientists cataloging congressional activity have noted that the sheer quantity of investigations has increased, as measured by the number of days conducting oversight, with a corresponding reduction in legislative activity.⁸⁸ While most committees have conducted investigations in some form or another, a handful of committees are responsible for the bulk of investigative activity. On the Senate side, for example, PSI has investigated matters as wide ranging as corruption at the United Nations, energy market manipulation, and various tax matters.⁸⁹ On the House side, the Committee on Energy and Commerce, which has long featured an extremely

⁸⁴ See PERMANENT SUBCOMM. ON INVESTIGATIONS, PSI SUBCOMMITTEE HISTORICAL BACKGROUND, http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=87d4cfa7-50c5-4506-95b7-d9b12488fde2 (last visited Sept. 12, 2011).

⁸⁵ See PERMANENT SUBCOMM. ON INVESTIGATIONS, COMPOSITE LIST OF PUBLICATIONS OF THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS (Feb. 1, 2011), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=891f6f42-f3da-4825-8193-91bd9953df98.

⁸⁶ See COLE & BRAND, supra note 6, at 50; see, e.g., Robert Kuttner, A Slight Oversight: Congressional Investigations Of The Executive Branch Have Been Sandbagged By The White House And Its Allies On Capitol Hill, AM. PROSPECT, 10, 2006, at 36 (praising the professionalism of PSI's investigations). The reports published by the present-day PSI show it has continued the trend of utilizing private interview sessions to complement and inform its public hearings. See PERMANENT SUBCOMM. ON INVESTIGATIONS, supra note 84.

⁸⁷ See Legislative Reorganization Act of 1970, Pub. L. 91-510, 84 Stat. 1140, 1156; ABERBACH, supra note 45, at 27; THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH 56-61 (2006).

⁸⁸ ABERBACH, supra note 45, at 25; see CAMPBELL, supra note 9, at XVI, 66; Friel, supra note 4 (explaining that Congress turns to oversight when it cannot legislate); Kuttner, supra note 86 (finding that from 1997-2002, congressional committees issued more than 1,000 subpoenas).

⁸⁹ See, e.g., Kuttner, supra note 86 (highlighting PSI's tax haven and evasion investigation); Carrie Mollenkamp & Liz Rappaport, Senate Report Lays Bare Mortgage Mess, WALL ST. J., Apr. 14, 2011, at C1 (describing PSI's report on the financial crisis); supra note 84 and accompanying text.

active Subcommittee on Oversight and Investigations, and the Committee on Oversight and Government Reform (OGR) have been among the most active investigative committees, inquiring into such varied issues as health care, steroids in baseball, and food safety.⁹⁰ In fact, OGR has held more than one-hundred hearings per year since 2009.⁹¹ These investigators and their investigations have been recognized as driving the agenda in Washington.⁹² But, while Congress took center stage in the investigations arena during the twentieth century, in the twenty-first century it began supplementing its efforts by relying on quasi-legislative independent commissions to conduct investigations.

II. 21st Century Development: Increasing Use of Quasi-Legislative Independent Commissions

While politics, to some degree, almost always plays a role in congressional activity, one scholar of congressional investigations has noted,

Some events are too calamitous, and some problems are too important and intractable, for the public to tolerate the usual partisan political gamesmanship. And, from a political perspective, some situations are too politically hazardous for a president to leave the official government response entirely to the congressional investigative process.⁹³

In such situations, the modern inclination has been to empanel quasi-legislative independent commissions to investigate and report.⁹⁴ This Part looks at that trend by first discussing the confluence of events that created the opportunity for this expanded investigative framework.

Next, it describes the trend for Congress to create quasi-legislative independent commissions in

⁹⁰ See Brian Friel, The Watchdog Growls, NAT'L J., Mar. 24, 2007.

⁹¹ See Jake Sherman & Richard E. Cohen, Issa Plans Hundreds of Hearings, POLITICO, Nov. 8, 2010 (noting that OGR conducted 203 hearings during the 111th Congress). As of November 11, 2011, OGR had held 111 hearings during the 112th Congress. See H. COMM. ON OVERSIGHT & GOV'T REFORM, <http://oversight.house.gov> (last visited Nov. 11, 2011). See generally ABERBACH, supra note 45, at 43-46 (charting historical increase in investigative funding and oversight days).

⁹² See supra note 4 and accompanying text.

⁹³ Cole, supra note 14, at 3-4.

⁹⁴ See, e.g., Campbell, supra note 5, at 6-7 (noting that from 1993-1997, 92 Members of Congress introduced legislation that included proposals to establish an independent commission); infra Part II.B (studying recently created quasi-legislative independent commission).

response to complex national security and economic challenges. Then, Part III catalogs the characteristics of recent quasi-legislative independent commissions, using them as a case study in search of the predictive elements that increase the likelihood that such a commission's investigation will be viewed as successful and its recommendations enacted.

A. Strains on Traditional Congressional Investigations Created An Opportunity for a New Investigative Model.

Scholars have noted that, on some level, Congress may never have been the ideal forum for investigations. For example, initially the House was not given subpoena power for fear that Members would conduct uncontrolled investigations to increase publicity and advance political agendas.⁹⁵ Professor Joel Aberbach has noted that “congressional style, even for most active overseers, clashes with the norm of comprehensive and systematic oversight work.”⁹⁶ He has also found that this stylistic discord may be exacerbated by congressional behavior that could be distorted by electoral concerns that trump rational priority setting.⁹⁷ Although congressional investigations can theoretically unfold in a rational and impartial manner (and in fact often do), the historian Arthur M. Schlesinger, Jr. explained in his history of the subject that,

In practice they proceed in the buffeting winds of fears and fancies, the ethnic, religious, and political pressures that mark a society at a particular time. Too often they reflect opinion rather than present information necessary for the legislative process. Too often they are clearly vulnerable to partisan exploitation.⁹⁸

For many years, experts had recognized the challenges inherent in Congress's investigative function. And the twenty-first century would only exacerbate these obstacles.

⁹⁵ TAYLOR, *supra* note 17, at 233.

⁹⁶ *See* ABERBACH, *supra* note 45, at 33.

⁹⁷ *See id.* at 34; Campbell, *supra* note 5, at 5. *See generally* DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

⁹⁸ Wallace, *supra* note 78, at 3746.

In the modern age, factors such as increasing partisanship and legislative complexity have challenged the system of congressional investigations. Describing Congress as “the broken branch,” scholars Thomas Mann and Norman Ornstein explained that, over the years, “[t]he institutional rivalry designed by the framers gave way to a relationship in which Congress assumed a position subordinate to the executive. Party trumped institution.”⁹⁹ Experts noted that such partisan pressures created a situation where oversight seemed to vary based on the party in power.¹⁰⁰ Congressional investigators have themselves confirmed such a trend by questioning the rigor and rationale of the other party’s oversight agenda and activity.¹⁰¹ All the while, Congress has struggled to simultaneously focus on legislating and investigating the complex, cross-jurisdictional issues with which it is routinely confronted.¹⁰² And as policymakers were often unable to resolve the day’s major issues, the American people became increasingly distrustful of politicians and government.¹⁰³ As a result, the traditional model of congressional investigations was ripe for change.

Communications trends have also added to the challenges facing Congress and further strained the traditional congressional investigations model. Past investigators “honed their

⁹⁹ MANN & ORNSTEIN, *supra* note 87, at 139; *see also* Joe Nocera, *The Last Moderate*, N.Y. Times, Sept. 16, 2011, at A27 (profiling Rep. Jim Cooper (D-TN) describing the decline of congressional collegiality).

¹⁰⁰ *See* ABERBACH, *supra* note 45, at 23-30, 59-70 (noting the trend of increased oversight when a congressional majority and the President are from different parties); Kuttner, *supra* note 86; Schumer, *supra* note 71, at 9-10 (citing Norman J. Ornstein & Thomas E. Mann, *Congress Checks Out*, FOREIGN AFFS., Nov.-Dec. 2006, at 67, 70 (studying reduced oversight during periods of unified government)).

¹⁰¹ *See, e.g.*, MINORITY STAFF OF H. COMM. ON OVERSIGHT AND GOV’T REFORM, 110TH CONG., A CONSTITUTIONAL OBLIGATION: CONG. OVERSIGHT OF THE EXEC. BRANCH (Comm. Print 2010) (compiling instances of allegedly partisan oversight by Democrats); 156 CONG. REC. S5875-76 (daily ed. Jul. 15, 2010) (statement of Sen. Shelby) (accusing Democrats of weak oversight of Obama administration); Letter from Rep. Elijah E. Cummings to Rep. Darrell E. Issa (Jan. 18, 2011) (alleging Republican use of committee resources for partisan purposes); *see also* Tim Fernholz, *Democrats, Meet Darrell Issa, Likely the Man With the Subpoena*, NEWSWEEK, Sept. 7, 2010 (describing the Oversight Committee’s acrimonious history).

¹⁰² *See, e.g.*, THOMAS H. KEAN & LEE H. HAMILTON, WITHOUT PRECEDENT: THE INSIDE STORY OF THE 9/11 COMMISSION 318 (2006); Ruby, *supra* note 67, at 236-37; *supra* note 88 and accompanying text.

¹⁰³ CAMPBELL, *supra* note 9, at 8; PEW RESEARCH CTR., *DISTRUST, DISCONTENT, ANGER AND PARTISAN RANCOR: THE PEOPLE AND THEIR GOVERNMENT* (2010), *available at* <http://people-press.org/2010/04/18/distrust-discontent-anger-and-partisan-rancor/> (“By almost every conceivable measure Americans are less positive and more critical of government these days.”).

public relations skills to attract press coverage and hold public attention” while grappling with the advent of photography and television.¹⁰⁴ Modern congressional investigators have had to confront the amplified communications challenge of a fragmented media landscape and an around-the-clock news cycle.¹⁰⁵ Political experts have noted that operating at a frenetic pace often made it even more difficult for investigators to sustain focus on a particular topic.¹⁰⁶ And some have feared that such a pace encouraged investigators to develop headline-grabbing attacks instead of undertaking in-depth inquiries.¹⁰⁷ At the same time, however, blogs and other electronic media have provided new leads for committee investigators to follow.¹⁰⁸ While new technologies do have many clear benefits for congressional investigators, there is no doubt that they have made the job of congressional investigators even more challenging.

Congress has also faced considerable time and scheduling pressures to complete significant investigations. The official two-year congressional session, marked from convening to adjournment, has edged to approximately a full calendar year.¹⁰⁹ In addition, many Members spend Friday to Monday in their home districts, leaving just Tuesday, Wednesday, and Thursday for legislative business.¹¹⁰ As a result, Members and commentators have voiced concern about

¹⁰⁴ U.S. SENATE, supra note 1; see also SELIGMAN, supra note 63, at 31 (citing new media at Pecora hearing); TAYLOR, supra note 17, at 240-49 (noting that investigators were accused of exploiting then-new media to distort facts); Theodore Wilson, The Kefauver Committee, 1950, in 5 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, supra note 21, at 3439, 3460-62, 3465-66 (characterizing the Kefauver Committee as using television to introduce “a new element into the structure of congressional investigations”).

¹⁰⁵ See, e.g., KEAN & HAMILTON, supra note 102, at 318 (2006); Friel, supra note 90; Mark Hemingway, The Waxman Cometh – But He Doth Not Succeed, NAT’L REV., Jan. 28, 2008 (describing investigators’ utilization of media).

¹⁰⁶ See ABERBACH, supra note 45, at 38-39; See also, KEAN & HAMILTON, supra note 102, at 318; Friel, supra note 4.

¹⁰⁷ See, e.g., CAMPBELL, supra note 9, at 131; Brian Friel, Op-Ed., Where Will the G.O.P. Go Digging?, N.Y. TIMES, Nov. 14, 2010, at WK9.

¹⁰⁸ See, e.g., Carol Guensberg, Non-Profit News, AMER. JOURNALISM REV., at 26 (February 2008) (describing the rise of electronic news outlets and the impact of their investigations).

¹⁰⁹ See OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, SESSION DATES OF CONGRESS, http://artandhistory.house.gov/house_history/Session_Dates/sessionsAll.aspx (last visited Sept. 25, 2011); see also CAMPBELL, supra note 9, at 56-66 (laying out time and schedule constraints on Members of Congress).

¹¹⁰ See, e.g., John Cochran, ‘Do-Nothing Congress’ Raises Critics’ Ire, ABC NEWS, May 12, 2006, <http://abcnews.go.com/Politics/Story?id=1955256&page=1>; see also CAMPBELL, supra note 9, at 56-66 (describing congressional travel schedules).

the amount of time available for congressional oversight.¹¹¹ It follows that when Representatives and Senators are in Washington, their schedules are packed: between 1995 and 2010 they took an average of 668 and 344 votes each year, respectively.¹¹² Furthermore, House committees held 912 hearings per year between 2005 and 2010, while Senate committees held 551 hearings per year during that same period.¹¹³ From a docket and timing perspective, the traditional system of conducting investigations within congressional committees has been challenged as never before.

As Congress confronted these myriad challenges, creating quasi-legislative independent commissions became a way to delegate complex policy investigation and development to outside experts while retaining legislative control. As a possible solution to political, communications, and calendar pressures, scholars have noted that such commissions “[enable] deliberative, expert, and independent consideration of a controversial issue” on which Congress lacks sufficient time, will, or expertise.¹¹⁴ Moreover, such commissions are “generally the most inexpensive way for Congress to solve complex and technical problems.”¹¹⁵ By empanelling a non-congressional commission to investigate controversial issues and recommend reform, Congress can delegate intricate policy development to knowledgeable private citizens, thereby freeing time for

¹¹¹ See, e.g., *id.* (quoting Rep. Jeff Flake and scholar Norm Ornstein).

¹¹² THE LIBRARY OF CONGRESS, ROLL CALL VOTES, <http://thomas.loc.gov/home/rollcallvotes.html> (last visited Sept. 25, 2011). The House averaged 771 votes in a non-election year and 566 in an election year, whereas the Senate averaged 416 in a non-election year and 272 in an election year. *Id.*; see also CAMPBELL, *supra* note 9, at 56-66 (describing congressional voting patterns).

¹¹³ GPO ACCESS, CONGRESSIONAL HEARINGS, <http://www.gpoaccess.gov/chearings/browse.html> (last visited Sept. 25, 2011). From 2005-2010, House committees held a total of 5,475 hearings, while Senate committees held 3,307 hearings. *Id.*; see also CAMPBELL, *supra* note 9, at 56-66 (cataloging congressional committee activity).

¹¹⁴ WOLANIN, *supra* note 15, at 44-45; see Campbell, *supra* note 5, at 2-7; Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH & LEE L. REV. 1239, 1246-48; Ruby, *supra* note 67, at 252; Col. Stephen R. Schwalbe, *An Exposé on Base Realignment and Closure Commissions*, AIR & SPACE POWER J. (2003), available at <http://www.airpower.au.af.mil/airchronicles/cc/schwalbe.html> (last visited Aug. 25, 2011) (noting that independent commissions provide expertise to resolve policy issues amid legislative and executive gridlock).

¹¹⁵ Schwalbe, *supra* note 114.

Members to tackle other issues.¹¹⁶ In addition, delegation to an independent commission theoretically allows commissioners to reach potentially politically controversial conclusions without being subject to typical interest group and other pressures.¹¹⁷ As a result, Members can sidestep potential allegations of inaction or influence,¹¹⁸ while simultaneously choosing which commission recommendations to accept.¹¹⁹ Members can also gain cover from any resulting political fallout.¹²⁰ And such commissions can quickly earn the public's trust by endowing respected elder statesmen, among others, with powerful tools and expert staff to complete the given task.¹²¹ Creating independent commissions also allows Congress to raise awareness of a

¹¹⁶ See Campbell, *supra* note 5, at 10-16 (recounting that congressional offices cited workload and expertise in support of creating an independent commission); Ruby, *supra* note 67, at 251 (noting that history suggests congressional committees cannot simultaneously manage vigorous oversight, substantive reform, and an investigation); Schwalbe, *supra* note 15; *see, e.g.*, 155 CONG. REC. S4548 (daily ed. Apr. 22, 2009) (statement of Sen. Dodd) (favoring empanelling an independent commission because of Congress's busy schedule); LINOWES, *supra* note 42, at 1 (describing commissioners as "a cross-section of private citizens").

¹¹⁷ See CAMPBELL, *supra* note 9, at 13, 130 & n.2; FISHER, *supra* note 8, at 150; WOLANIN, *supra* note 15, at 45; Rasky, *supra* note 16 (noting the views that commissions obviate the challenge of resolving interest group conflicts); Schwalbe, *supra* note 15 (highlighting view that independent commissions develop non-partisan solutions).

¹¹⁸ See CAMPBELL, *supra* note 9, at 18; TAYLOR, *supra* note 17, at XIV-XVII (empanelling an investigation, which creates guilt by association, may be enough for Congress to appear active); Campbell, *supra* note 5, at 4, 16-18 ("Incentives to avoid blame lead members of Congress to adopt a distinctive set of political strategies, such as 'passing the buck' or 'deflection.'"); Jacobson, *supra* note 51 (quoting Prof. Paul Light stating that "some [commissions] are serious, and some are designed to distract the public and move an issue out of the headlines"); *see, e.g.*, 134 CONG. REC. S5364 (daily ed. May 10, 1988) (statement of Sen. Cohen) (stating that Congress should create a commission to close military bases because "we can't afford to bear that kind of responsibility").

¹¹⁹ See CAMPBELL, *supra* note 9, at 12, 130 & n.6; Cole, *supra* note 14, at 14; *see, e.g.*, Ezra Klein, *2012 Budget: Like the Fiscal Commission Never Happened*, WASH. POST'S WONKBOOK BLOG (Feb. 14, 2011, 11:32 AM), http://voices.washingtonpost.com/ezra-klein/2011/02/2012_budget_no_fiscal_commissi.html; Beth Rosenson, *Against Their Apparent Self-Interest: The Authorization of Independent State Legislative Ethics Commissions*, 3 ST. POL. & POL'Y Q. 42, 45 (2003) (noting legislators' desire to empanel a commission to avoid judging colleagues). As scholars have noted, Congress may avoid the impact of a commission's report by scheduling its due date after an election, or during a non-election year. See Campbell, *supra* note 5, at 8; *see, e.g.*, Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 5(h), 123 Stat. 1625, 1630. (requiring FCIC report on December 15, 2010); Schwalbe, *supra* note 15 (remarking that Defense Base Closure and Realignment Commission conclusions were due in non-election years).

¹²⁰ WOLANIN, *supra* note 15, at 142, 146-151 (highlighting the "educational impact of commissions" which make it safer for policymakers to support or advocate a proposal); *see, e.g.*, 134 CONG. REC. H5317 (daily ed. July 7, 1988) (statement of Rep. Brooks) (describing commissions as "Rube Goldberg gimmicks that are purposely crafted to let us avoid making" tough choices).

¹²¹ See CAMPBELL, *supra* note 9, at 70; WOLANIN, *supra* note 15, at 148-51 (describing commissioners as an "august group"); Schwalbe, *supra* note 15 ("To lend credibility and legitimacy to a commission, staff members will generally be recruited who are senior experts with well-known reputations inside and outside their fields of expertise."); Schwalbe, *supra* note 114 (noting that appointing commissioners that are knowledgeable, well-known, respected, and seen as independent enhances commission credibility).

particular issue¹²² and provides a productive outlet for former politicians and senior officials still seeking an opportunity to shape policy.¹²³ In sum, independent commissions provide an opportunity to alleviate some of the political, communications, and scheduling pressures that have increasingly confronted congressional investigators.

B. Since 2001, Congress Has Increasingly Turned to Quasi-Legislative Independent Commissions To Conduct Investigations.

In response to major twenty-first century challenges, Congress began supplementing its own investigations by creating quasi-legislative independent commissions. This section looks more closely at this phenomenon by exploring the creation of three such commissions: first, the Commission on Terrorist Attacks Upon the United States (9/11 Commission), which investigated the terrorist attacks of September 11, 2001; second, the Commission on Wartime Contracting in Iraq and Afghanistan (CWC), which investigated waste, fraud, and abuse in contingency contracting; and third, the Financial Crisis Inquiry Commission (FCIC), which examined the causes of the recent global economic and financial crisis. This discussion sets the stage for Part III, which scrutinizes the specific characteristics of these three commissions to determine why some were considered more successful than others.

1. Case Study: The Commission on Terrorist Attacks Upon the United States (9/11 Commission)

The 9/11 Commission was almost never created. In the aftermath of September 11, 2001, President Bush favored continuing the joint inquiry being done by the House and Senate

¹²² See WOLANIN, *supra* note 15, at 146-51 (“Commissions have helped to place broad new issues on the national agenda, to elevate them to a level of legitimate and pressing matters about which government should take affirmative action.”).

¹²³ See CAMPBELL, *supra* note 9, at 16-18, 70; LINOWES, *supra* note 42, at 1 (characterizing commissioners as experts who volunteer to design public policy); Ruby, *supra* note 67, at 241.

intelligence committees, rather than creating a new independent inquiry.¹²⁴ Others favored an independent commission over a congressional committee investigation because they believed that an independent inquiry could exercise broader jurisdiction, take a more objective view, and be less prone to political considerations.¹²⁵ In short, they felt that an independent commission's findings and recommendations would have more credibility than those of a congressional committee.¹²⁶ However, executive opposition was overcome when the families of the victims of 9/11 spoke out in favor of an independent commission.¹²⁷ On November 27, 2002, the 9/11 Commission was born,¹²⁸ with subpoena power,¹²⁹ and "an extraordinarily broad investigative charge . . . [and] only eighteen months to complete its task."¹³⁰

Empanelling an independent commission to carry out the investigation represented a significant shift by Congress. The 9/11 Commission, unlike the Roberts and Warren Commissions,¹³¹ began as a congressional inquiry and was later transformed into a quasi-legislative independent tribunal.¹³² The quasi-legislative solution was so unique that it was

¹²⁴ COLE & BRAND, *supra* note 6, at 479-80; Victoria S. Shabo, "We Are Pleased To Report That the Commission Has Reached Agreement with the White House": The 9/11 Commission and Implications for Legislative-Executive Information Sharing, 83 N.C. L. REV. 1037, 1041-42 & nn.19-20 (2005).

¹²⁵ See, e.g., 148 CONG. REC. S9084 (daily ed. Sept. 24, 2002) (statement of Sen. Hatch) (supporting a "detached and objective analysis of mistakes"); 148 CONG. REC. H5435 (daily ed. July 24, 2002) (statement of Rep. Pelosi) (arguing for an independent commission to provide a fresh perspective); 148 CONG. REC. H5438 (daily ed. July 24, 2002) (statement of Rep. Rohrabacher) (highlighting that independence would alleviate political concerns and conflicts of interest); 148 CONG. REC. H5432 (daily ed. July 24, 2002) (statement of Rep. Holt) (noting that an independent commission's findings would "earn the trust of the American public").

¹²⁶ See, e.g., 155 CONG. REC. S4552 (daily ed. Apr. 22, 2009) (statement of Sen. Isakson) (noting that an independent investigation would have enhanced credibility); 148 CONG. REC. S4451-52 (daily ed. May 15, 2002) (statement of Sen. Lieberman) (describing the enhanced "credibility" of an investigation by a "nonpolitical citizens commission"); *supra* notes 103-121 and accompanying text.

¹²⁷ See KEAN & HAMILTON, *supra* note 102, at 19-21; David Firestone & James Risen, White House, In Shift, Backs 9/11 Inquiry, N.Y. TIMES, Sept. 21, 2002, at A1 (stating the White House gave in to "Congressional demands for an independent investigation").

¹²⁸ See Intelligence Authorization Act for Fiscal Year 2003 (IAA), Pub. L. No. 107-306 §§ 601-11, 116 Stat. 2383, 2408-13 (codified at 6 U.S.C. § 101 note 602 (2010)).

¹²⁹ See IAA §§ 601-11.

¹³⁰ COLE & BRAND, *supra* note 6, at 481; see KEAN & HAMILTON, *supra* note 102, at 318.

¹³¹ See Exec. Order No. 11,130, 28 Fed. Reg. 12789 (Dec. 3, 1963) (creating the Warren Commission); *supra* notes 73-74 and accompanying text (discussing Roberts Commission).

¹³² Cole, *supra* note 14, at 27; Fenster, *supra* note 114, at 1269-70.

without precedent; although Members of Congress compared the new entity to various inquiries established throughout American history,¹³³ the examples they cited were either legislative or executive commissions, but not quasi-legislative independent commissions.¹³⁴ In fact, “none of the other commissions appointed to study a particular event [had] been explicitly legislative bodies.”¹³⁵ In sum, Congress had responded to the terrorist attacks like never before.

Ultimately, though, the 9/11 Commission may be remembered as much for its success as for its uniqueness. While the Commission was criticized for being slow at the outset of its investigation, it eventually held nineteen days of hearings, took testimony from 160 people, and reviewed millions of pages of documents.¹³⁶ The comprehensive 9/11 Commission Report was “widely hailed as a bipartisan success” and was positively received by policy makers and experts.¹³⁷ The paperback version of its report sold more than one million copies.¹³⁸ Congress quickly began working on implementing the Commission’s legislative proposals, even cutting short its August recess to conduct hearings.¹³⁹ By 2007, more than eighty percent of the Commission’s recommendations had been enacted, including reorganizing the nation’s

¹³³ See, e.g., 148 CONG. REC. H5434 (daily ed. July 24, 2002) (statement of Rep. Kind) (citing commission created to study the bombing of Marine barracks in Lebanon); 147 CONG. REC. S10268 (daily ed. Oct. 4, 2001) (statement of Sen. Torricelli) (making comparisons to investigations after the Civil War, Titanic sinking, Pearl Harbor bombing, Kennedy assassination, and Space Shuttle Challenger explosion).

¹³⁴ See Fenster, *supra* note 114, at 1272 (“By situating the Commission within the legislative branch, the Commission’s creators distinguished it, at least formally, from similar independent commissions in the past, even as they cited these past commissions as historic precedents.”); see also *supra* notes 22-24 and accompanying text (describing legislative response to the Civil War); *supra* notes 71-76 and accompanying text (discussing the response to Pearl Harbor).

¹³⁵ Shabo, *supra* note 124, at 1044 & n.37.

¹³⁶ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 431-33 (2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

¹³⁷ See, e.g., Jim Puzanghera, *Federal Commission’s Challenge: To Be Bipartisan*, LOS ANGELES TIMES, Sept. 17, 2009, at 1; Edward Wyatt, *9/11 Report Is National Book Award Finalist*, N.Y. TIMES, Oct. 14, 2004, at E1; Andrea Mitchell, *Bush Vows To Heed 9/11 Report Advice*, MSNBC, July 24, 2004, http://www.msnbc.msn.com/id/5485889/ns/us_news-security/t/bush-vows-heed-report-advice/. See generally NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, *supra* note 136.

¹³⁸ Edward Wyatt, *Publisher Names 9/11 Charities*, N.Y. TIMES, Jul. 21, 2005, at E5.

¹³⁹ See, e.g., J. Scott Orr, *Congress Gets Fast Start On 9/11 Work*, THE STAR-LEDGER, July 31, 2004, at 3 (“Moving at what amounts to lightning speed on Capitol Hill, Congress yesterday began considering the politically charged recommendations of the 9/11 commission with a vow to give them an accelerated but thorough review.”).

intelligence agencies, enhancing airport screenings, and reallocating funding based on risk.¹⁴⁰

And the 9/11 commissioners continued to be consulted as national security experts for years after the release of their report.¹⁴¹ In practice, the 9/11 Commission operated exactly as Congress had hoped when it empanelled this quasi-legislative independent commission.

2. Case Study: The Commission on Wartime Contracting in Iraq and Afghanistan (CWC)

Following the model of the 9/11 Commission, Congress created a quasi-legislative independent commission to study contingency contracting during the wars in Iraq and Afghanistan. During the war in Iraq, Members of Congress and others had proposed creating independent commissions to investigate allegations of torture and harsh interrogation techniques.¹⁴² After a series of high-profile investigations into Defense Department procurement and the conduct of military contractors,¹⁴³ Senators Claire McCaskill (D-MO) and Jim Webb (D-VA) proposed a commission to study wartime contingency contracting and contractors in Iraq and Afghanistan, in the mold of the Truman Committee.¹⁴⁴ Congress and the President agreed on its creation, and the CWC was statutorily empowered, albeit without subpoena power, to hold

¹⁴⁰ See, e.g., Mitchell, *supra* note 137; Bush Signs Homeland Security Bill, USA TODAY, Aug. 3, 2007, http://www.usatoday.com/news/washington/2007-08-03-homeland-security_N.htm; J.L. Hensle, 9/11 10 Years Later: The 9/11 Commission Recommendations, HOMELAND SEC. DIGITAL LIB. (July 19, 2011 7:29 AM), <https://www.hsdl.org/hslog/?q=node/6265>.

¹⁴¹ See, e.g., NAT'L SEC. PREPAREDNESS GRP., TENTH ANNIVERSARY REPORT CARD: THE STATUS OF THE 9/11 COMMISSION RECOMMENDATIONS (Sept. 2011) (describing group as "follow-on" to the 9/11 Commission, with the same chair and vice-chair); Philip Shenon & Carl Hulse, Leaders Say Senate Can Act on 9/11 Bills Soon, N.Y. TIMES, Sept. 30, 2004, at A26.

¹⁴² See, e.g., H.R. 3003, 109th Cong. (2005) (proposing to establish an independent commission to investigate abuses at Abu Ghraib prison); GRETCHEN BORCHELT & CHRISTIAN PROSS, PHYSICIANS FOR HUMAN RIGHTS, BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY U.S. FORCES 16 (2005) (calling for an independent commission to investigate torture allegations); Am. Morning (CNN broadcast Nov. 9, 2005) (Sen. Rockefeller) (supporting an independent inquiry into detention, interrogation, and rendition).

¹⁴³ See, e.g., Glenn Kessler, Justice Dept. Conducting Criminal Probe of Baghdad Embassy Contracts, WASH. POST, Nov. 16, 2007, at A28; Matthew Schwarzfeld, Waxman's Strategy for Undoing Blackwater, PROPUBLICA, July 30, 2008, <http://www.propublica.org/article/waxmans-strategy-for-undoing-blackwater-730>.

¹⁴⁴ Background, COMM'N ON WARTIME CONTRACTING IN IRAQ & AFGHANISTAN, <http://www.wartimecontracting.gov/index.php/about> (last visited Apr. 25, 2011) (noting that the Truman Committee was the inspiration for the CWC); see Schumer, *supra* note 71, at 15-16; *supra* notes 70-71 (discussing the Truman Committee).

hearings, take testimony, and gather evidence.¹⁴⁵ It was given two years to complete an interim report and a final report that covered six particular subjects, which all fell within the relatively narrow area of contracting in Iraq and Afghanistan, and the power to complete other reports as appropriate.¹⁴⁶ For the second time in recent memory, Congress had delegated a critical investigation to an independent commission.

The CWC was widely considered a successful quasi-legislative independent commission. Senator Webb described the CWC as “the way that Congressional commissions should work. It was bi-partisan, high energy, comprised of highly qualified people who were brought in for a specific period of time . . . and who will continue to be able to maintain very high profile careers out in the community once this is over.”¹⁴⁷ News accounts of the release of CWC’s final report focused on the quantification of alleged contracting fraud and the Commission’s recommendations for reform.¹⁴⁸ The accounts also lauded the experience of the commissioners and their ability to reach a unanimous, bipartisan agreement.¹⁴⁹ Although it is too early to know whether the CWC recommendations will be enacted, in full or in part, some legislators have signaled support for various of the Commission’s proposals.¹⁵⁰ And legislation introduced by

¹⁴⁵ National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 230 (codified at 10 U.S.C. § 2302 note 841 (2010)); Press Release, Senator Jim Webb, Senator Webb: Congress Will Act on Wartime Contracting Commission Recommendations (Aug. 31, 2011) (“We did not get the ability to have a subpoena. But what we did get was the structure that was put into place in this Commission . . .”).

¹⁴⁶ NDAA §§ 841(c), (d).

¹⁴⁷ Webb, *supra* note 145; *see also* Press Release, Representative John F. Tierney, Congressman Tierney to Introduce Legislation on Commission on Wartime Contracting Recommendation (Aug. 31, 2011) (“The Commission was tasked with a big challenge and its bipartisan members should be commended for the fair and thorough manner in which they conducted their work and thanked for their service to our country.”).

¹⁴⁸ *See, e.g.*, Megan Scully, War-Related Contracting Wasted Up To \$60 Billion, Commission Reports, NATL. J., Aug. 31, 2011, <http://www.govexec.com/dailyfed/0811/083111wartime.htm>; Richard Lardner, Up To \$60B In War Funds Said Wasted, ASSOC. PRESS, Aug. 30, 2011. *See generally* COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS (2011), available at http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf.

¹⁴⁹ Dana Liebelson, Non-Partisan Commission Urges Congress to Adopt Contracting Reforms, PROJECT ON GOV’T OVERSIGHT (Sept. 1, 2011 11:37 AM) (noting that CWC commissioners described themselves as non-partisan, in contrast to the FCIC); Webb, *supra* note 145.

¹⁵⁰ See Where is the Peace Dividend? Examining the Final Report to Congress of the Commission on Wartime Contracting: Hearing Before the H. Comm. On Oversight & Gov’t Reform, 112th Cong., 1st Sess. (Oct. 4, 2011)

Representative John F. Tierney (D-MA) to create an Office of the Special Inspector General for Overseas Contingency Operations, based on a CWC recommendation, has already gained some support in Congress.¹⁵¹ At this point, it appears that history will likely view the CWC as a generally successful quasi-legislative independent commission.

3. Case Study: The Financial Crisis Inquiry Commission (FCIC)

After the economy faced unprecedented challenges in 2008 and 2009, Congress again used a quasi-legislative independent commission to help shape its response to the crisis. As part of the legislation that authorized the Trouble Asset Relief Program (TARP), Congress created the Congressional Oversight Panel (COP) to review the state of the financial markets and regulations, and the Treasury Department's management of the TARP.¹⁵² COP was empowered to hold hearings and swear-in witnesses, and was charged to complete a special report on financial regulatory reform by January 20, 2009.¹⁵³ Although COP was similar to the previous quasi-legislative investigative commissions, it was not responsible for uncovering the root of the crisis. As a result, COP more closely resembled an advisory commission,¹⁵⁴ leaving the deep investigation of the crisis to another entity.

In an attempt to get to the heart of the economic turmoil, Congress created another quasi-legislative independent commission – the FCIC. Members of Congress had proposed at least six

(voicing support for CWC recommendations by Members of Congress); Wartime Contracting: Recommendations of The Commission On Wartime Contracting: Hearing Before the S. Comm. On Homeland Sec. & Gov't Affs., 112th Cong., 1st Sess. (Sept. 21, 2011) (discussing the positive legislative response to CWC report); see, e.g., Press Release, Senator Claire McCaskill, Contracting Commission Offers 'Roadmap For Accountability' (Aug. 31, 2011) (pledging "'to go at this as hard as I know how' to turn the Commission's recommendations into law"); Webb, supra note 145 ("I would like to express my strong view that these recommendations will be listened to and, when appropriate, acted on by the United States Congress.").

¹⁵¹ See H.R. 2880, 112th Cong. (2011) (listing 19 co-sponsors as of November 11, 2011).

Where is the Peace Dividend? Examining the Final Report to Congress of the Commission on Wartime Contracting: Hearing Before the H. Comm. On Oversight & Gov't Reform, 112th Cong., 1st Sess. (Oct. 4, 2011) (including support for Rep. Tierney's legislation by some Members of Congress).

¹⁵² See Emergency Economic Stabilization Act of 2008 (EESA), Pub. L. No. 110-343, 122 Stat. 3765 (codified at scattered sections of 12 U.S.C.).

¹⁵³ See id. at §§ 125(b), (e)(1), 122 Stat. at 3793 (codified at 12 U.S.C. § 5233).

¹⁵⁴ See supra note 11 and accompanying text.

versions of such a commission, of varying sizes, powers, duties, and funding, to conduct the investigation.¹⁵⁵ Proponents wanted the entity to conduct a modern-day Pecora investigation,¹⁵⁶ and promised to model the entity's membership and structure after the 9/11 Commission.¹⁵⁷ Such a quasi-legislative body, supporters said, would avoid becoming an “antagonistic [and] adversarial” investigation, foster thoughtful reforms, and be “divorced from partisan pressures.”¹⁵⁸ By the spring of 2009, the House of Representatives and the White House had gone on record supporting an independent investigation.¹⁵⁹ Then, on May 20, 2009, Congress officially created the FCIC, charging it “to examine the causes, domestic and global, of the current financial and economic crisis,”¹⁶⁰ and to return a wide-ranging report covering twenty-two specified economic and regulatory subtopics by December 15, 2010.¹⁶¹ As supporters had promised, the FCIC was created as an amalgam of the Pecora and 9/11 Commissions.¹⁶² With the FCIC, Congress created another quasi-legislative independent commission, this time to investigate economic affairs.

¹⁵⁵ Matthew Eric Glassman & Jacob R. Straus, Proposals for a Congressional Commission on the Financial Crisis: A Comparative Analysis, CONG. RES. SERV., at 1 (Apr. 29, 2009).

¹⁵⁶ See, e.g., 156 CONG. REC. S2415 (daily ed. Apr. 19, 2010) (statement of Sen. Kaufman) (praising Pecora Commission); 155 CONG. REC. S3967 (daily ed. Mar. 30, 2009) (statement of Sen. Dorgan) (calling for Pecora-like investigation into the financial crisis); 155 CONG. REC. H3791 (daily ed. Mar. 24, 2009) (statement of Rep. Kaptur) (calling on Congress to “investigate, investigate, investigate” through a “Pecora-type investigation”); Brady Dennis, In Original Reformer, a Model, WASH. POST, Sept. 16, 2009, at A16; Robert Schmidt & Phil Mattingly, Crisis Panel Report Blames Wall Street, Washington, BLOOMBERG NEWS, Jan. 26, 2011, <http://www.bloomberg.com/news/2011-01-26/crisis-panel-report-pins-blame-on-wall-street-washington.html>.

¹⁵⁷ BRAND & COLE, supra note 6, at 490; see 155 CONG. REC. S4552 (daily ed. Apr. 22, 2009) (statement of Sen. Isakson) (touting the benefit of expert commissioners, not elected officials, modeled after members of the 9/11 Commission); Kate Phillips, Financial Inquiries and the Pecora Legacy, N.Y. TIMES CAUCUS BLOG (May 6, 2009, 4:19 PM), <http://thecaucus.blogs.nytimes.com/2009/05/06/financial-inquiries-and-the-pecora-legacy/>.

¹⁵⁸ See Phillips, supra note 157.

¹⁵⁹ See Kate Phillips, White House Supports Financial Inquiry, N.Y. TIMES CAUCUS BLOG (May 7, 2009, 4:06 PM), <http://thecaucus.blogs.nytimes.com/2009/05/07/white-house-supports-financial-inquiry/>.

¹⁶⁰ Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 5, 123 Stat. 1625, 1625 (codified at 18 U.S.C. § 1 note (2010)).

¹⁶¹ Id. at §§ 5(c)(1), (h). The report's release was scheduled during Congress's post-election break.

¹⁶² See, e.g., 155 CONG. REC. S4547-48 (daily ed. Apr. 22, 2009) (statement of Sen. Dodd) (seeking a 9/11 style commission to serve as a modern-day Pecora Commission).

The FCIC, however, has largely been viewed as unsuccessful. From the get-go, many noted internal friction at the Commission and feared that it would have difficulty reaching consensus.¹⁶³ Such fears proved prescient, as the commissioners were unable to reach agreement and, instead, ultimately released a majority report signed by the six members appointed by Democrats, and two dissenting reports by Republican-appointed members.¹⁶⁴ The release of multiple final reports highlighted the divisions within the Commission and the conflicting lessons learned from the investigation, and fueled speculation that the appearance of partisanship “could blunt the impact of its findings.”¹⁶⁵ While it is too early to tell whether Congress will enact any of the suggestions from the FCIC’s various reports, the Republicans on the House Committee on Oversight and Government Reform responded by investigating “potential financial mismanagement” at the FCIC.¹⁶⁶ Committee Democrats countered, though, that such allegations “were largely unsubstantiated,” and noted a number of concerns with the Republican-appointed commissioners.¹⁶⁷ Based on the outcome and the coverage of the FCIC’s investigation and reports, the Commission thus far is considered to have been largely unsuccessful in fulfilling its mandate.

The trend in favor of quasi-legislative independent commissions was firmly established throughout the first decade of the twenty-first century. In just ten years, Congress created three

¹⁶³ See, e.g., Puzzanghera, supra note 137; Editorial, Meltdown Commission’s Report Lands With A Partisan Thud, USA TODAY, Jan. 28, 2011, at 10A.

¹⁶⁴ See, e.g., Sewell Chan, Financial Crisis Was Avoidable, Inquiry Finds, N.Y. TIMES, Jan. 26, 2011, at 1A; Adam Shell, Paul Davidson & John Waggoner, Crisis Inquiry Panel Calls Recession Avoidable, USA TODAY, Jan. 28, 2011, at 1B. See generally FINANCIAL CRISIS INQUIRY COMM’N, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011), available at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.

¹⁶⁵ Chan, supra note 164; see Schmidt & Mattingly, supra note 156; Shell, et al., supra note 164.

¹⁶⁶ MINORITY STAFF OF H. COMM. ON OVERSIGHT AND GOV’T REFORM, 112TH CONG., AN EXAMINATION OF ATTACKS AGAINST THE FINANCIAL CRISIS INQUIRY COMMISSION (Comm. Print 2011) (recounting Oversight committee investigation and allegations against FCIC); see also Jim Puzzanghera, GOP Partisanship on Panel Alleged, LOS ANGELES TIMES, at B2 (July 14, 2011).

¹⁶⁷ MINORITY STAFF OF H. COMM. ON OVERSIGHT AND GOV’T REFORM, supra note 166; see also Puzzanghera, supra note 166; supra note 101 and accompanying text (describing turmoil within OGR).

such commissions to investigate major issues, including national security, military affairs, and economic turmoil,¹⁶⁸ and more were being proposed to investigate other issues.¹⁶⁹ Even commissions themselves got into the act of helping to create independent commissions.¹⁷⁰ As Part I and Part II chronicled, these quasi-legislative independent commissions are likely now a fixture of our national government and our investigative landscape. Next, Part III looks at the features that distinguish such commissions, in search of the predictive characteristics that increase the likelihood that their work will be considered successful and that their recommendations will be adopted.

III. What Distinguishes Quasi-Legislative Independent Commissions? And Do These Features Guarantee a Commission’s “Success”?

Like snowflakes, no two quasi-legislative independent commissions are the same. Congress creates each commission by making individual decisions on a multitude of issues that determine the character and makeup of the entity. A sampling of such issues include a commission’s scope and mandate, level of funding, staff, reporting timeline, membership qualifications, mode of commissioner appointment, power to obtain information, and power to punish the failure to provide information. With seemingly infinite possibilities for structuring quasi-legislative independent commissions, Congress has yet to find a formula that guarantees success – with success being that the commission fulfills its mandate, that its report is viewed

¹⁶⁸ See *supra* Part II.B and accompanying text (studying the 9/11 Commission, the CWC, and the FCIC).

¹⁶⁹ See, e.g., William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597, 650 (2009) (proposing independent commission to uncover precedent for elections not settled by the Electoral College); Paul Taylor, *Independent of the Constitution? Issues Raised By An Independent Federal Legislative Ethics Commission with Independent Enforcement Authority*, 42 U. RICH. L. REV. 543, 544 (2008) (discussing independent ethics commission as a response to congressional corruption); Juliet Eilperin, *Independent Probe of BP Oil Spill In Works*, WASH. POST, May 18, 2010, at A8 (noting lawmakers “pushing for an independent commission” to investigate the sinking of the Deepwater Horizon oil rig).

¹⁷⁰ See, e.g., Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266, 501 (codified as amended at 50 U.S.C. § 2931 (2010)) (creating the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, as recommended by the 9/11 Commission).

positively, and that many of its recommendations are ultimately enacted.¹⁷¹ Instead, what emerges, based on a study of the three recent commissions, is a series of characteristics that appear to enhance or reduce the likelihood that a commission's efforts will be viewed favorably: scope, membership, power, and connection with broader reform. With the benefit of this knowledge, Congress should craft future quasi-legislative independent commissions with these features in mind to enhance the likelihood that such a commission's efforts will be regarded as successful.

A. *Scope: Commissions Should Be Granted Investigative Flexibility and Freedom*

The first element that distinguishes quasi-legislative independent commissions is the scope of their mandate. Congress has broad power to empanel such commissions as agents that wield its legislative power.¹⁷² Still, commissions are typically not endowed with the full breadth of congressional jurisdiction. Representing one end of the spectrum, Congress charged the 9/11 Commission to investigate the “relevant facts and circumstances relating” to the terrorist attacks, and specified eight areas that the commission may investigate.¹⁷³ At the middle ground, the CWC was created to investigate seven specific aspects of “federal agency contracting” in Iraq and Afghanistan.¹⁷⁴ Such mandates contrast with the experience of the FCIC, which was directed to “examine the causes of the current economic and financial crisis” and to report on twenty-two specific components that may have related to the financial crisis.¹⁷⁵ For example, the FCIC was simultaneously tasked with inquiring into employee compensation at financial firms,

¹⁷¹ This definition of success does not account for significant external factors, such as the contemporaneous passage of other related legislation or major world events. Such events may irreparably compromise a commission's ability to achieve success, as that term is defined by these authors.

¹⁷² TAYLOR, *supra* note 17, at 225-26; *supra* notes 36-40 and accompanying text.

¹⁷³ *See* Intelligence Authorization Act for Fiscal Year 2003 (IAA), Pub. L. No. 107-306 § 604, 116 Stat. 2383, 2408 (codified at 6 U.S.C. § 101 note 602 (2010)).

¹⁷⁴ *See* National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 841(c)(1), 122 Stat. 230, 232 (codified at 10 U.S.C. § 2302 note 841 (2010)).

¹⁷⁵ *See* Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 5(c), 123 Stat. 1625, 1626-27 (codified at 18 U.S.C. § 1 note (2010)).

as compared to non-financial firms, the “legal and regulatory structure of the United States housing market,” and “fiscal imbalances of various governments.”¹⁷⁶ Comparing the scope of the mandates of the 9/11 Commission, the CWC, and the FCIC demonstrate the varying models that Congress has at its disposal – and why some models might work better than others.

Comparing the scope of each commission’s mandate reveals that Congress can boost the likelihood of success by providing broad guidance on the topics it should investigate, but without prescribing the specific subtopics that must comprise its investigation. The CWC was given a large budget, 13 months to complete an interim report, twenty-four months to complete a final report, and the added freedom of issuing other reports as it deemed appropriate.¹⁷⁷ In contrast, the leaders of the 9/11 Commission believed from the outset that they were “set up to fail” because they were given a broad investigative mandate, short timetable, lack of funding, and an unclear blueprint for making progress.¹⁷⁸ Although Congress directed the inquiries of both the 9/11 Commission and the CWC, it did not exhaustively prescribe the matters that each commission should address when submitting its conclusions. Rather, the statute which created each commission provided sufficient flexibility to permit the commissioners to investigate, with the freedom to follow the inquiry where it led, and to report on what they found. Such flexibility, however, with its twenty-two pronged mandate, was not a feature that the FCIC could

¹⁷⁶ FERA § 5(c)(1).

¹⁷⁷ See supra note 146 and accompanying text. The CWC’s authorizing statute does not describe a funding mechanism, but CWC Communications Director Clark T. Irwin stated that the commission received \$20-25 million from within the Defense Department’s budget. Telephone Interview with Clark T. Irwin, Director of Communications, Commission on Wartime Contracting (Sept. 13, 2011). The CWC ultimately submitted five optional reports. Reports, COMM’N ON WARTIME CONTRACTING IN IRAQ & AFGHANISTAN, <http://www.wartimecontracting.gov/index.php/reports> (last visited Sept. 12, 2011).

¹⁷⁸ KEAN & HAMILTON, supra note 102, at 318; Cole, supra note 14, at 27. To fund the 9/11 Commission, Congress reprogrammed \$3 million and appropriated an additional \$12 million. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, FREQUENTLY ASKED QUESTIONS ABOUT THE 9-11 COMMISSION, <HTTP://GOVINFO.LIBRARY.UNT.EDU/911/ABOUT/FAQ.HTM#Q1> (last visited Sept. 12, 2011).

draw upon to work around its own temporal and financial challenges.¹⁷⁹ But while experts often cite time and funding as critical factors for commission success, there is a delicate balance to be struck with respect to both factors, as more time and money may challenge commissions to stay focused and ignore frivolous leads.¹⁸⁰ In sum, a statutorily prescribed investigation likely magnified the challenges facing the FCIC, while the CWC and the 9/11 Commission were both able to harness their statutory flexibility to overcome any time and funding constraints. Congress would be well served to broadly define the topics for future quasi-legislative independent commissions to investigate, and it should be careful not to delineate with too much specificity the subtopics that must comprise that investigation.

B. Membership: Commissioners Should Have Relevant Expertise and Appear Free from Political Motivation.

Congress has near infinite flexibility to determine the size, membership, and appointment process of quasi-legislative independent commissions. Congress is not constrained in selecting the number of commissioners that it appoints to serve on such commissions, or in requiring that commissioners have a certain background or expertise.¹⁸¹ It could pull such commissioners from anywhere, including current or former officials from any level of government, and professionals from think tanks, industry, or academia.¹⁸² Once Congress decides on the number and pool of potential commissioners, it has an array of options for a commission's composition. Congress can make the panel officially non-partisan, bipartisan (with any balance of power among the

¹⁷⁹ Sewell Chan & Eric Dash, A Congressional Panel, Hobbled in Its Financial Inquiry, N.Y. TIMES, Apr. 6, 2010, at B4. Congress initially appropriated \$8 million for the FCIC, and later appropriated another \$1.8 million. MINORITY STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 112TH CONG., supra note 166, at 7.

¹⁸⁰ See Cole, supra note 14, at 42-45 (warning that excessive funding risks investigation into frivolous matters); cf. George Lardner Jr., Clinton Probes Cost \$60 Million, WASH. POST, Mar. 31, 2001, at A10 (compiling more than \$110 million in spending by sprawling independent counsel investigations).

¹⁸¹ See Schwalbe, supra note 15 (“The number of members varies by the type of commission. Normally, presidential and congressional commissions have fewer than ten members. However, regulatory commissions may have many more than ten due to the complexity and scope of the industry being overseen.”).

¹⁸² See LINOWES, supra note 42, at 1 (noting the diverse backgrounds and experience of commissioners).

parties), or a hybrid, with both partisan and ostensibly nonpartisan members. However, non-partisan commissioners would likely reflect the political differences of their elected appointers. For example, the 9/11 Commission was bipartisan, with the President appointing the chair, the Democratic leader in the Senate appointing the vice-chair, and the four senior party leaders in the House and Senate each appointing two commissioners.¹⁸³ Commissioners were to be prominent citizens of national recognition who were not current government officers or employees.¹⁸⁴ Similarly, Congress created the CWC as an eight-member, equally divided, bipartisan commission, with congressional leaders and the President appointing the commissioners.¹⁸⁵ Unlike the 9/11 Commission, though, the statute that created the CWC required appointers to consult with the relevant leaders of congressional committees and executive departments regarding the appointments,¹⁸⁶ and it was silent on commissioner qualifications.¹⁸⁷ The FCIC was created as a hybrid of previous commissions, composed of ten commissioners who possessed qualifications on par with those prescribed for the 9/11 commissioners, but who were appointed exclusively by congressional leaders in consultation with relevant committee leaders.¹⁸⁸ Unlike other quasi-legislative independent commissions, a majority of the FCIC commissioners were appointed by one party.¹⁸⁹ These variations in the size, balance, and composition of quasi-legislative independent commissions showcase the flexibility with which Congress can create such entities.

¹⁸³ See Intelligence Authorization Act for Fiscal Year 2003 (IAA), Pub. L. No. 107-306, § 603, 116 Stat. 2383, 2408-09 (codified at 6 U.S.C. § 101 note (2010)).

¹⁸⁴ Id.

¹⁸⁵ National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 841(b), 122 Stat. 230, 232 (codified at 10 U.S.C. § 2302 note 841 (2010)).

¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ See Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 5(b), 123 Stat. 1625, 1629 (codified at 18 U.S.C. § 1 note (2010)).

¹⁸⁹ Puzzanghera, supra note 137.

Generally, appointing members seen as independent from political influence enhances the likelihood that a quasi-legislative commission will be viewed as successful.¹⁹⁰ Scholars have noted that a commission is best positioned for success when its individual commissioners have no stake in the outcome, and are perceived by the public as outside of politics.¹⁹¹ The late David F. Linowes concurred with this view, recounting that he told members of the four commissions which he chaired that “Even if the commission’s recommendations were made in good faith, without the perceived credibility bolstered by independence and thoroughness, no one would give our findings the kind of attention essential for action.”¹⁹² The 9/11 Commission members were required by statute to be “prominent United States citizens, with national recognition and significant depth of experience”;¹⁹³ in practice they were high-ranking former officials, representing a spectrum of viewpoints, who were seen as removed from direct partisan politics.¹⁹⁴ Although the CWC commissioners were not subject to specific statutory qualifications,¹⁹⁵ they similarly represented a variety of perspectives and, with the exception of one co-chair, were largely viewed as outside of politics.¹⁹⁶ Whereas members of the 9/11

¹⁹⁰ See Schwalbe, *supra* note 15 (One commentator viewed membership as “[t]he most important characteristic for any commission”); U.S. SENATE, *supra* note 1 (noting that “the very best [congressional investigators] have managed to achieve a level of bipartisanship to maintain credibility”).

¹⁹¹ DAVID S. SORENSON, *SHUTTING DOWN THE COLD WAR: THE POLITICS OF MILITARY BASE CLOSURE* 37 (1998); Richard A. Bernardi, *The Base Closure and Realignment Commission: A Rational or Political Decision Process?* 16 *PUB. BUDGETING & FIN.* 37, 42 (1996) (suggesting that for a commission’s conclusions to be respected, “each member of the commission must be individually perceived as independent of political influence”); Friel, *supra* note 4 (noting that experts believe bipartisanship marks an effective investigation).

¹⁹² LINOWES, *supra* note 42, at 138.

¹⁹³ IAA § 603(b)(3).

¹⁹⁴ Cole, *supra* note 14, at 27; PHILIP SHENON, *THE COMMISSION: THE UNCENSORED HISTORY OF THE 9/11 INVESTIGATION* 16-34 (2008) (describing appointment of commissioners). Former Secretary of State Dr. Henry Kissinger and Former Senator George Mitchell were initially appointed to lead the 9/11 Commission, but ultimately resigned due to concerns about conflicts of interest. See *id.*

¹⁹⁵ See NDAA § 841(b).

¹⁹⁶ See *Commissioners*, COMM’N ON WARTIME CONTRACTING IN IRAQ & AFGHANISTAN, <http://www.wartimecontracting.gov/index.php/about/commissioners> (last visited Sept. 12, 2011); Daniela Altimari, *Shays Plans Bid For Senate*, HARTFORD COURANT, Aug. 23, 2011, at B2 (describing CWC co-chair Chris Shays announcing his campaign for Senate); Robert Brodsky, *Wartime Contracting Commission Members Named*, GOV’T EXEC., June 30, 2008, <http://www.govexec.com/dailyfed/0608/063008rb1.htm> (describing commissioners as “a diverse group” of experts).

Commission and the CWC were appointed by both the legislature and the executive, FCIC commissioners were appointed by Members of Congress alone.¹⁹⁷ In addition, a number of FCIC members had recent political experience or aspired to elective office.¹⁹⁸ As a result, some noted that FCIC members were more prone to political considerations and were less likely to reach consensus.¹⁹⁹ Because perceived independence is a critical reason for empanelling quasi-legislative independent commissions, a commission's conclusions are more likely to be respected and adopted if its members are seen as separated from politics.

In the next quasi-legislative independent commission, Congress would be well advised to take advantage of some of these lessons learned. First, Congress should rationally determine a commission's size, composition, funding, and timetable without viewing any such factor as dispositive of success. Second, it should follow the examples of the 9/11 Commission and the CWC to allow the President to appoint some commissioners, and continue the trend of including the perspectives of congressional and executive branch leaders. Finally, it should rigorously scrutinize potential commissioners to ensure that they have largely separated themselves from partisan politics. Potential commissioners who do not harbor immediate ambition to run for elected office are particularly well suited for the work of quasi-legislative independent commissions and the appointment of such commissioners minimizes the likelihood that a commission's conclusions will be seen as politically motivated.²⁰⁰ While something akin to a

¹⁹⁷ See FERA § 5(b).

¹⁹⁸ See Phillips, *supra* note 157; Stephen Labaton, A Panel Is Named to Examine Causes of the Economic Crisis, N.Y. TIMES, July 16, 2009, at B3 (noting recent political experience by members of the FCIC); see also Sandra Chereb, Georgiou Bows Out Of Nevada's US Senate Bid, ASSOC. PRESS, Aug. 10, 2011 (highlighting campaign for senate by a FCIC commissioner).

¹⁹⁹ See Phillips, *supra* note 157; *supra* notes 163-164 and accompanying text (recounting division within the FCIC).

²⁰⁰ See Nominations: Hearing Before the S. Comm. on Banking, Hous. & Urban Affs., 112th Cong., 1st Sess. (Sept. 6, 2011) (statement of Sen. Corker) (highlighting the rarity for commissioners of independent agencies to be appointed when they intend to run for elected office); see, e.g. OFFICE OF CONGRESSIONAL ETHICS

political cooling off period or a promise not to run for office would no doubt come at a cost to commissioner talent, maintaining the appearance of independence may be the factor most correlated with the success of quasi-legislative independent commissions; such an appearance of independence must be the paramount consideration.²⁰¹ Therefore, to maximize the likelihood of a positive outcome for the next commission, Congress should consider additional features to enhance commissioner independence.

C. Power: Commissions Should Judiciously Exercise Their Power To Compel Information.

Congress also distinguishes quasi-legislative independent commissions based on the power that it delegates to such commissions. Congress must determine how commissions receive information and how much they must (or may) share with the public.²⁰² Further, the legislature must determine whether the commission will be given subpoena power and the ability to compel testimony and documents. And it must decide what recourse the commission has available if its requests, whether or not pursuant to a subpoena, are not heeded.²⁰³ These decisions are important because, in practice, a powerful investigator is often provided the authority to issue, or credibly threaten to issue, a subpoena.²⁰⁴ The 9/11 Commission was

UNITED STATES HOUSE OF REPRESENTATIVES, CODE OF CONDUCT 2-3 (2011) (requiring that board members and staff agree not to be a candidate for Congress until at least three years after serving the Office of Congressional Ethics).

²⁰¹ CWC commissioners specifically decided not to vet their report with Members of Congress or other officials in order to ensure the report reflected the Commission's independent judgment. Telephone Interview with Clark T. Irwin, Director of Communications, Commission on Wartime Contracting (Sept. 13, 2011).

²⁰² See, e.g., COLE & BRAND, *supra* note 6, at 478-79 (discussing risks that a commission which operates privately will foster conspiracy theories and undermine its results); Schwalbe, *supra* note 114 (suggesting that a commission's legitimacy is enhanced where it publicly deliberates and reviews data).

²⁰³ COLE & BRAND, *supra* note 6, at 509-14; TAYLOR, *supra* note 17, at 86-87.

²⁰⁴ See, e.g., 155 CONG. REC. S4552 (daily ed. Apr. 22, 2009) (statement of Sen. Isakson) (highlighting the importance of vesting financial crisis investigators with subpoena power); Justice Department Response To Congressional Subpoenas, Hearing Before the H. Comm. on Oversight & Gov't Reform, 112th Cong., 1st Sess. (June 13, 2011) (statement of Morton Rosenberg) (explaining that in the 1970's "the mere threat of a subpoena was usually sufficient to get compliance," whereas in modern times "a subpoena became virtually always necessary, and threats and actual votes of subpoenas were frequent"); see also Perry Bacon, Jr., California Rep. Darrell Issa Takes On Role As Obama's Chief Antagonist, WASH. POST, June 4, 2010; Fernholz, *supra* note 101.

delegated more power than “any previous outside commission not necessarily composed of legislators.”²⁰⁵ It could subpoena witnesses and compel document production upon either bipartisan agreement of the Commission’s chair and vice chair, or a majority of commissioners.²⁰⁶ The subpoena was not self-executing, however, and obtaining a civil judgment was required for enforcement.²⁰⁷ Years later, the FCIC was granted similar subpoena and enforcement authority.²⁰⁸ By comparison, the CWC was not given subpoena authority, although it was empowered to hold hearings, take testimony, receive evidence and documents, and provide for the attendance of witnesses.²⁰⁹ If the CWC’s requests were rejected, though, the Commission’s statute empowered it to “notify the committees of Congress of jurisdiction and appropriate investigative authorities,” which could then presumably subpoena the information itself, or revisit the question of vesting the CWC with subpoena power.²¹⁰ But just as Congress must decide what power to delegate to quasi-legislative independent commissions, each commission must also decide how to exercise its delegated power.

The experience of the 9/11 Commission, the CWC, and the FCIC suggests that subpoena authority alone will not determine success. Over its lifetime, the CWC conducted 25 formal hearings, conducted more than 1,000 meetings, and made repeated fact-finding visits to Iraq and

²⁰⁵ Ruby, *supra* note 67, at 240.

²⁰⁶ IAA § 605(a).

²⁰⁷ IAA § 605(a)(2)(b).

²⁰⁸ FERA § 5(d).

²⁰⁹ NDAA § 841(e); see Carrie Dann, *Senators Offer More Muscle To Contracting Oversight Panel*, NATL J.’S CONGRESSDAILY, Feb. 2, 2009 (quoting Members of Congress pledging to help CWC obtain necessary information).

²¹⁰ NDAA § 841(e)(2); see *Commission On Wartime Contracting: Interim Findings And Path Forward: Hearing Before the H. Comm. On Oversight & Gov’t Reform, Subcomm. On Nat’l Sec. & Foreign Affs.*, 111th Cong., 1st Sess. (June 13, 2009) (statement of Rep. Tierney) (offering to assist the CWC to obtain information); Dann, *supra* note 209. To the knowledge of these authors, the CWC did not need to call upon Congress for subpoena authority. Instead, the CWC used letter requests, which Congress often uses to obtain information without resorting to subpoena. Refusal to comply with such requests from a congressional committee is frequently viewed as risking a subpoena. A proposal to give the CWC subpoena authority failed to gain a majority in Congress. See Webb, *supra* note 145.

Afghanistan.²¹¹ The CWC's effectiveness without subpoena authority could be the result of a number of factors, including its initial membership, strong congressional backing, or the threat of a congressional subpoena that could potentially result from noncompliance with CWC requests.²¹² While Congress ensured that the 9/11 Commission could issue a subpoena with bipartisan support, and commissioners encouraged the use of subpoenas, the chair and vice-chair noted that practical difficulties prevented the actual exercise of subpoena authority.²¹³ The Commission used subpoena power only when necessary to obtain critical information from recalcitrant federal agencies; the sparing use of such subpoenas rendered the receipt of one "a mark of public shame."²¹⁴ Still, with minimal use of subpoena authority, the 9/11 Commission held nineteen days of hearings, took testimony from 160 people, reviewed millions of pages of documents,²¹⁵ and developed a comprehensive report that was released to wide acclaim and acceptance.²¹⁶ In contrast, the FCIC actively utilized its subpoena authority to compel testimony and documents.²¹⁷ While frequently using its subpoena power, the FCIC conducted 700 interviews, obtained millions of e-mail exchanges, and compiled 1,900 supporting documents – on par with the 9/11 Commission.²¹⁸ However, the media largely panned the FCIC's report as divided and partisan.²¹⁹ Although at least one expert believes that an effective commission must possess, use, and be able to enforce subpoena authority,²²⁰ the recent history of quasi-legislative

²¹¹ Press Release, Commission on Wartime Contracting in Iraq and Afghanistan, Wartime Contracting Commission closes its doors September 30 (Sept. 28, 2011).

²¹² See, e.g., Bill Lambrecht, Missouri Senator Tackles Fraud: Sen. Claire McCaskill Chairs New Contracting Oversight Subcommittee, ST. LOUIS POST-DISPATCH, Apr. 22, 2009, at A1.

²¹³ KEAN & HAMILTON, supra note 102, at 19-20, 63-65; Cole, supra note 14, at 32.

²¹⁴ KEAN & HAMILTON, supra note 102, at 65; see Cole, supra note 14, at 47.

²¹⁵ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, supra note 136, at 431-33.

²¹⁶ See supra notes 136-141 and accompanying text (discussing success of 9/11 Commission).

²¹⁷ See, e.g., Steve Eder, Goldman Subpoenaed By Financial Crisis Commission, REUTERS, Jun. 8, 2010; Jia Lynn Yang, Buffett: Don't Blame Ratings Services For Housing Crisis, WASH. POST, June 3, 2010, at A13.

²¹⁸ Sewell Chan, Crisis Panel's Report Parsed Far and Wide, N.Y. Times, Jan 28, 2011, at B1; supra note 136 and accompanying text.

²¹⁹ See supra notes 163-166 and accompanying text (discussing results of FCIC).

²²⁰ See Cole, supra note 14, at 47, 51-52.

independent commissions suggests that judicious use of such authority, or even the threat of such authority, appears more important than the actual resort to subpoena power.

D. Connection with Broader Reform: Commissions' Reports Should Be Tied To Policy Change.

Congress can choose the degree to which it ties quasi-legislative independent commissions to a broader reform effort. It could make commissions the foundation for reform by using their conclusions as the blueprint for legislative action. Congress could instead consider the commission report advisory in nature, and determine later to what extent it will enact the reports' recommendations. In between, Congress can empower commissions to offer proposals to reform specific issues, without mandating or encouraging that commissions offer comprehensive policy revision. Congress utilized the first option with the 9/11 Commission, creating that entity to serve as the foundation for reform and directing it to release a final report, and any interim reports, with "recommendations for corrective measures."²²¹ For the CWC, Congress used the third model – it directed the CWC to gather information, offer contingency contracting reform proposals, and issue a final report that recommended ways to improve contracting.²²² Following the second model, Congress created the FCIC in May of 2009, amid deep discussion about broad financial regulatory reform, and charged it to return a report by December 15, 2010.²²³ Congress directed the FCIC to report on its findings and conclusions, and consult with government leaders, but it was not explicitly asked to recommend proposals for reform.²²⁴ Thus, Congress need not always empanel a quasi-legislative independent commission to develop reform proposals.

²²¹ IAA § 610.

²²² NDAA § 841(d)(3)(c).

²²³ FERA § 5(c)(1).

²²⁴ See, e.g., FERA § 5(h).

But, reviewing the recent history of quasi-legislative independent commissions, it seems that marrying an investigation with legislative reform may boost the chances for success. Experts have noted that Congress is more likely to enact commission recommendations that are easily implemented, incremental, defensible, and realistic.²²⁵ Additionally, a commission's recommendations are more likely to be adopted where they are unanimously endorsed, or at least enjoy broad bipartisan support among the commissioners.²²⁶ The 9/11 Commission was the blueprint for policy change, and its final report was distributed with commercial and public policy success;²²⁷ some of its recommendations were enacted right away and others were subsequently enacted after becoming a theme in political campaigns across the country.²²⁸ Additionally, some 9/11 commissioners were able to successfully push for policy reform even after the Commission had officially been terminated.²²⁹ While Congress investigated contracting issues and enacted legislation related to contracting while the CWC was active,²³⁰ legislation to reform contingency contracting was introduced, and gained support, after the CWC's report was issued.²³¹ The FCIC also conducted its investigation while Congress was investigating in parallel,²³² but Congress moved forward on reform before the Commission's work concluded; the House passed its version of financial regulatory reform in December 2009, the Senate acted

²²⁵ LINOWES, *supra* note 42, at 49, 190; *see also* WOLANIN, *supra* note 15, at 139-40 (revealing that about two-thirds of the presidential commissions established from 1945-1974 had their recommendations substantially implemented via legislative or administrative action).

²²⁶ WOLANIN, *supra* note 15, at 119; Schwalbe, *supra* note 114.

²²⁷ *See supra* note 138 and accompanying text; *see also* WOLANIN, *supra* note 15, at 150 (noting that the National Commission on the Causes and Prevention of Violence had released a commercial paperback edition that sold 1.75 million copies).

²²⁸ *See supra* notes 136-141 and accompanying text (discussing success of 9/11 Commission).

²²⁹ *See supra* note 141 and accompanying text.

²³⁰ *See, e.g.*, S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, AD HOC SUBCOMM. ON CONTRACTING OVERSIGHT, <http://hsgac.senate.gov/public/index.cfm?FuseAction=Subcommittees.ContractingOversight> (last visited Oct. 6, 2011) (listing contracting hearings); Pub. L. No. 111-347, 124 Stat. 3623 (codified at 26 U.S.C. § 5000C); Pub. L. No. 110-245, § 302 (codified at 26 U.S.C. § 3121(z) and 42 U.S.C. § 410(e)).

²³¹ *See supra* notes 150-151 and accompanying text (outlining legislative response to CWC report).

²³² *See, e.g.*, H. COMM. ON FIN. SERVS. HEARING ARCHIVE, <http://financialservices.house.gov/hearings111.shtml> (last visited Apr. 25, 2011) (listing hearings); S. COMM. ON BANKING, HOUS. & URBAN AFFS., HEARINGS, <http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Home> (last visited Apr. 25, 2011) (same).

in May 2010, and President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act on July 15, 2010.²³³ By the time the FCIC released its official reports, on January 27, 2011, the moment to influence significant reform had passed, and the press instead focused on divisions within the Commission's reports rather than on its recommendations for reform.²³⁴ In sum, tying a quasi-legislative independent commission to broader reform, whether piecemeal or comprehensive, seems to enhance the likelihood that its reports will be considered influential and that it will be considered successful.

IV. A Practitioner's Perspective on the Rise of Quasi-Legislative Independent Commissions and Practical Tips for Engaging with Such Entities

While there is no absolute formula to determine how quasi-legislative independent commissions will conduct their investigations, the authors of this article can offer some of the lessons learned during our time practicing in this area. What follows is a primer on representing clients with business before such commissions (whether as a subject of an investigation, or as a witness providing testimony or documents); although these pointers are not intended as an exhaustive manual, we believe investigations practitioners would do well to consider the following.

First, recognize that representing clients in connection with an inquiry conducted by a quasi-legislative independent commission requires, in the same fashion as representations in congressional committee investigations, an appreciation of the unique rules and mores that apply in this special part of the government investigations world. This is in part because Congress looms in the background. For example, although Congress does not, ab initio, give all such commissions subpoena authority, one may wish to treat a letter request as if it was from a

²³³ Brady Dennis, Obama Signs Financial Overhaul Into Law, WASH. POST, Jul. 22, 2010.

²³⁴ See supra notes 163-166 and accompanying text (discussing results of FCIC).

commission that has such authority.²³⁵ This is because Congress may step in, at any time, and help commissions that are not getting the information they want or need.²³⁶ Even if a commission's power to obtain a congressional subpoena is not explicit in the statute, Congress can independently seek the information at issue, so long as it could validly investigate in that area.²³⁷ Finally, always consider the Members of Congress with a stake in the investigation of quasi-legislative independent commissions, including those responsible for each commission's creation (and the traditional congressional committee responsibilities of such Members), and relevant committee and congressional leaders. Such Members may, among other things, advise commissioners on fruitful areas of investigation, suggest strategies for interviewing witnesses, and offer to aid in the procurement of information. In sum, practitioners and those they represent would be wise to regard quasi-legislative independent commissions, in this regard, as temporary committees of Congress.

Second, counsel should closely scrutinize the authorizing statutes of quasi-legislative independent commissions to determine the commission's scope and mandate, power, and relationship to reform. Because most quasi-legislative independent commissions face limited time and funding,²³⁸ consider the topics that the commission is required to investigate, the issues that are most important to individual commissioners and staff, and determine where each intersects with client interests and concerns. At least in theory, knowing the motivations and pressures on a commission's members and staff make it more likely that you can anticipate the direction of the investigation. This understanding should aid counsel in setting an effective strategy for engaging with such commissions.

²³⁵ See *supra* notes 202-210 and accompanying text.

²³⁶ See *supra* notes 204, 212 and accompanying text.

²³⁷ See *supra* notes 57-59, 206-210 and accompanying text.

²³⁸ See *supra* note 180 and accompanying text.

Finally, when possible, counsel should seek opportunities to develop the trust of quasi-legislative independent commissions by serving as a partner for reform. This is particularly true in those instances in which the commission is operating in a less partisan fashion than a congressional committee – delving deep into the pertinent issues, without regard for short-term press coverage or political considerations, and away from the hearing room klieg lights. Recognizing that commissions are empanelled to obtain results and that commissioners generally serve to advance good policy, when appropriate counsel should take advantage of opportunities to visit the Truman “dog house.”²³⁹ The commission and the client may find common ground more easily during such interviews because they are conducted outside the glare of the committee hearing room.²⁴⁰ But no matter the setting, counsel must always recognize and appreciate the full scope of the potential impact of a commission’s investigation from the civil, criminal, regulatory, political, and business perspectives; a statement made or a document produced in one context may have an important effect in another proceeding. This reality must always be at the forefront of counsel’s considerations.

Above all, the best advice we can offer is to be prepared to adapt because no two investigations are alike. Based on the case studies to date, quasi-legislative independent commissions are most likely to be successful where they have flexibility to conduct their investigation, apolitical commissioners, sufficient power to compel information, and a mission that is tied to legislative reform. But these factors cannot possibly account for the effect of unpredictable external events. In the end, the more that these quasi-legislative independent commissions do not mimic traditional congressional committees – conducting deeper

²³⁹ See supra note 72 and accompanying text.

²⁴⁰ See supra note 72 and accompanying text.

investigations outside of the public spotlight – the more likely they are to succeed. And the more counsel can adapt a representation to reflect these realities, the more successful he or she will be.

Conclusion

Investigations by quasi-legislative independent commissions are likely to become increasingly prevalent and relevant, so long as such commissions remain an efficient, terminable, and deflectable way for Congress to delegate and investigate. And although “[c]ommissions are not a panacea for achieving innovation in federal policy . . . [n]either are commissions a sham.”²⁴¹ As the chair and vice-chair of the 9/11 Commission summarized,

Congress cannot deal with the toughest questions facing the nation. Because of the divisiveness in the country, the dizzying twenty-four-hour news cycle, the constant need to raise funds and travel back and forth to a home district, the complexity of some bills, and the pressure on members to be partisan team players, it is harder for Congress to take the time to work through issues and build consensus. So many tough issues now get foisted off on commissions.²⁴²

By comparing the Commission on Terrorist Attacks Upon the United States, the Commission on Wartime Contracting in Iraq and Afghanistan, and the Financial Crisis Inquiry Commission, it is clear, however, that the relative views of success of such commissions vary by topic and panel – there is no absolute formula of mandate, membership, power, and reform by which Congress can guarantee that a commission will be successful or that their conclusions will be heeded. To maximize the chances that a quasi-legislative commission will be deemed successful, Congress should give such entities a broad mandate with flexibility to follow the investigation where it leads, appoint respected members seen as separated from politics, ensure the commission uses its delegated power judiciously, and combine the investigation with broader reform efforts. In the end, though, independent investigations do not occur in a vacuum and external factors – often unanticipated and unforeseen – will typically play a role in shaping the legacy of any such

²⁴¹ WOLANIN, *supra* note 15, at 142.

²⁴² KEAN & HAMILTON, *supra* note 102, at 318.

commission. What is certain is that American history will continue to be captured and told through investigations, and increasingly so through quasi-legislative independent commissions.