

St. John's University School of Law

St. John's Law Scholarship Repository

Faculty Publications

2012

The Financial Crisis Inquiry Commission and the Politics of Governmental Investigations

Michael A. Perino

St. John's University School of Law

Follow this and additional works at: https://scholarship.law.stjohns.edu/faculty_publications



Part of the [Banking and Finance Law Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), and the [Legal History Commons](#)

This Article is brought to you for free and open access by St. John's Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

THE FINANCIAL CRISIS INQUIRY COMMISSION AND THE POLITICS OF GOVERNMENTAL INVESTIGATIONS

Michael Perino *

I. INTRODUCTION

Sitting on a leather chair in front of the deep blue banner of the Commonwealth Club of California, then Speaker of the House Nancy Pelosi laid out her vision for how the country should proceed in the aftermath of the worst financial crisis since the Great Depression. The country, she said in April 2009, was angry at the financial industry and angry that the federal government had stepped in to bail out firms that were deemed too big to fail. Seventy-five percent of the country, she contended, wanted an investigation “to find out what happened on Wall Street.” Pelosi vowed to give the country just that. When she returned to Washington, Pelosi would propose legislation to create a new “Pecora Commission,” which, she explained, was an independent “commission formed when Franklin Roosevelt became president.”¹ In May 2009, a month after Pelosi’s speech, Congress passed the Fraud Enforcement and Recovery Act (“FERA”), which, among other things, created the Financial Crisis Inquiry Commission (the “FCIC” or the “Commission”), an independent, bipartisan panel tasked to “examine the causes, domestic and global, of the current financial and economic crisis in the United States.”²

Nancy Pelosi’s history was not quite right.³ Franklin Roosevelt never created an independent commission to investigate Wall Street, although it is difficult to criticize her too harshly for that historical error. Ferdinand Pecora is, after all, hardly a household name today.⁴ Nearly 80 years ago, however, it was a different story. The Pecora hearings, the eponymous investigation of Wall Street wrongdoing run by this former New York prosecutor turned Senate inquisitor, captivated the country.⁵ For sixteen months in the worst depths of the Great Depression, Pecora paraded a series of elite financiers before the Senate Banking

* Dean George W. Matheson Professor of Law and Associate Dean for Faculty Scholarship, St. John’s University School of Law. Subject to the usual caveats, the author would like to thank June Carbone and Bill Black for helpful comments and suggestions.

¹ *Pelosi Calls for Investigation of Economic Crisis*, YOUTUBE (Apr. 30, 2009), <http://www.youtube.com/watch?v=1j64-PuAk9U>.

² Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 5, 123 Stat. 1617, 1625 (2009).

³ Neither was her reporting of current events—by April 2009 there were already several proposals to create a commission to investigate the financial crisis. *See, e.g.*, S. 298, 111th Cong. (1st Sess. 2009) (bill offered by Senators Isakson, Conrad, and Chambliss to create a Financial Markets Commission). *See infra* note 91.

⁴ The hearings are so little known today that one modern writer (no doubt aware of the convention that congressional investigations typically bear the name of the senator or representative that chairs the committee) thought that they must have been led by “Senator Ferdinand Pecora.” DONALD WARREN, RADIO PRIEST: CHARLES COUGHLIN, THE FATHER OF HATE RADIO 56 (1996).

⁵ *See* MICHAEL PERINO, THE HELLHOUND OF WALL STREET: HOW FERDINAND PECORA’S INVESTIGATION OF THE GREAT CRASH FOREVER CHANGED AMERICAN FINANCE (2010).

and Currency Committee. In one dramatic hearing after another, he chronicled how the leaders of Wall Street, men previously thought to be of “unimpeachable integrity,” had manipulated stocks, dodged taxes, fleeced their shareholders, and collected enormous bonuses for peddling shoddy securities to unsuspecting American investors.⁶

The sensational headlines galvanized public opinion for reform and created the climate in which Congress was able to re-shape and, in some instances create, much of the modern structure of federal financial regulation. In the first hundred days of Roosevelt’s administration, Congress passed the Banking Act of 1933,⁷ better known for its co-sponsors, Senator Carter Glass and Representative Henry Steagall. Glass-Steagall not only separated commercial from investment banking, but also created federal deposit insurance, perhaps the most important structural change to banking regulation to emerge from the New Deal.⁸ A few weeks earlier, Congress had passed the Securities Act of 1933, the first federal law to regulate the sale of securities to investors.⁹ A year later came the Securities Exchange Act of 1934, which regulated the stock markets, created a system of periodic disclosure for public companies, and established the Securities and Exchange Commission.¹⁰

The drafters of those laws were candid in their gratitude for Pecora’s meticulous and sensational investigation. “We built completely on his work,” acknowledged James M. Landis, the Harvard Law professor who had a major hand in writing both securities laws.¹¹ Even Roosevelt drew a direct link

⁶ See FERDINAND PECORA, *WALL STREET UNDER OATH: THE STORY OF OUR MODERN MONEY CHANGERS* (1939).

⁷ Banking Act of 1933, 12 U.S.C. § 227 (1933).

⁸ MILTON FRIEDMAN AND ANNA JACOBSON SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES, 1867-1960* 434-442 (1963). Congress repealed the restrictions separating commercial from investment banking in the Gramm-Leach-Bliley Act passed in 1999. 12 U.S.C. § 1811 (2006). Although deposit insurance has played such an important role in the stability of the banking system, it is notable because it was one of the few financial reforms not originally supported by the Roosevelt administration. From the banking panic of 1893 through 1933, 150 bills seeking to introduce some form of federal deposit insurance were introduced; they all failed. See generally Carter H. Golembe, *The Deposit Insurance Legislation of 1933: An Examination of Its Antecedents and Its Purposes*, 75 POL. SCI. Q. 181 (1960). Roosevelt, mirroring the objections of large, urban banks, argued that deposit insurance would cause strong banks to subsidize small, weak ones, creating disincentives to prudent management. He also thought that deposit insurance opened the federal government to potentially huge losses, and he threatened to veto any banking bill that contained deposit insurance. See *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT*, vol. 2 37 (Samuel L. Roseman, ed., 1938). Steagall was one of the strongest proponents of the proposal and he capitalized on the political pressure for deposit insurance in the wake of the Pecora hearings and the banking crisis to push for its inclusion in the final bill. See Eugene Nelson White, *Deposit Insurance*, in *REFORMING FINANCIAL SYSTEMS: HISTORICAL IMPLICATIONS FOR POLICY* 85 (Gerard Caprio, Jr. & Dimitri Vittas, eds., 1997). Deposit insurance, therefore, was a prime example of the power the Pecora hearings had to shape legislative outcomes.

⁹ Securities Act of 1933, 15 U.S.C. § 77a (2006).

¹⁰ Securities Exchange Act of 1934, 15 U.S.C. § 78a (2006).

¹¹ *Reminiscences of James McCauley Landis* (1964), in *ORAL HISTORY COLLECTION OF COLUMBIA UNIVERSITY* 199.

between the wrongdoing Pecora uncovered and his ability to push through reform legislation.¹² The investigation surely ranks among the most successful congressional inquiries in the more than 200 year history of such probes.

Coming anywhere close was a tall order, but initially there was hope that the FCIC could replicate at least some of the success Pecora enjoyed. When he was selected to chair the Commission in July 2009, former California Treasurer Phil Angelides said that his goal, like Pecora's, was to "deepen the national dialogue about the need and the shape of reform."¹³ Angelides claimed that he kept a copy of Pecora's memoirs, a book called *Wall Street under Oath*, on his bedside table and he was forthright in his ambition for the Commission.¹⁴ The FCIC's task, he said, was no less than "writing the official history of what brought our financial and economic system to its knees."¹⁵

Now, more than a year after the FCIC released its final report, it is clear that the Commission did not live up to either Angelides's aspirations or the legacy of its Depression-era predecessor. During the course of its investigation critics derided the hearings as "nearly universally boring and bereft of new information."¹⁶ After just a few months, critics were ready to write off the enterprise. "Let's be realistic here," wrote *Wall Street Journal* columnist Holman W. Jenkins, Jr., "in the time available to the panel, given its make-up, and given [Vice Chairman Bill] Thomas's descent into popinjayism, there's little chance that somebody with an interesting mind will take control and issue a report that's anything more than a distillation of well-worn motifs already in the media, adding nothing illuminating to the history of this episode."¹⁷ Former New York governor Eliot Spitzer bluntly called the entire effort "a waste."¹⁸

In some respects, these assessments are hard to refute, particularly in light of the Pecora investigation's legislative successes. The FCIC investigation had no discernable influence over the shape of and prospects for financial reform. Its work proceeded along an entirely different track than the efforts that led to the Dodd-Frank Wall Street Reform and Consumer Protection Act passed in 2010 (Dodd-Frank).¹⁹ It was not until six months after Dodd-Frank was enacted that the FCIC released its report on the causes of the financial crisis.

¹² PERINO, *supra* note 5, at 5.

¹³ Greg Kaufmann, *Financial Crisis Inquiry Kicks into High Gear*, THE NATION, Nov. 16, 2009, available at <http://www.thenation.com/article/financial-crisis-inquiry-kicks-high-gear>.

¹⁴ Michael Hirsh, *Last Chance for Justice*, NEWSWEEK, Sept. 16, 2009.

¹⁵ Kaufmann, *supra* note 13.

¹⁶ Charles Gasparino, *Is The Financial Crisis Inquiry Commission Wimping Out on JP Morgan?*, HUFFINGTON POST (June 30, 2010, 5:00 PM), http://www.huffingtonpost.com/charles-gasparino/how-the-financial-crisis_b_631361.html.

¹⁷ Hollman W. Jenkins Jr., *Incurious Inquiry: Was There Anything Useful Learned From Last Week's Hearing of the Financial Crisis Inquiry Commission?*, WALL ST. J., Apr. 14, 2010, at A19.

¹⁸ Eliot Spitzer, *Two Disgraceful Failures: How Congress and the Financial Crisis Inquiry are Botching Their Only Chance to Reform Wall Street*, SLATE (Apr. 13, 2010, 3:20 PM), http://www.slate.com/articles/news_and_politics/the_best_policy/2010/04/two_disgraceful_failures.html.

¹⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2012).

In the waning months of the investigation, the FCIC was wracked with controversy and dissension. Indeed, by the summer of 2010 it looked like the FCIC was self-destructing. There was a raft of resignations from the Commission staff.²⁰ A member of the House of Representatives announced that he was launching an investigation of the investigators because he believed that the FCIC was rife with conflicts, partisanship, and waste. Chairman Angelides was forced to ask Congress for additional money to complete the investigation. The FCIC announced in late 2010 that it would not meet its December 15, 2010 deadline and that it would not release its report until late January 2011. The commissioners split along partisan lines over this announcement, unable to agree that more time was necessary or that it was appropriate for the FCIC to miss its statutory deadline.²¹

A month before the report was released, word leaked out that Republican commissioners were arguing that the words “Wall Street,” “deregulation,” and “shadow banking system,” should be excised from the report.²² Republican vice chairman Bill Thomas complained that the Democrats were preparing a “hit piece” on Wall Street banks.²³ When the report was finally released on January 27, 2011,²⁴ it proved to be a good deal less than the official history of the financial crisis. The ten commissioners had managed to write three different reports explaining what caused it. In the face of those competing narratives, it was all too easy for commentators and Congress to write off the FCIC as just another example of the climate of hyper-partisanship in Washington.²⁵

I have discussed in cursory form elsewhere why the Pecora investigation and the FCIC had such disparate results.²⁶ This article attempts a somewhat deeper analysis that compares the politics that underlay the FCIC investigation with those not only of the Pecora investigation but with those of what is generally

²⁰ Sewell Chan & Eric Dash, *Internal Dissent and Staff Losses May Hurt Financial Crisis Panel*, N.Y. TIMES, Sept. 1, 2010, at B1.

²¹ Sewell Chan, *Financial Crisis Panel to Delay Report*, N.Y. TIMES, Nov. 18, 2010, at B4.

²² Felix Salmon, *The FCIC Falls Apart*, REUTERS (Dec. 15, 2010), <http://blogs.reuters.com/felix-salmon/2010/12/15/the-fcic-falls-apart/>.

²³ John D. McKinnon, *Partisan Rancor Undercuts Probe*, WALL ST. J., Jan. 28, 2011, at A4.

²⁴ THE FINANCIAL CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: 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 [hereinafter FCIC REPORT].

²⁵ See, e.g., *Final Report of the Financial Crisis Inquiry Commission*, Hearing before the H. Comm. on Financial Services, 112th Cong., 1st Sess. 112-6 (2011), available at <http://financialservices.house.gov/uploadedfiles/112-6.pdf> (Statement of Rep. Patrick T. McHenry (R-NC)) (“The fact that 3 different opinions have emerged from a body of only 10 Commissioners brings into question the objectivity of the majority report.”) [hereinafter House Hearing].

²⁶ See Michael Perino, *How the FCIC Can Salvage its Relevancy*, CNNMONEY (Nov. 2, 2010, 12:46 PM), <http://finance.fortune.cnn.com/2010/11/02/how-the-fcic-can-salvage-its-relevancy/>; Michael Perino, *Lessons from Pecora Were Ignored*, N.Y. TIMES DEALBOOK (Oct. 14, 2010, 11:05 AM), [http://dealbook.nytimes.com/2010/10/14/another-view-lessons-from-pecora-were-ignored/?scp=1&sq=perino%20pecora&st=cse](http://dealbook.nytimes.com/2010/10/14/another-view-lessons-from-pecora-were-ignored/?scp=1&sq=perino%20pecora&st=csehttp://dealbook.nytimes.com/2010/10/14/another-view-lessons-from-pecora-were-ignored/?scp=1&sq=perino%20pecora&st=cse).

perceived as a more successful independent commission—the National Commission on Terrorist Attacks upon the United States (better known as the 9/11 Commission). Although the FCIC is most frequently compared to the former, the comparison to the latter is more apt. When Congress created the FCIC it rejected proposals to conduct a congressional investigation more in line with the Pecora investigation and instead chose to model the FCIC explicitly on the 9/11 Commission.

This paper highlights two reasons why the FCIC was not the Pecora investigation redux and why it failed to achieve the same consensus as the 9/11 Commission. The first explanation involves how the goals for these different investigations were defined. As explained in more detail in Section II, the Pecora investigation appears to have represented an innovative and novel application of congressional investigatory power. Available evidence suggests that before the Pecora investigation, congressional inquiries were generally thought to serve two broad goals: (1) checking executive branch abuse or ferreting out executive corruption or (2) providing a means for Congress to investigate conditions in areas in which it was seeking to legislate. In both situations, investigations often had a public informing function—achieving, for example, partisan political advantage through exposure of executive misfeasance or malfeasance or simply making the case that a contemplated legislative program was warranted. Before the New Deal, the driving force behind those investigatory efforts was internal, emanating from members of Congress.

While the Pecora probe was ostensibly designed to investigate conditions in the securities markets in preparation for potential legislation, it differed from prior congressional efforts because its motivation was external to the legislature. Originally proposed by the Hoover administration, the main thrust of the investigation was backed primarily by the Roosevelt administration as a way to create public support for its legislative program. Although such a purpose seems commonplace now, no president before Roosevelt apparently used Congress's investigatory power in quite this way. It worked beautifully. Capitalizing on the banking crisis facing the country and on Pecora's formidable courtroom skills, Roosevelt was able to channel the broad public anger at the financial community into a clamor for reform that eased passage of his proposals through Congress.

The FCIC's purpose was far less clear. The statute was straightforward—like the 9/11 Commission, the FCIC was supposed to analyze the causes of a national crisis. During the course of the investigation, however, the commissioners and outside commentators offered several other explanations for what the Commission was supposed to accomplish. Some pitched it as a latter-day Pecora investigation, intended to build the public case for reform and to hold bankers accountable for the country's economic straits. Others suggested that the FCIC was meant to collect the data Congress needed to shape financial reform legislation, even though work on that legislation was already well advanced when the FCIC finally got up and running. In some cases, commissioners espoused multiple goals at the same time. With this confusion over the FCIC's function and with commissioners often working at cross purposes, it was no wonder the effort foundered.

The second reason why the FCIC hearings never looked like the Pecora hearings was because the former's design and structure bore absolutely no resemblance to the latter. Rather than being an investigation by a standing congressional committee subject to the near dictatorial control of the committee's chair, the FCIC was an independent, bipartisan commission that needed consensus to operate effectively. As explained in Section III, the FCIC was subject to the same limitations and political pressures that beset the 9/11 Commission's investigation. Both commissions faced numerous obstacles to conducting vigorous investigations: the partisan selection of commissioners combined with broad commission mandates, woefully small budgets, short time frames for conducting their investigations, and weak subpoena powers. The 9/11 Commission's chairman, former New Jersey Governor Thomas Kean, went so far as to argue that his commission was designed to fail.²⁷ The fact that the 9/11 Commission did not devolve into partisan sniping was the product of Kean's ability to promote a nonpartisan atmosphere on the commission and of the high cost of politicizing the investigation into the September 11th attack. While little has been disclosed about the inner workings of the FCIC, an analysis of what is available and of the literature on the 9/11 Commission shows why the FCIC was never able to achieve a similar détente among its ideologically opposed members.

II. THE PURPOSE OF GOVERNMENTAL INVESTIGATIONS

Congressional investigations have multiple purposes, from the mundane to the malicious. They can involve everything from routine fact-finding and petty publicity seeking to spectacular political theater that unalterably changes the course of the nation. Independent commissions also have multiple purposes, although very rarely are they designed to build that kind of public clamor. Particularly in the context of commissions instigated in the wake of a crisis, they are often charged with finding, theoretically in a nonpartisan setting, the causes for that crisis. Such investigations are typically portrayed as dispassionate post-mortems that address questions so important that they stand apart from the normal political processes. In many cases, however, this investigatory function appears to be more symbolic than real and far from nonpartisan. Forming a commission is a tangible manifestation that the government is concerned about a problem, even if, as is often true, the results of the investigation are never expected to inform future legislation.

²⁷ Mike Kelly, *Kean: Some Wanted 9/11 Panel to Fail*, THE RECORD, July 20, 2004, at A1.

A. Congressional Investigations

1. A Brief Overview of Congressional Investigations before the Pecora Hearings

Prior to the Pecora investigation, congressional probes were thought to have one of two primary goals. The first, and for most commentators the most important, was to act as a check on executive abuses or to root out executive corruption. Woodrow Wilson, writing in the late 1800s, saw “vigilant oversight of administration” as even more important than Congress’s legislative function. Congress acted as “the eyes and voice” of the country. For Wilson, “the only really self-governing people is that people which discusses and interrogates its administration.”²⁸

This kind of executive oversight already had a long history by 1933. Its origins lay in the British parliamentary system, with examples of legislative oversight of the administration of government going back as far as the seventeenth century.²⁹ Many of these early investigations had a decidedly modern cast. Often they were tied to parliamentary power over appropriations and they involved matters as diverse as the scandals involving the administration of relief to the poor and improprieties in the operation of the East India Company.³⁰ In 1861, John Stuart Mill, like Wilson twenty years later in the United States, stressed the importance of these investigatory efforts. “The proper office of a representative assembly,” he argued, “is to watch and control the government.”³¹ Indeed, Wilson mimicked Mills’s assessment of the relative importance of investigation and legislation. For Mills, the legislature’s most important function was “to throw the light of publicity on [the government’s] acts.” The legislature needed to be able to “compel a full exposition and justification” for any governmental acts it considered questionable and to “censure” and “expel” governmental officials who abused their trust or “acted in a manner which conflicts with the deliberate sense of the nation.”³² Implicit in this function was the idea that control required the legislature to inform the populace when the executive overstepped its proper bounds.

The nascent United States copied this model of legislative oversight of the executive. Legislatures in the pre-Constitutional United States conducted probes of potential executive wrongdoing. In 1792, Congress authorized an investigation of Major General Arthur St. Clair’s defeat at the hands of Indian

²⁸ See WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 195, 198 (Meridian Books 1956) (1885).

²⁹ See Arthur M. Schlesinger, Jr., *Introduction* in CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792-1974 xviii-xix (Arthur M. Schlesinger, Jr. & Roger Bruns, eds., 1975).

³⁰ See MARSHALL E. DIMOCK, CONGRESSIONAL INVESTIGATING COMMITTEES 49-52 (1929); James M. Landis, *Constitutional Limitations of the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 162-64 (1926).

³¹ JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 104 (1861).

³² *Id.*

tribes in the Ohio Valley.³³ From there, Congress's investigations were wide-ranging. The first few decades of the nineteenth century saw congressional investigations involving, among other things, whether the Commander in Chief of the United States Army, James Wilkinson, had pledged his allegiance to and was being paid by the Spanish government, the burning of the District of Columbia in the War of 1812, and the operation of the Second Bank of the United States.³⁴ Later Congresses tackled administrative abuses and corporate and political corruption.³⁵ All told, by the late 1920s, Congress had conducted around 300 different investigations; by one count two-thirds of those involved some sort of executive oversight.³⁶

In *McGrain v. Dougherty*, a case that arose out of Congress's investigation of the Teapot Dome scandal in the 1920s, the Supreme Court relied on this long history in holding that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."³⁷ From those early investigations, through Teapot Dome, Watergate, Iran-Contra, and the myriad Clinton-era probes, Congress has used and abused its investigatory power to oversee the executive branch or simply to achieve partisan political advantage or personal aggrandizement.³⁸ Frequently these were

³³ Schlesinger & Bruns, *supra* note 29, at 3-101.

³⁴ See generally *id.* at 105-331, 591-685,

³⁵ For example, in 1873 Congress investigated the Credit Mobilier scandal. Credit Mobilier of America was a corporation used to finance construction of the transcontinental Union Pacific Railroad. Massachusetts Representative Oakes Ames, a Credit Mobilier shareholder, and promoters of the Union Pacific were accused of selling Credit Mobilier stock at bargain prices to United States vice president Schuyler Colfax, the secretary of the treasury, the Speaker of the House, and a dozen members of Congress, including future president James A. Garfield. See W. Allan Wilbur, *The Credit Mobilier Scandal 1873* in Schlesinger & Bruns, *supra* note 29, at 1849-63.

³⁶ DIMOCK, *supra* note 30, at 57, 87.

³⁷ *McGrain v. Dougherty*, 273 U.S. 135, 174-75 (1927). On this history, the Court noted that investigations were "employed in American legislatures before the Constitution was framed and ratified" and that early Congresses, whose members included some of the framers, similarly authorized investigations. "A long-continued practical construction by Congress of powers under provisions of the Constitution should be taken as fixing the meaning of such provisions." *Id.* at 174.

Three years earlier, Felix Frankfurter, then still a Harvard law professor, quoted Woodrow Wilson in opining that investigating the executive branch of government was one of Congress's "basic duties." Felix Frankfurter, *Hands Off the Investigation*, THE NEW REPUBLIC, May 21, 1924, 330. That defense of congressional investigatory prerogatives came in the midst of enormous pressure to rein in those powers. *Id.* at 329 (noting that as the Teapot Dome investigation progressed "every influence of authority, of powerful social connections, of the press, the whole milieu of officialdom in Washington was on the side of those in power and against disclosure and truth-telling.").

³⁸ BENJAMIN GINSBURG & MARTIN SHEFTER, POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA 26-31 (1990); Douglas L. Kriner & Eric Schickler, *Investigating the President: Committee Probes and Presidential Approval, 1953-2006* (2011). APSA 2011 Annual Meeting Paper, available at SSRN: <http://ssrn.com/abstract=1900886>, at 6-7. Although there appeared to be some uncertainty with respect to the issue, prior to the Pecora investigation Congress's power to oversee the executive included the power to oversee administration agencies. DIMOCK, *supra* note 30, at 21-26.

attempts to shape public opinion against the president or the party in power.³⁹ The audience, in other words, was primarily an external one.⁴⁰

The second rationale for congressional investigatory power is to enable Congress to determine existing conditions so that it may legislate intelligently.⁴¹ “A legislative body cannot legislate wisely or effectively,” the Supreme Court noted in *McGrain* in affirming broad, but not unlimited powers of congressional investigation, “in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.”⁴² The “power of inquiry” was “necessary and appropriate attribute of the power to legislate.”⁴³ As with investigations of the executive, this kind of fact finding often has an auxiliary public function. Legislators conducting hearings often attempted to mold public opinion in support of the policies they favored.⁴⁴

2. The Pecora Investigation

At first glance, the Pecora investigation would appear to be an investigation in contemplation of proposed legislation. The original resolution authorizing the investigation called for a broad inquiry into stock exchange practices and required a report back to the full Senate “as soon as practicable.”⁴⁵ In its report, the Banking and Currency Committee was directed that “if in its judgment such practices should be regulated, to submit with such report its recommendations for the necessary remedial legislation.”⁴⁶ When the

³⁹ See DIMOCK, *supra* note 30, at 15.

⁴⁰ One type of investigation that has an internal focus is when Congress investigates its own members. In such an investigation, Congress might seek to determine whether an individual satisfies the requirements for sitting in that body. More commonly, Congress might seek to determine whether one of its members should be punished for violating congressional rules or for some other misconduct. See *id.* at 15.

⁴¹ M. Nelson McGary, *Congressional Investigations: Historical Development*, 18 U. CHI. L. REV. 425, 426-27 (1951).

⁴² *McGrain*, 273 U.S. at 174-75.

⁴³ *Id.*

⁴⁴ DIMOCK, *supra* note 30, at 15.

⁴⁵ S. Res. 84, 72d Cong (1932) (directing the Committee on Banking and Currency “to make a thorough and complete investigation of the practices with respect to the buying and selling and the borrowing and lending of listed securities upon the various stock exchanges, the values of such securities, and the effect of such practices upon interstate and foreign commerce, upon the operation of the national banking system and the Federal reserve system, and upon the market for securities of the United States Government, and the desirability of the exercise of the taxing power of the United States with respect to any such securities . . .”), available at http://www.senate.gov/artandhistory/history/common/investigations/pdf/Pecora_SenRes84.pdf.

⁴⁶ *Id.* Interestingly, the historical record shows that the impetus for the investigation was not in contemplation of potential legislation. At several points in the days surrounding adoption of the resolution, Senator Frederic Walcott, a member of the Senate Banking and Currency Committee, who was one of the leading proponents of an investigation, disclaimed any interest in legislation.

investigation was extended into the next Congress, it was again in contemplation of potential legislation.⁴⁷

While the investigation appeared to be a conventional legislative fact-finding exercise and while much of the wrongdoing uncovered in the Pecora investigation was reflected in the New Deal's financial reform legislation, in reality the inquiry (at least after Roosevelt assumed office) was not intended to provide Congress with the raw data it needed to shape those bills. The Pecora investigation was innovative because it involved a third use of congressional investigatory power. When Woodrow Wilson wrote that legislative investigations should be for "the enlightenment of the people," he was concerned with revelation of executive abuses by Congress. Most of the investigations in the decade prior to the Pecora hearings involved allegations of this kind of executive misconduct.⁴⁸ Franklin Roosevelt turned that power on its head. His forceful, behind the scenes orchestration and vigorous public backing of the Pecora investigation was intended to win public support for his reform agenda.⁴⁹ Pecora's job, in short, was to create a groundswell of support for the financial reforms the new administration would offer. This was not an investigation of the executive branch; this was an investigation in support of the executive branch.

The cornerstone of that effort was the public hearing, in which Pecora would grill bankers for the benefit of the assembled reporters. It was political theater, to be sure, but it was also effective. Having Pecora uncover Wall Street's sins in this dramatic fashion, Roosevelt knew, would ease passage of the kind of reform legislation that would, under normal circumstances, succumb to special interest wrangling. Even though the Democrats controlled Congress, there were still ample opportunities to filibuster legislation in the Senate.⁵⁰ As Benjamin Cohen, a lawyer and one of the primary architects of the federal

"There is no intention," he told reporters, "to seek legislation interfering with the regular operations of the stock exchanges." *Target for Blunderbuss*, TIME, Mar. 14, 1932, at 53.

⁴⁷ When Senator Edward Costigan proposed extending the investigation, he pointed to the disclosures that had already emerged from the investigation and their potential for reform legislation. "[The Committee's] disclosures, and legislative remedies which may naturally be expected to flow from the testimony being taken, are justly attracting nation-wide attention. It is assumed that no Member of the Senate will desire to interfere with that highly important investigation at a time when general public agreement is being expressed on the overwhelming necessity for remedial enactments by Congress to guard, so far as humanly possible, against the recurrence of such conditions as have been and are being revealed by the testimony." 76 CONG. REC. 5,212 (1933).

⁴⁸ See M. Nelson McGeary, *Congressional Investigations during Franklin D. Roosevelt's First Term*, 31 AM. POL. SCI. REV. 680, 680 (1937).

⁴⁹ See M. NELSON, MCGEARY, *THE DEVELOPMENTS OF CONGRESSIONAL INVESTIGATIVE POWER 39* (1966) ("Experience under the New Deal—when in direct contrast to the previous decade, a strong majority, Presidentially led, was committed to a program of social change—showed a development of this legislative-Administrative collaboration to a degree perhaps unprecedented.").

⁵⁰ At that time, a cloture vote on a filibuster required a two-thirds vote, not the 60 percent now required. Indeed, in the lame duck session of Congress that had just ended, Louisiana Senator Huey Long had just led a successful filibuster to defeat passage of an earlier version of Glass-Steagall. PERINO, *supra* note 5, at 64-69.

securities laws, put it, by the time Pecora was finished the bankers “were so discredited in the public eye that Congress was ready to pass anything.”⁵¹

The Pecora investigation, of course, was not the first time a president had urged congressional allies to conduct investigations. Indeed, the original impetus for the Pecora investigation came from President Herbert Hoover. In February 1932, Hoover approached Senator Frederic Walcott, his political ally on the Senate Banking and Currency Committee, and asked him to start an investigation of short selling. Hoover was convinced that short sellers affiliated with the Democratic Party were planning massive bear raids that would drive down securities prices to embarrass the administration and weaken Hoover’s chances for re-election. Hoover wanted Walcott to call short sellers to the stand in Washington in an attempt to thwart their plans.⁵²

Although Hoover instituted the investigation and Roosevelt promoted its continuation, their purposes in doing so were quite different. Hoover had a partisan and overtly political agenda for asking Walcott to start hearings—the president was seeking to enhance his electoral chances. Hoover had no intention of regulating the securities markets; in fact he thought that it was unconstitutional for the federal government to regulate the New York Stock Exchange.⁵³ Roosevelt, by contrast, seemed to view the congressional investigating power from a far more strategic perspective. Hearings were a mechanism that he (rather than a legislator) could use to shape public opinion. In his hands, the congressional investigation was not a tool for checking the executive but a tool for the executive to exert control over the legislative process. By creating a political climate in which the public demanded meaningful reform legislation, Congress had little opportunity to thwart the administration’s plans.

The Pecora investigation was the first of many investigations in the 1930s in which the administration orchestrated the hearings in order to promote its political agenda. During Roosevelt’s first term, 51 of 165 congressional investigations (about 31 percent) have been classified as investigations aimed at facilitating the passage of legislation the administration was seeking or facilitating some other administrative initiative or political objective.⁵⁴ It was then a novel approach, but it quickly became well established. Not even twenty years after the Pecora investigation, Senator William Fulbright was able to assert confidently that: “Sometimes the congressional investigation results only in public disclosure—or exposure. When this is the case, the results may be regarded as an appeal to public opinion, an invitation to the people to say whether or not they discern the need for legislation which the legislators themselves have not yet seen fit to enact.”⁵⁵

⁵¹ D. B. HARDEMAN & DONALD C. BACON, *RAYBURN: A BIOGRAPHY* 154 (1987).

⁵² PERINO, *supra* note 5, at 16-18.

⁵³ *Id.* at 16-17.

⁵⁴ McGeary, *supra* note 48, at 681-82.

⁵⁵ J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 441, 443-444 (1951).

B. The FCIC and Other Independent Commissions

Since Theodore Roosevelt's administration, independent commissions have been common in Washington,⁵⁶ although academic work studying them remains somewhat sparse.⁵⁷ Rather than attempts to analyze the phenomenon, most works tend to be histories of particular commissions, often by insiders,⁵⁸ although sometimes by academics⁵⁹ or by journalists.⁶⁰

Congress or the president may create commissions to achieve a variety of aims. Commissions are often asked to make recommendations on topics, such as social security or budget cuts, that are too politically charged for elected officials to tackle directly.⁶¹ In these cases, commissions can be an important mechanism for creating cover for officials who may want to make politically unpopular proposals.⁶² Instead of taking full responsibility for those proposals, government officials can point to the wise counsel of independent experts to justify their stances.⁶³ Alternatively, commissions can be an expedient mechanism for delaying a response to a thorny political problem.⁶⁴

As with congressional investigations, independent commissions are sometimes formed to provide data about a problem, either for public education or to allow the relevant governmental actors to make policy proposals.⁶⁵ In other

⁵⁶ DAVID FLITNER, *THE POLITICS OF PRESIDENTIAL COMMISSIONS 7-14* (1986). While Theodore Roosevelt popularized commissions, examples of presidential commissions can be found as early as the Washington administration. *Id.*

⁵⁷ See, e.g., Amy Zegert, *Blue Ribbons, Black Boxes: Toward a Better Understanding of Presidential Commissions*, 34 *PRES. STUD. Q.* 366 (2004); Colton C. Campbell, *Creating an Angel: Congressional Delegation to Ad Hoc Commissions*, 25 *CONG. & THE PRES.* 161 (1998); Daniel A. Smith, et al., *Predicting the Outcomes of Presidential Commissions: Evidence from the Johnson and Nixon Years*, 28 *PRES. STUD. Q.* 269 (1998).

⁵⁸ See generally RICHARD BEN-VENISTE, *THE EMPEROR'S NEW CLOTHES: EXPOSING THE TRUTH FROM WATERGATE TO 9/11* (2009); THOMAS H. KEAN & LEE H. HAMILTON, *WITHOUT PRECEDENT: THE INSIDE STORY OF THE 9/11 COMMISSION* (2006); RICHARD FEYNMAN, *WHAT DO YOU CARE WHAT OTHER PEOPLE THINK?: FURTHER ADVENTURES OF A CURIOUS CHARACTER* (1988).

⁵⁹ See PAUL LIGHT, *ARTFUL WORK: THE POLITICS OF SOCIAL SECURITY REFORM* (1985); ANTHONY M. PLATT, *THE POLITICS OF RIOT COMMISSIONS, 1917-1970* (1971); Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 *WASH. & LEE L. REV.* 1239 (2008); William E. Juhnke, *President Truman's Committee on Civil Rights: The Interaction of Politics, Protest, and Presidential Advisory Commission*, 19 *PRESIDENTIAL STUD. Q.* 593 (1989).

⁶⁰ See PHILIP SHENON, *THE COMMISSION: THE UNCENSORED HISTORY OF THE 9/11 INVESTIGATION* (2008).

⁶¹ See LIGHT, *supra* note 59, at 163. This would include military base closure commissions and the recent National Commission on Fiscal Responsibility and Reform (the Simpson-Bowles Commission), which formulated proposals for federal deficit reduction.

⁶² Campbell, *supra* note 57, at 162.

⁶³ As with the recent example of the Simpson-Bowles Commission, politicians will just as frequently distance themselves from a commission's recommendations as embrace them. Jackie Calmes, *Deficit Reduction Plan Draws Scorn From Left and Right*, *N.Y. TIMES*, Nov. 12, 2010, at A1.

⁶⁴ FLITNER, *supra* note 56, 25-28.

⁶⁵ *Id.* at 20, 23, 65.

situations, Congress may delegate to an ad hoc commission instead of conducting an investigation itself in order to manage its own workload more effectively.⁶⁶ This latter explanation was one of the rationales for creating the FCIC. An outside commission, Senator Christopher Dodd argued, “is probably the best alternative, given the magnitude of the problem that must be examined.”⁶⁷ It was a job, he asserted, that was simply too big for the Senate to handle itself. Given the work he and other Senators had to put in on drafting financial reform legislation, it was “asking an awful lot” for them to investigate as well.⁶⁸

This argument about the difficulty of undertaking an investigation while at the same time drafting reform legislation seems a bit odd. After all, one of the primary purposes of congressional investigations is to provide the data necessary for Congress to formulate appropriate legislation. If anything, it would seem that Congress would want to investigate first and legislate second. Critics of Dodd-Frank made a similar argument. The Shadow Financial Regulatory Committee, a part of the conservative American Enterprise Institute, chastised Congress for enacting Dodd-Frank “long before the [FCIC] has concluded its hearings, much less written its report. As a result, Congress has failed to deal with many of the underlying causes of the crisis that the Commission is likely to identify.”⁶⁹ Republican critics in Congress would echo this criticism.⁷⁰

This critique, however, ignores a basic reality of major financial reform legislation—it is almost invariably enacted in the immediate aftermath of crisis and scandal.⁷¹ Waiting until 2011 would have likely killed any attempt to pass meaningful financial reform because, without the combination of crisis and palpable public outrage, it is unlikely that Congress would have had the political will to act. Moreover, the FCIC report was due after the 2010 mid-term elections. Those elections ultimately shifted control of the House of Representatives from the Democrats to the Republicans. As House Republicans sought to repeal Dodd-Frank immediately upon assuming power, it seems clear that the legislation would never have passed if Congress waited for the FCIC to complete its work. Opponents of financial reform may have anticipated or at least hoped for such an electoral shift when they urged delay.

FCIC member Brooksley Born made just this point in the FCIC’s first open hearing. She urged Congress and the Obama administration to pass financial reform quickly and specifically stated that they should not wait for the

⁶⁶ Campbell, *supra* note 57, at 170-74.

⁶⁷ 155 CONG. REC. S4547-48 (daily ed. Apr. 22, 2009).

⁶⁸ *Id.*

⁶⁹ Statement of the Shadow Financial Regulatory Committee, *Missed Opportunities in the Dodd-Frank Act*, Sept. 13, 2010, available at <http://fic.wharton.upenn.edu/fic/policy%20page/Statement%20No.%20296.pdf>.

⁷⁰ *Shelby: In the End, the FCIC Did Not Matter*, FEDERAL INFORMATION AND NEWS DISPATCH, May 10, 2011.

⁷¹ Larry E. Ribstein, *Bubble Laws*, 40 Hous. L. Rev. 77, 81-82 (2003); Michael Perino, *Enron’s Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN’S L. REV. 671, 671-73 (2002).

Commission to complete its work. Once the economy begins some recovery, she warned, the urgency of serious reform will diminish.⁷² At the same hearing, former Senator Bob Graham said that the FCIC should not serve as a means for procrastinating on reform.⁷³ Born's and Graham's reading of the political environment was undoubtedly correct, but it raises a significant issue—if the FCIC investigation was not intended to provide Congress with data on the true causes of the financial crisis, just exactly what was it supposed to do?

Sometimes, as with the 9/11 Commission and the FCIC, commissions are created as a result of external political pressures, often in the wake of a crisis and in response to public demand for an explanation of the causes of that crisis. In the case of the 9/11 Commission, the pressures came from the families of the victims of the terrorist attacks who publicly lobbied for an inquiry into intelligence failures.⁷⁴ These kinds of crisis-oriented commissions were common in the 1960s and 1970s, when political assassinations and civil unrest grew more prevalent. They included the Warren Commission, the National Advisory Commission of Civil Disorders, the National Commission on the Causes and Preventions of Violence, and the President's Commission on Campus Unrest.⁷⁵ For many of these commissions, there is little expectation that they will produce recommendations that will actually make their way into legislation. Instead, the commissions are largely symbolic, tangible manifestations that the government truly does care about the problem in question.

In at least some instances, commissions hold the promise of something more. They can provide a meaningful, impartial, and nonpartisan analysis of an issue. The commission's function in these situations is analogous to the coroner performing an autopsy to determine the cause of death or the National Transportation Safety Board pinpointing the causes of an airplane crash. In contexts where causes can be identified with some degree of scientific precision, this model can work reasonably well. The Rogers Commission, which determined that the *Challenger* space shuttle disaster was caused by the effects of

⁷² Remarks of Brooksley Born at the Public Meeting of the Financial Crisis Inquiry Commission, Washington D.C. (Sep. 17, 2009), 3-4, available at http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2009-0917-CommissionerStatements.pdf [hereinafter FCIC First Public Meeting]. Pecora's own report was written in June 1933, a year after the first federal securities laws were passed and days after Congress passed the legislation that created the SEC. The report was not what guided Congress, but the ongoing investigation. Senator Dodd seemed to contemplate a similar relationship between Congress and the FCIC. He suggested that the FCIC could report back to the appropriate congressional committees "as they uncover evidence or [come up with] ideas that would help us fill in these gaps. . . ." 155 CONG. REC. S4548 (daily ed. Apr. 22, 2009). While such an iterative process would have replicated the Pecora investigation and might have been useful, there is no evidence that it actually occurred. FERA simply required a report at the completion of the investigation. Fraud Enforcement Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (May 20, 2009).

⁷³ FCIC First Public Meeting, *supra* note 72, at 9-10.

⁷⁴ See Ernest R. May, *When Government Writes History*, THE NEW REPUBLIC, May 23, 2005, at 30.

⁷⁵ See FLITNER, *supra* note 56, 29-40.

cold temperatures on the rubber o-rings used in the booster rockets, provides an example of this kind of successful investigation.⁷⁶

Two major problems affected the FCIC's ability to perform a similar kind of analysis. The first was that re-constructing the root causes of a financial crisis is a very different exercise than pinpointing design flaws in the space shuttle. Answers are far less certain and far more contestable. Economists, for example, continue to debate the cause of the Great Depression and are likely to debate the causes of the financial crisis well into the future. The causes of a financial crisis, moreover, implicate highly charged political issues in a manner that dissecting a shuttle explosion simply does not. Grappling with those kinds of issues makes it much more difficult for a commission to operate in a truly impartial and nonpartisan manner.

The other major problem for the FCIC was uncertainty over precisely what its mission was. The enabling legislation directed the FCIC to identify the causes of the financial crisis. This seemed to be a classic crisis-oriented commission. The constant comparisons to the Pecora investigation, however, suggested that the FCIC was supposed to be building the public case for reform. Much of the analysis and commentary before the hearings began concerned whether the FCIC would be able to hold bankers accountable for wrecking havoc on the economy. As noted previously, other commentators said that the FCIC's job was to provide Congress with the information it needed to structure financial reform, even though legislative efforts were already well under way at that point. Which of these tasks was the FCIC supposed to be doing?

Apparently, even the commissioners were unsure. Different commissioners seemed to have different views of the FCIC's mission. A few seemed to be espousing multiple goals simultaneously. At the FCIC's initial public meeting, Angelides said that he wanted the commission to conduct a rigorous investigation that would provide the definitive account of the causes of the financial crisis.⁷⁷ "It's important that we deliver new information," he told reporters on another occasion. "We can't just rehash what we've known to date."⁷⁸ To satisfy their statutory mission, the FCIC's hearings had to "shed light not heat."⁷⁹ Those statements were consistent with a dispassionate dissection of the crisis. But at other times, Angelides struck an entirely different tone. The chairman said that he wanted to examine the "greed, stupidity, hubris and outright corruption" in the financial industry.⁸⁰ The first public hearing in January 2010 seemed to be an attempt to recreate the power and atmosphere of

⁷⁶ REPORT OF THE PRESIDENTIAL COMMISSION ON THE SPACE SHUTTLE CHALLENGER ACCIDENT (June 6, 1986), available at <http://history.nasa.gov/rogersrep/genindex.htm>.

⁷⁷ See Opening Remarks of Chairman Phil Angelides, FCIC First Public Meeting, *supra* note 72, at 1-3 ("We have been called upon to conduct a full and fair investigation in the best interests of the nation—pursuing the truth, uncovering the facts, and providing an unbiased, historical accounting of what brought our financial system and our economy to its knees.")

⁷⁸ Frank Rich, *The Other Plot to Wreck America*, N.Y. TIMES, Jan. 10, 2010, at WK10.

⁷⁹ FCIC First Public Meeting, *supra* note 72, at 2.

⁸⁰ Rich, *supra* note 78, at WK10.

the Pecora investigation, without its depth of research. Angelides and other commissioners asked the CEOs of Goldman Sachs, J. P. Morgan Chase, Bank of America, and Morgan Stanley tough sounding questions about their role in the crisis. It was “[p]olitical theater and public scolding,” the *New York Times* wrote, but with little substance and no progress toward a deeper understanding of the forces that sparked the crisis.⁸¹

Other commissioners complained about the tone of the hearings and Angelides’s role in setting the schedule and subject matter of the hearings. It was really a complaint about using the hearings to fuel anger at the financial industry in order to build public support for reform legislation. Republican commissioner Peter Wallison⁸² thought “the first hearing was a fiasco.” Its goal, he complained, was pure publicity. “Without any preparation for this hearing, the Commission summoned the CEOs of four of the largest U.S. financial institutions, seemingly just so they could be photographed being sworn in.”⁸³ The bigger problem from Wallison’s perspective was that Angelides dictated the schedule and subject matter of the hearings without any apparent consideration of the results of the staff’s investigatory efforts. For Wallison, it was putting the cart before the horse. “The hearings should have been shaped by what was turned up in the investigation, not function as drivers of what the Commission would study,” he subsequently wrote. Members of the staff, he charged, took the same position. “There was a pervasive sense that a serious investigation was being sacrificed to the publicity that could be wrung from public hearings.”⁸⁴

Although hearings are typically viewed as the *sine qua non* of independent commissions, the staff of the 9/11 Commission did not view them as crucial; they saw hearings as a secondary task that would soak up precious time and resources that might otherwise be devoted to the investigation.⁸⁵ Such concerns are legitimate, as were Wallison’s complaints about having hearings that were more show than substance. During the Pecora investigation there were senators who tried to embarrass or ridicule witnesses with little preparation. As often as not, those efforts backfired.⁸⁶ Pecora always built his hearings on a solid foundation of investigation and research. Still, the purpose underlying most crisis-oriented commissions is to show governmental concern over a problem. It is virtually inconceivable, therefore, that there will be no public hearings. The real question is not whether there will be hearings, but when those hearings will be held, how many there should be, and how they will be conducted. Contrary to

⁸¹ Editorial, *The Show Must Not Go On*, N.Y. TIMES, Jan. 17, 2010, at WK7.

⁸² Wallison wrote a sole dissent from the FCIC report and, as described below, seemed to have his own agenda during the investigation. Peter J. Wallison, Statement Submitted to the Senate Committee on Banking, Housing and Urban Affairs in Connection with a Hearing on the Financial Crisis Inquiry (May 10, 2011) at 3, available at <http://www.aei.org/files/2011/05/13/Senate-testimony-on-FCIC-dissent.pdf> [hereinafter Wallison Testimony].

⁸³ Wallison Testimony, *supra* note 82, at 4.

⁸⁴ *Id.* at 3.

⁸⁵ KEAN & HAMILTON, *supra* note 58, at 126-27.

⁸⁶ PERINO, *supra* note 5, at 124-25, 152-53.

what Wallison's statement implied, Pecora showed that it was possible to have both substance and show.

Wallison also expressed definite views on the relationship between the FCIC inquiry and the financial reform effort, views that were strictly at odds with the views of Born and Graham discussed earlier. For Wallison, it was critical that any reform efforts cease until the FCIC had completed its work. "Congress, the president, and the American people," he announced at the FCIC's initial public meeting, "should want to know the central causes of the crisis before our Congress adopts legislation that is supposed to prevent a recurrence."⁸⁷ If the FCIC's mission was to provide Congress with data it could use to structure reform, this view would obviously be correct. But, as is discussed in more detail in Section III, it is not hard to imagine that partisan political considerations played an important role in shaping Wallison's opinion. Under his plan, congressional action would not occur until after the 2010 mid-term elections and after anger at the financial community may have cooled, decreasing the likelihood of comprehensive financial reform.

With these clashing views and agendas, the FCIC was unable to achieve any of these varied goals. Unlike the Pecora investigation in which powerful hearings drove public opinion, the FCIC's hearings were dull and largely tepid affairs. Most hearings opened with commissioners and witnesses reading their bland opening statements. Each commissioner then took his or her turn to question each witness, using their allotted time to ask often long-winded and compound questions or to make what were little more than self-serving speeches. There was frequently no attempt to pin down witnesses who gave evasive or incomplete answers and no attempt to develop a coherent narrative. Indeed, the panel seemed to explicitly eschew any effort to develop a storyline listeners could follow. Rather than follow up on what one commissioner would ask, the next commissioner in the queue would often jump to a completely different line of inquiry.⁸⁸ The byproduct of this presentation style was to turn the hearings into what even Thomas admitted was little more than a "Whitman's Sampler" of the topics likely to be covered in the FCIC's final report.⁸⁹

The FCIC also obviously failed to produce the official history of the financial crisis. Members of Congress chided the commissioners for acting in such an overtly partisan way on such an important assignment.⁹⁰ That outcome,

⁸⁷ FCIC First Public Meeting, *supra* note 72, at 16.

⁸⁸ This type of hearing is common for Congress and for independent commissions as well. Famed physicist Richard Feynman was a member of the Rogers Commission, which studied the Challenger shuttle disaster, and complained about this kind of desultory hearing. "[M]ost of the time," he wrote, "other people are asking questions you already know the answer to—or are not interested in—and you get so fogged out that you're hardly listening when important points are being passed over." FEYNMAN, *supra* note 58, at 128.

⁸⁹ Sewell Chan & Eric Dash, *Financial Crisis Inquiry Wrestles with Setbacks*, N.Y. TIMES, Apr. 5, 2010, at B4.

⁹⁰ See, e.g., House Hearing, *supra* note 25, at 28 (Statement of Representative Hensarling, "I think it is sad that such an important work is hard to take seriously when it was conducted on such a partisan basis.").

however, involved more than just uncertainty over what the Commission was supposed to accomplish. And it was Congress, as well as the commissioners, who bore the blame for the FCIC's failure to achieve consensus. As discussed below, the way Congress designed the FCIC and the political context in which it operated made it highly unlikely that the Commission could conduct an effective investigation and achieve a meaningful consensus.

III. THE DESIGN AND POLITICAL CONTEXT OF INDEPENDENT COMMISSIONS

The FCIC was a commission that, like the 9/11 Commission before it, seemed destined to founder. Six separate bills were introduced in the 111th Congress to create some form of independent commission to investigate the financial crisis.⁹¹ A careful analysis of the choices Congress made in establishing and structuring the Commission shows that Congress hamstrung the FCIC from the start, making it difficult for the panel to conduct a meaningful investigation of the causes of the financial crisis or to write a unanimous report. This section focuses on three areas: (1) the structure and methods used for selecting the commissioners; (2) the FCIC's mandate and resources as well as the timetable for the investigation; and (3) the restrictions placed on the FCIC's investigatory powers. The section also briefly discusses some obvious ways that politicians tried to influence the FCIC's operations.

A. Structure and Commissioner Selection Methods

Congressional investigations are viewed as, and often are, highly charged political affairs. Particularly where Congress is purporting to perform its traditional function of checking executive abuse or rooting out executive corruption, investigations seem either to proliferate or grow more contentious in instances of divided government.⁹² All too often, congressional investigations

⁹¹ The six proposals were:

Senate amendment 995 to S. 386, Cong. Rec. S4588 (April 22, 2009). The amendment was sponsored by Republican Senator Johnny Isakson and co-sponsored by Democratic Senators Kent Conrad, Christopher Dodd, and Sheldon Whitehouse and Republican Senators Olympia Snow and Saxby Chambliss.

S. 195, 111th Cong. (2009), at § 5 (the "Taxpayer Protection Act," sponsored by Democratic Senator Dorgan);

S. 298, 111th Cong. (2009) (the "Financial Markets Commission Act of 2009," sponsored by Senator Isakson);

H.R. 74, 111th Cong. (2009) (the "Financial Oversight Commission Act of 2009," sponsored by Republican Representative Issa);

H.R. 768, 111th Cong. (2009) (the "Commission on Financial Crisis Accountability Act of 2009," sponsored by Democratic Representative Larson); and

H.R. 2111, 111th Cong. (2009) (the "Congressional Commission on Financial Accountability and Preparedness Act of 2009," sponsored by Republican Representative Burgess).

⁹² Kriner & Schlicker, *supra* note 38, at 15.

have been subject to significant abuse. There are myriad examples of legislators using investigations for self-aggrandizement or simply to score political points.

In the public mind, however, commissions seem different. They are stocked with accomplished, well-known individuals, frequently with expertise in the subject matter under consideration.⁹³ Their stature is intended to enhance the credibility of the investigation. Commissioners are supposed to be free of partisan influence and willing to engage in a thorough and unbiased inquiry of the matter under consideration because they have established national reputations that they wish to preserve.⁹⁴ Indeed, these requirements were written into the FCIC's enabling legislation.⁹⁵

There is also a strong unanimity norm that is typically at work in independent commissions⁹⁶ that can help to smooth over differences of opinion, a norm that might be thought to be at its strongest when commissions tackle important national issues. Indeed, clashes during the deliberative process are seen as a benefit of commissions if the resulting report "represents an honest synthesis of varying opinions."⁹⁷ The unanimity norm is, however, a two-edged sword. In some cases, it might cause commissioners with disparate viewpoints to reach a meaningful consensus. In others, the only way to achieve consensus may be to write a report that is so watered down that it fails to tackle the tough issues that it was meant to address.

For a commission's recommendations to be taken seriously, however, the clashes among commissioners cannot be seen as base partisan politics. For example, during the first meeting of the 9/11 Commission chairman Thomas Kean warned his fellow commissioners that politics could destroy the commission's work. "If we become like everybody else in Washington," he lectured, "if the Republicans on the commission start fighting Democrats, then we'll destroy our credibility."⁹⁸ Kean and the 9/11 Commission's vice-chairman, Lee Hamilton, constantly emphasized the need for bipartisan cooperation and

⁹³ See FLITNER, *supra* note 56, at 47.

⁹⁴ ALAN BARTH, *GOVERNMENT BY INVESTIGATION* 211-15 (1955).

⁹⁵ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, § 5(b)(2) (May 20, 2009) ("It is the sense of the Congress that individuals appointed to the Commission should be prominent United States citizens with national recognition and significant depth of experience in such fields as banking, regulation of markets, taxation, finance, economics, consumer protection, and housing.")

⁹⁶ See FLITNER, *supra* note 56, at 88 ("Conflict on commissions may be restrained by a desire for unanimity growing out of the belief that a united front conveys more legitimacy than does a fragmented one."). As Slade Gorton, a member of 9/11 Commission put it, if the commission could not issue a unanimous report, "we were wasting our time and the government's money. So there was that frame of reference from the beginning." KIRSTEN LUNDBERG, *PILOTING A BIPARTISAN SHIP: STRATEGIES AND TACTICS OF THE 9/11 COMMISSION* 11 (2005) (Kennedy School of Government Case Program, C15-05-1813.0).

⁹⁷ FRANK POPPER, *THE PRESIDENT'S COMMISSIONS* 16 (1970).

⁹⁸ SHENON, *supra* note 60, at 70-71

unanimity.⁹⁹ Another 9/11 commissioner, Richard Ben-Veniste, made a similar point about the dangers of partisanship:

Unless we could somehow get beyond the kind of Washington partisan ambiance that had for so long characterized public discourse in this town, the commission would in the end be doomed to failure. Unless we could put aside our individual partisan feelings and views, the ultimate impact of what we had to say would be greatly diminished.¹⁰⁰

In its first public meeting, several FCIC commissioners stressed the need for a unanimous report if the American people were going to take the work of the Commission seriously.¹⁰¹

The problem of overt political partisanship was particularly acute for the 9/11 Commission. The terrorist attacks were a profound national tragedy that, however briefly, united an increasingly disputatious populace. Emotions were still raw when the 9/11 Commission was created just over a year later. In that kind of climate, public perceptions that commissioners were politicizing the investigation risked enormous backlash that could scuttle the entire effort and damage the offending political party.¹⁰² This is not to say that party politics were absent from the investigation. Democratic commissioners on the 9/11 Commission, for example, were convinced that their fellow Republican commissioner, Fred Fielding, was constantly relaying information concerning confidential internal communications to the White House.¹⁰³ White House staff members, hoping to destroy the credibility of Richard Clarke, a witness hostile to the administration, helped to prepare questions for Republican commissioners.¹⁰⁴ There were numerous other examples as well. However, the political costs of appearing to take partisan positions were so high that at least some of the normal gamesmanship that might be expected to occur did not.

If one examines the congressional debate over the creation of the FCIC, it is easy to find similar expressions of the value of nonpartisan, independent commissions. Although Senators Byron Dorgan and John McCain wanted to

⁹⁹ See LUNDBERG, *supra* note 96, at 11-15.

¹⁰⁰ *Id.* at 18.

¹⁰¹ Statement of Bob Graham, FCIC First Public Meeting, *supra* note 72, at 10 (“We must strive to be apartisan in the manner in which we proceed towards the goal of a unanimous report which will command the attention of the American people and the Congress.”); Statement of Bill Thomas, FCIC First Public Meeting, *supra* note 72, at 17 (“I fervently hope that we’ll be unanimous . . .”).

¹⁰² KEAN AND HAMILTON, *WITHOUT PRECEDENT*, *supra* note 58, at 6.

¹⁰³ See SHENON, *supra* note 60, at 27. Professor William K. Black, who served as Deputy Staff Director of the National Commission on Financial Institution Reform, Recovery and Enforcement (“NCFIRRE”), relates a similar incident. As Black recalled, “One of the Commissioners, a Republican, good-naturedly announced that he was appointed to serve as the Bush administration ‘spy.’” William K. Black, *Flaws Inherent in the Current Commission, and How to Minimize Them*, NEW DEAL 2.0, (Jul. 14, 2009, 10:00 AM) <http://www.newdeal20.org/2009/07/14/flaws-inherent-in-the-current-commission-and-how-to-minimize-them-3147/>.

¹⁰⁴ See SHENON, *supra* note 60, at 280.

create a Senate select committee to study the crisis,¹⁰⁵ such a committee was not included in the final bill, ostensibly because such a select committee would not be viewed as nonpartisan and objective. “We are part of what needs to be scrutinized,” argued Georgia Senator Johnny Isakson. “If we left this just strictly to a select committee, it would be like appointing the board of directors to AIG to tell us what went wrong with AIG. It wouldn’t be a good autopsy. It wouldn’t be objective.”¹⁰⁶

Other senators and representatives expressed similar sentiments in favor of a “nonpartisan commission.” Representative Darryl Issa (later a fierce critic of the FCIC) argued:

I view the effort to create this commission as a vehicle for this Congress to demonstrate a willingness to set aside partisanship and put the interests of our country first. As with the 9/11 Commission, the Financial Markets Commission report should be free of accusations of political showmanship and a partisan slant that have tainted current investigations. This Commission is not the place for partisanship [or] Congressional meddling. It is a place for the American people to get answers.¹⁰⁷

The FCIC was, according to these sentiments, supposed to be able to perform the same dispassionate analysis of the financial crisis that the Rogers Commission performed on the *Challenger* space shuttle disaster.

The FCIC, of course, proved that it was incapable of such an analysis. Given how it was structured and the political environment in which it operated, it had little hope of doing so right from the start. When it comes to crisis-oriented commissions operating in charged political environments, the 9/11 Commission was the rare example of an independent panel that actually could at least partially divorce itself from immediate political considerations and operate independently. It was a tribute, in no small measure, to its chairman, who constantly sought to steer a course between the partisan views that were sometimes expressed by its members, although he was aided by the risks associated with politicizing the September 11th attacks.¹⁰⁸

Rather than being nonpartisan undertakings intended to provide independent advice to Congress, crisis-oriented commissions frequently operate as partisan affairs, designed to advocate each party’s existing positions. Angelides and Thomas apparently did not possess Kean’s and Hamilton’s instincts and skills for bipartisanship. Republican commissioners complained that Angelides was “inflexible and a micromanager.” When Thomas was in the House, he reportedly “had sometimes volatile relations with leaders of both

¹⁰⁵ 155 CONG. REC. S4552 (daily ed. Apr. 22, 2009).

¹⁰⁶ 155 CONG. REC. S4550-51 (daily ed. Apr. 22, 2009).

¹⁰⁷ 155 CONG. REC. H5269 (daily ed. May 6, 2009); *see also* 155 CONG. REC. S4545 (daily ed. May 6, 2009) (comments of Senator Leahy).

¹⁰⁸ *See generally* LUNDBERG, *supra* note 96; *see* FLITNER, *supra* note 56, 51-53 (noting the importance of chairman’s role in maintaining a nonpartisan atmosphere).

parties”¹⁰⁹ and was ranked among “the ‘hottest-tempered’ lawmakers in *Washingtonian* magazine polls of Congressional staffers.”¹¹⁰

Of course, it is entirely possible that neither Angelides nor Thomas were selected for their skills at building bipartisan consensus. In fact, given the divisive political atmosphere in Washington, the selection method used to pick the FCIC commissioners seemed unlikely to generate a truly independent and unbiased investigation free of preconceived notions about the causes of the financial crisis.¹¹¹ FERA required Speaker of the House Nancy Pelosi and Senate majority leader Harry Reid to select three members each and the minority leaders of the House and Senate (John Boehner and Mitch McConnell) to select the remaining four. To further solidify the bipartisan makeup of the panel, the statute mandated that the chair and vice-chair could not be from the same political party, although given the appointment structure such an outcome would seem to be highly unlikely.¹¹² In effect, it looked very much like AIG board investigating itself; the only difference was that the board, rather than conducting the investigation, would pick the investigators.

The political leaders in Congress were, and remain, engaged in highly charged, partisan political battles, including over which party bore the bulk of the blame for the financial crisis and ensuing recession. With such a significant political question at stake, it might be difficult for a bipartisan commission to reach a consensus. Indeed, a Congressional Research Service (CRS) Report warned specifically about this danger when it provided advice about the structure of any commission created to investigate the financial crisis. On April 29, 2009, just weeks before the FCIC was created, it acknowledged that bipartisan commissions can be useful because the joint recommendations that do emerge immediately gain greater credibility. At the same time, the CRS warned, the prospects of reaching a consensus on recommendations may be substantially dimmed when the subject under review is a political football. “In situations where a commission is tasked with studying inherently partisan issues,” the report noted, “the appointment of an equal number of majority and minority commissioners may serve to promote partisanship within the commission rather than suppress it.”¹¹³

The FCIC that emerged a few weeks later had six Democratic commissioners and four Republican ones, but that slight change seems to have done little to relieve the partisan bickering. In fact, vice chairman Thomas later

¹⁰⁹ John D. McKinnon, *Partisan Rancor Undercuts Probe*, WALL ST. J., Jan. 28, 2011, at A4.

¹¹⁰ Ben Pershing, *The Republican led House that Bill Thomas built*, WASH. POST, Mar. 29, 2011, at A19.

¹¹¹ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, § 5(b)(1) (May 20, 2009).

¹¹² *Id.* at § 5(b)(3)(B).

¹¹³ MATTHEW ERIC GLASSMAN & JACOB R. STRAUS, CONG. RESEARCH SERV., R40553, PROPOSALS FOR A CONGRESSIONAL COMMISSION ON THE FINANCIAL CRISIS: A COMPARATIVE ANALYSIS 5 (2009), available at <http://www.fas.org/sgp/crs/misc/R40553.pdf>.

complained that the presence of this Democratic majority made matters worse, reducing further the chances that the factions would try to achieve consensus.

From the beginning, I thought that the Commission was created for political purposes with a partisan structure and a partisan agenda. It called for six of us to be appointed by Democrats and four by Republicans. And any six votes were all that was needed to transmit the report to the President and Congress. The math is simple.¹¹⁴

Thomas was right, but only superficially. The atmospheric would have been much better if there were an even five-five split and perhaps it might have been easier to foster bipartisan cooperation. To have its report taken seriously, however, the FCIC needed to reach a consensus, giving the majority less practical ability to simply ram through its preferences for conducting the investigation and reporting its results. Even with a six-four split, both sides should have had an incentive to bridge the gaps that divided them, unless of course bridging those gaps was less important than satisfying the needs and desires of their own political constituencies.

Even the 9/11 Commission, which is generally considered to be an exemplar of non-partisan independent commissions, did not operate free from political influence or considerations. Its best-selling report, for example, has been criticized for its unwillingness to place blame on specific individuals, particularly Presidents Clinton and Bush. It was a conscious choice by the chair and vice-chair to achieve the unanimity they so desperately desired. “The instructions that we gave [to the staff],” vice chair Hamilton recalled, were to tell the story of the 9/11 attacks “as non-judgmentally as possible, stripping out conclusions and making it very factual.”¹¹⁵ Still the actual drafting of politically sensitive portions of the final report was grueling, according to Hamilton, because “the underlying tension here was partisan; it was between the Democrats who wanted to protect Clinton, and the Republicans who wanted to protect Bush.”¹¹⁶

¹¹⁴ House Hearing, *supra* note 25, at 12. Thomas added:

When inordinate hours of staff time are being used to find ‘gotcha’ documents to support provocative headlines rather than to produce material relevant to Commissioner deliberations; when the proceedings of private Commission meetings are inaccurately leaked again and again in an attempt to embarrass the minority and create artificial hype for a commercial book; when the minority is forced to vote on potentially illegal motions presented to them just one day prior; when the final findings and conclusions of the majority are first presented to the minority four days before the final vote; and when minority views are then excluded by a 6-4 vote from the report and suppressed in the commercial book, in the event presenting the report, and on the Commission’s website, it becomes abundantly clear that consensus is not a primary goal.

Id. at 78-79.

¹¹⁵ LUNDBERG, *supra* note 96, at 14.

¹¹⁶ *Id.* at 57.

Consensus, therefore, came at a cost. In order to “achieve unanimity,” one author noted, “there was little accountability.”¹¹⁷ The report maintained an almost maniacal balance—whenever a person or institution was criticized in one sentence, it was lauded in another, even in situations where it seemed clear that such balance was not warranted.¹¹⁸ It refused to make judgments about contradictory assertions, although its staff was probably in the best position to determine which was more credible.¹¹⁹ Such an “imprecise, anodyne and impersonal assignment of responsibility for the U.S. government’s failure to prevent the 9/11 attacks,” one critic wrote, was “exactly the wrong message to send to future government officials and the people who train them.”¹²⁰ Given the political limits of bipartisan commissions, however, it was the only message that was feasible to send.¹²¹

Indeed, the CRS analysis regarding the potential for partisanship on an independent committee echoes the observations 9/11 Commission chairman Thomas Kean had made several years earlier about his own difficulties operating in this kind of political undertaking. “If you want something to fail, you take a controversial topic and appoint five people from each party. You make sure they are appointed by the most partisan people from each party—the leaders of the party. And, just to be sure, let’s ask the commission to finish the report during the most partisan period of time—the presidential election season.”¹²² The FCIC

¹¹⁷ SHENON, *supra* note 60, at 387.

¹¹⁸ May, *supra* note 74, at 33-34.

¹¹⁹ *Id.* at 34.

¹²⁰ Ernest R. May, Phillip D. Zelikow, Richard A. Falkenrath, *Sins of Commission? Falkenrath and His Critics*, 29 INT’L SEC. 208, 210-11 (2005). While it may have been the wrong message, it was hardly an unsurprising one. Independent commission reports frequently sacrifice specificity to obtain unity. FLITNER, *supra* note 56, at 92.

¹²¹ Professor Black’s experience with the NCFIRRE, which studied the causes of the savings and loan crisis, was similar:

The Commission members that actively participated generally found that they could work together constructively by muting their disagreements and compromising. In particular, some of the Commissioners were adamant that “control fraud” (fraud led by the CEOs of seemingly legitimate businesses) had to be trivial. Other Commissioners believed that the factual investigations and data we had assembled demonstrated that control frauds were a major contributor to the crisis. The result was a compromise in which a number was made up—the NCFIRRE report states that fraud could not have caused more than 10-15 percent of all S&L losses. The report, however, presented analyses explaining why fraud caused far larger losses. It was all very polite, sometimes internally inconsistent, and contrary to everything that made Pecora’s investigation successful. The NCFIRRE report, at the Commissioners’ direction, does not hold any individual accountable.

Black, *supra* note 103.

¹²² May, *supra* note 74, at 30. To be sure, the 9/11 Commission did manage to produce not only a consensus report, but a best-seller to boot. The credit for that result, however, would seem to belong to the 9/11 commissioners and not to Congress and the Bush administration, which appeared to take substantial steps to hamstring the investigation. See generally SHENON, *supra* note 60. The 9/11 Commission report, moreover, was not the first to achieve best-seller status. The reports of the Warren Commission, the National Advisory Commission of Civil Disorders, the

was, of course, originally scheduled to release its report on December 15, 2010, just weeks after the 2010 mid-term elections.¹²³

Indeed, several Republican representatives made precisely this point in the floor debate on FERA, although their primary purpose in doing so seemed to be to accuse Democratic leaders of being primarily responsible for the financial crisis. Texas Representative Michael Burgess, for example, warned that commissioners selected by the political leaders in Congress were unlikely to assign blame to those same political leaders.¹²⁴ Despite these warnings, when Congress created the FCIC it used almost precisely the same selection methods as used in the 9/11 Commission and ensured that the report would be in the last drafting stages during what was sure to be a highly charged political environment.

The problem with this appointment method is not just that commissioners are unlikely to blame their political patrons. If the partisan political environment is strongly divisive, as is currently the case and as was the case in 2009, members of Congress are unlikely to appoint commission members who could be expected to work hard to find areas of agreement. Instead, the most likely appointees would be individuals with strong political ties¹²⁵ or those who could reasonably be expected to tote the party line,¹²⁶ swamping the

National Commission on the Causes and Preventions of Violence, and the President's Commission on Campus Unrest were published in paperback editions by private publishers and sold millions of copies. See FLITNER, *supra* note 56, at 101-02.

¹²³ Pub. L. No. 111-21, §5(h)(1), 123 Stat. 1630 (2009).

¹²⁴ 155 CONG. REC. H5687 (May 6, 2009) ("Senate 386 allows the chairman of the Senate Banking Committee to select a commissioner. The chairman of the Senate Banking Committee may have been part of the problem. This bill allows the chairman of the House Financial Services Committee to appoint a representative to the commission. Mr. Speaker, the chairman of the House Financial Services Committee may have been part of the problem. Senate 386 creates an accountability commission focused on protecting the government.")

¹²⁵ Angelides has been described as a "crony of Nancy Pelosi." Hirsh, *supra* note 14. Vice chairman Bill Thomas served fourteen terms in the House of Representatives, was a former chair of the House Ways and Means Committee, and, according to one account, "played a key role in helping members of the House GOP's current leadership team get where they are today." Pershing, *supra* note 110, at A19. Other FCIC members were substantial campaign contributors to the politicians who named them. Aaron Kiersh, *Newly Appointed Wall Street Investigators are Big Campaign Contributors*, OPEN SECRETS BLOG (July 17, 2009 5:47 PM) <http://www.opensecrets.org/news/2009/07/newly-appointed-wall-street-in.html>. One assessment of the FCIC as a whole was that "despite the presence of a few standouts like Brooksley Born, the derivatives whistle-blower from the '90s, the commission is manned with partisans of the left and the right who could easily tie themselves—and the investigation—up in ideological knots." Hirsh, *supra* note 14.

¹²⁶ The selection of members for the 9/11 Commission followed a similar pattern, with one key difference. The enabling legislation for the 9/11 Commission required President George W. Bush to select the committee's chairman. Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2408, § 603(a)(1) (2002). This feature made the political motivations that lay behind the choice of committee members even more overt. After Henry Kissinger abruptly resigned rather than disclose the clients of his consulting firm, President Bush, with consultation of his key political adviser, Karl Rove, looked for a new chairman who they thought was unlikely to embarrass the administration and threaten President Bush's chances for re-election. Their choice, Thomas Kean, the former governor of New Jersey, was not as compliant as Rove had originally

unanimity norm that would normally apply to commissions. Any attempt to build consensus among these disparate commissioners was probably doomed from the start. More troubling, such commissioners have the ability to undermine the commission by leaking information to the press or by disrupting substantially staff operations.

Available public evidence suggests that Peter J. Wallison, a fellow at the American Enterprise Institute (AEI) and a former General Counsel of the Treasury Department in the Reagan administration, played this kind of role on the FCIC. Wallison's AEI biography notes that "he had a significant role in the development of the Reagan administration's proposals for the deregulation of the financial services industry."¹²⁷ Wallison was also a long-time critic of federal housing policy, arguing as far back as 2003 that Fannie Mae and Freddie Mac should be privatized.¹²⁸ In the midst of the financial crisis, Wallison was quick to identify federal housing policy as the culprit.¹²⁹ It was a claim he repeatedly made in the ensuing years, including in November 2009, after he was already a member of the FCIC. In a *Wall Street Journal* op-ed, he chided "the left" for blaming the crisis on "deregulation of the financial system."¹³⁰ Government's misguided interference with the housing market was the true source. "If the financial crisis was caused by subprime mortgages and predatory lending," Wallison wrote, "the government's own policies made it happen."¹³¹

To say that Wallison had well-established views on financial deregulation and housing policy is an understatement. Indeed, at the FCIC's first public meeting, Wallison's opening statement focused almost exclusively on subprime mortgages and he asked whether "government policy" played a role.¹³² It was thus hardly a surprise when Wallison contributed a solo dissent to the

hoped, but that outcome did not alter the political calculus behind his selection. See SHENON, *supra* note 60, at 15-19, 25-26, 35-39.

¹²⁷ Peter J. Wallison, *Arthur F. Burns Fellow in Financial Policy Studies*, AMERICAN ENTERPRISE INSTITUTE, <http://www.aei.org/scholar/58> (last visited Apr. 7, 2012); see also Robert M. Garsson, *Banking Lawyer Recalls His Term as President Reagan's Counsel*, AMER. BANKER, Mar. 25, 1987, at 12 (noting that "as general counsel for the Department of Treasury under Donald T. Regan, [Wallison] carried the administration's ball on financial deregulation, arguing for a marketplace in which banks, securities firms, and others could be able to compete head on."); *Wallison Leaving?*, AMER. BANKER, Oct. 22, 1984, at 2 (noting that "Wallison is known as one of the chief architects and lobbyists for the Treasury Department's proposals to Congress that would deregulate the banking industry.").

¹²⁸ See PETER J. WALLISON ET AL., *PRIVATIZING FANNIE MAE, FREDDIE MAC, AND THE FEDERAL HOME LOAN BANKS* (2004); Peter J. Wallison, *Privatize Mortgage Market to Minimize Economic Risk*, 168 AM. BANKER, 7 (Mar. 2003).

¹²⁹ See Charles W. Calomiris & Peter J. Wallison, *Blame Fannie Mae and Congress for the Credit Mess*, WALL ST. J., Sept. 23, 2008, at A29.

¹³⁰ Peter J. Wallison, Op-Ed, *Barney Frank, Predatory Lender*, WALL ST. J., Oct. 16, 2009, at A19.

¹³¹ *Id.*

¹³² *Commissioner Statements*, FIN. CRISIS INQUIRY COMM'N 16 (Sept. 17, 2009), available at http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2009-0917-CommissionerStatements.pdf.

FCIC report that blamed the financial crisis exclusively on federal housing policy.¹³³

A July 2011 report by the Democratic staff of the House Committee on Oversight and Government Reform (“Oversight Report”) casts some light on Wallison’s participation in the work of the Commission.¹³⁴ Authors of the Oversight Report asserted that they reviewed more than 400,000 internal FCIC emails and other documents.¹³⁵ The material had been produced in an investigation launched by Republican Representative Darrell Issa of potential Democratic mismanagement and partisanship on the FCIC.¹³⁶ To be sure, the Oversight Report is itself a partisan political document—it sought to undercut Issa’s charges by showing equally partisan behavior among Republicans on the FCIC. Still, the Oversight Report finds that the documents the staff reviewed “raise significant new questions about whether Republican Commissioners geared their efforts on the Commission toward helping House Republicans in their campaign to repeal the Dodd-Frank Act, rather than determining the facts that led to the economic crisis.”¹³⁷

Without full disclosure and release of the underlying documents, it is important not to accept that conclusion uncritically. Nonetheless, the material quoted in the report does suggest that throughout the investigation Wallison was unwilling to re-visit his pre-existing positions, virtually assuring that the FCIC would be unable to release a consensus report. One Republican staff member called Wallison “intractable.”¹³⁸ “Everyone agrees,” the same staffer added, “that there is simply no way to make Peter happy.”¹³⁹ The Oversight Report also charges that Wallison improperly leaked confidential Commission documents and that he encouraged Republican members of the FCIC to structure their dissents to support attempts to repeal Dodd-Frank.¹⁴⁰ “It’s very important,” Wallison wrote to the other Republican commissioners, “that what we say in our separate statements not undermine the ability of the new House GOP to modify or repeal Dodd-Frank.”¹⁴¹

Similarly partisan behavior has been attributed to the Democratic commissioners, particularly Angelides. In January 2010 two FCIC staff members named Countrywide Financial and its chief executive Angelo Mozilo as targets for potential investigations and hearings, Angelides reportedly vetoed that plan, telling the staffers that Mozilo was off limits for the FCIC’s public

¹³³ Peter J. Wallison, *Dissenting Statement*, FIN. CRISIS INQUIRY COMM’N 443 (Jan. 2011), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.

¹³⁴ See Democratic Staff, *An Examination of Attacks against the Financial Crisis Inquiry Commission*, COMM. ON OVERSIGHT & GOV’T REFORM, U.S. HOUSE OF REP. (July 13, 2011) [hereinafter *Oversight Report*].

¹³⁵ *Id.* at 3.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 5.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 12-14.

¹⁴¹ *Id.* at 9.

hearings.¹⁴² Both staffers, Martin T. Biegelman and Bradley Bondi, eventually resigned.¹⁴³

Republican commissioners voiced similar complaints about partisanship on the committee. In testimony to Congress, Thomas complained about the “top-down structure from day one.”¹⁴⁴ There was little attempt to achieve consensus, Thomas asserted, because the Democratic majority on the Commission was not required to in order to move forward. “[W]hen it came down to the crunch,” he testified, “all the votes were 6-4.”¹⁴⁵ Wallison complained that he had “never seen a Commission as badly organized and run as this one.”¹⁴⁶ Commissioners, he asserted, were given little opportunity to hash out their competing views about the causes of the crisis. Wallison placed the Commission’s failures squarely on Angelides. “Throughout its 18 month life,” Wallison charged, “the Commission focused only on issues that the chairman wanted to cover, was more interested in publicity than in a thorough investigation, and never paid serious attention to other views.”¹⁴⁷

The truth of these competing allegations is difficult to assess without a deeper analysis of the internal operations of the FCIC.¹⁴⁸ What is clear is that Angelides, unlike Kean, was unable to bridge the partisan differences on the Commission. In the spring of 2010, Angelides sought to close off further discussion and analysis of Wallison’s theory that government housing policy was solely to blame for the financial crisis. “For what I have seen,” Angelides wrote, “the staff has spent more time responding to your questions and requests for

¹⁴² Gretchen Morgenson & Louise Story, *A Financial Crisis with Little Guilt*, N.Y. TIMES, Apr. 14, 2011, at A1.

¹⁴³ Sewell Chan & Eric Dash, *Internal Dissent and Staff Losses May Hurt Financial Crisis Panel*, N.Y. TIMES, Sept. 1, 2010, at B1; Sewell Chan & Eric Dash, *Financial Crisis Inquiry Wrestles with Setbacks*, N.Y. TIMES, Apr. 6, 2010, at B4.

¹⁴⁴ FCIC Hearing, *supra* note 25, at 32.

¹⁴⁵ *Id.* Another Republican Commissioner, Douglas Holtz-Eakin, disagreed. He thought that partisanship of this kind did not become a problem until the Commission was completing its work. *Id.* at 51 (“I am disturbed that late in the game, it appeared to become partisan in nature when, in fact, what I saw during the vast majority of the Commissioners’ deliberations were 10 individuals with views that did not agree and a willingness to look at the data and try to work that out.”). *Id.*

¹⁴⁶ Peter J. Wallison, *Statement Submitted to the Senate Committee on Banking, Housing, and Urban Affairs In Connection With A Hearing On the Financial Crisis Inquiry Commission*, AM. ENTER. INST. 2 (May 10, 2011), <http://www.aei.org/files/2011/05/13/Senate-testimony-on-FCIC-dissent.pdf>.

¹⁴⁷ *Id.* at 5. A parapraxis in an Angelides radio interview from November 2011 suggested there was at least a germ of truth to Wallison’s assertion. After claiming that New York mayor Michael Bloomberg did not understand the true causes of the financial crisis, Angelides volunteered that he would send Bloomberg “a copy of my book.” After a long pause he corrected himself; he would send Bloomberg a copy of “the Commission’s report.” *The Brian Lehrer Show* (WNYC radio broadcast Nov. 2011).

¹⁴⁸ For example, the last point Wallison makes seems to be a complaint that the staff did not take his view of the causes of the financial crisis seriously enough. According to the Oversight Report, however, the FCIC staff spent a great deal of time analyzing data that Wallison provided, but ultimately concluded that Wallison’s theory was flawed. *Oversight Report*, *supra* note 134, at 16-21.

information than any other Commissioner.”¹⁴⁹ That summer, Wallison wrote a bitter reply, denouncing Angelides for ignoring his theories and demonstrating once again his own intransigence and partisan approach to the inquiry. “I don’t like being told that I disagree with everything,” Wallison complained.¹⁵⁰

You should know that I have no compunction about filing a separate statement if I am not persuaded by data, by facts that have been tested and are not subject to dispute. . . . I hear that we should accept the point of view of ‘experts’ as evidence, as in a trial. As we all should know, in a trial *each side* can select its experts. All the experts I have ever suggested for the Commission’s hearings have been rejected or ignored. There is a price to pay for that.¹⁵¹

B. Mandate and Resources

An obvious way to limit the potential effectiveness of an independent commission is to give it an expansive mandate, few resources, and a short timetable for completing its work. All three techniques were used in the creation of the FCIC.

Congress instructed the FCIC to investigate twenty-two separate aspects of the financial crisis¹⁵² as well as the causes of the collapse of each major

¹⁴⁹ *Id.* at 20.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 20-21 (emphasis added).

¹⁵² Fraud Enforcement and Recovery Act of 2009, § 5(c). Congress required the FCIC “to examine the causes of the current financial economic crisis in the United States, specifically the role of—

- (A) fraud and abuse in the financial sector, including fraud and abuse toward consumers in the mortgage sector;
- (B) Federal and State financial regulators, including the extent to which they enforced or failed to enforce statutory, regulatory, or supervisory requirements;
- (C) the global imbalance of savings, international capital flows, and fiscal imbalances of various governments;
- (D) monetary policy and the availability of terms of credit;
- (E) accounting practices, including, mark-to-market and fair value rules, and treatment of off-balance sheet vehicles;
- (F) tax treatment of financial products and investments;
- (G) capital requirements and regulations on leverage and liquidity, including the capital structures of regulated and non-regulated financial entities;
- (H) credit rating agencies in the financial system, including, reliance on credit ratings by financial institutions and Federal financial regulators, the use of credit ratings in financial regulation, and the use of credit ratings in the securitization markets;
- (I) lending practices and securitization, including the originate-to-distribute model for extending credit and transferring risk;
- (J) affiliations between insured depository institutions and securities, insurance, and other types of nonbanking companies;
- (K) the concept that certain institutions are “too-big-to-fail” and its impact on market expectations;
- (L) corporate governance, including the impact of company conversions from partnerships or corporations;
- (M) compensation structures;

financial institution that failed during the 2008 financial crisis.¹⁵³ Congress recognized the enormity of this task; indeed, that is, as noted earlier, one reason why it chose to form an independent commission rather than conducting the inquiry through a select committee.¹⁵⁴ Nonetheless, it gave the Commission little money to complete the job—just \$8 million—underscoring again that the investigation was more symbolic than real.¹⁵⁵ Here too, the FCIC mirrored the 9/11 Commission, which was originally allotted just \$3 million.¹⁵⁶ To place these dollar figures in context, consider that during roughly the same period when Congress created the 9/11 Commission, it appropriated approximately \$50 million to investigate the Columbia space shuttle disaster.¹⁵⁷ The independent commission investigating the Challenger space shuttle accident spent \$175 million (including \$100 million searching for debris) in 1986 (approximately \$343 million in 2009 dollars).¹⁵⁸ To be sure, these comparisons are not entirely apt—an accident investigation is far different than an analysis of the causes of a terrorist attack or financial crisis. The Columbia investigation, for example, involved an expensive effort to reconstruct the recovered remnants of the shuttle. While explaining the financial crisis might be cheaper, there is a strong case to be made that doing the job correctly required far more resources. After all, the shuttle investigations were analyzing discrete events; the FCIC was trying to untangle decades of private sector decisions and governmental policies.

(N) changes in compensation for employees of financial companies, as compared to compensation for others with similar skill sets in the labor market;

(O) the legal and regulatory structure of the United States housing market;

(P) derivatives and unregulated financial products and practices, including credit default swaps;

(Q) short-selling;

(R) financial institution reliance on numerical models, including risk models and credit ratings;

(S) the legal and regulatory structure governing financial institutions, including the extent to which the structure creates the opportunity for financial institutions to engage in regulatory arbitrage;

(T) the legal and regulatory structure governing investor and mortgagor protection;

(U) financial institutions and government-sponsored enterprises; and

(V) the quality of due diligence undertaken by financial institutions.

Id.

¹⁵³ See *id.* § 5(c)(2) (requiring the FCIC “to examine the causes of the collapse of each major financial institution that failed (including institutions that were acquired to prevent their failure) or was likely to have failed if not for the receipt of exceptional Government assistance from the Secretary of the Treasury during the period beginning in August 2007 through April 2009 . . .”).

¹⁵⁴ See *supra* notes 67 and 68 and accompanying text.

¹⁵⁵ *Oversight Report*, *supra* note 134, at 26.

¹⁵⁶ Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383, 2413 § 611(a) (Nov. 27, 2002).

¹⁵⁷ Ralph Vartabedian & Peter Pae, *Cost of Columbia Accident Inquiry Is Soaring*, L.A. TIMES, Mar. 15, 2003, at 18. This figure does not include the money spent searching for debris, which has been estimated at approximately \$300 million. William Langewiesche, *Columbia’s Last Flight: The Inside Story of the Investigation—And the Catastrophe It Laid Bare*, ATLANTIC, Nov. 2003, at 73. *New York Times* columnist Frank Rich offered an even more colorful comparison. The FCIC “had less than one-sixth the budget of the musical ‘Spider-Man’ to shed light on years of opaque financial maneuvers by huge, lawyered-up institutions.” Frank Rich, *At Last, Bernie Madoff Gives Back*, N.Y. TIMES, Feb. 13, 2011, at 8.

¹⁵⁸ Vartabedian & Pae, *supra* note 157.

Shortly after it began operations, the commissioners apparently reached a consensus that they had insufficient funds to complete the investigation. At a closed meeting on November 17, 2009, the consensus among the commissioners was that vice chairman Thomas should “take the lead with Congress” to obtain additional funding.¹⁵⁹ The original plan was to ask for an additional \$3 million, but that was later reduced to \$2.66 million, and then again to \$1.8 million, a 23 percent increase over its original \$8 million budget.¹⁶⁰ That amount, the commissioners complained, was probably far less than the firms questioned were paying their lawyers and media advisors.¹⁶¹

In addition to paltry budgets, both the FCIC and the 9/11 Commission were given tight deadlines for completing their respective investigations, eighteen months for the 9/11 Commission and two years for the FCIC. These deadlines were particularly problematic because so much of the beginning stages of the inquiry would not involve any actual investigation but would be devoted to setting up the commission and hiring the staff, an undertaking that has been compared to setting up “a new government agency” in a period of weeks.¹⁶² Not surprisingly, much of the first few months were taken up with these logistical details, leaving even less time to conduct the actual investigation. For example, the FCIC did not name 14 senior staff members until December 2009, seven months after it was created and just one month before its first public hearings.¹⁶³ The FCIC’s statutory authorization was not unusual—short deadlines are the norm rather than the exception for independent commissions—but it created a strong risk, particularly given the long list of matters that it was required to analyze, that the investigation would necessarily be shallow, focusing on compiling previously disclosed information and recounting existing themes and explanations.¹⁶⁴

These constraints created another difficulty as well. To save time and money, FCIC staffers were often detailed from Treasury, the Federal Reserve, and the SEC—the very governmental bodies they were asked to evaluate. Wendy Edelberg, an economist on loan from the Federal Reserve, replaced J. Thomas Greene, as the staff director. Bradley Bondi worked at the SEC.¹⁶⁵ There is no evidence to suggest that the efforts of these individuals were in any way lacking and they presumably had the requisite expertise to undertake this

¹⁵⁹ *Oversight Report*, *supra* note 134, at 26-27.

¹⁶⁰ *Id.*

¹⁶¹ It is worth noting, however, that few resources, in and of itself, does not doom an investigation to failure. Pecora had an even more meager budget, just \$180,000. Adjusting for inflation, Pecora managed to scrape by with just 30 percent of the money the FCIC had and with an even smaller staff. The explanation for the different outcomes is not just in the resources deployed, but in the way these two investigations were organized and in how they used (or failed to use) their powers.

¹⁶² LUNDBERG, *supra* note 96, at 15; *see* FLITNER, *supra* note 56, at 59 (noting that lengthy start-up times are common among commissions).

¹⁶³ Chan & Dash, *supra* note 20, at B4. Similar delays plagued the 9/11 Commission as well. SHENON, *supra* note 60, at 92.

¹⁶⁴ *See* FLITNER, *supra* note 56, at 61-64.

¹⁶⁵ Chan & Dash, *supra* note 20, at B4.

investigation, but relying on them raised significant potential questions about the impartiality of the investigation. Outside observers might expect that these kinds of staffer would bring their own loyalties, biases, and blind spots to the investigation. Perhaps they would be willing to see their agencies in a better light than they actually deserved. In some cases, FCIC staffers were slated to return to those agencies, which could be expected to heighten these tendencies. Here too, the FCIC closely resembled the 9/11 Commission. At the very least, such relationships could reasonably be expected to create a perception of a conflict of interest when it came to exploring the government's role in the financial crisis.¹⁶⁶

C. Restricting the Commission's Investigatory Powers

Congress further hamstrung the effort to investigate the financial crisis by placing inordinate restrictions on the FCIC's use of its primary investigatory tool—the subpoena. Pecora used the subpoena power Congress granted the committee liberally in order to pry documents out of recalcitrant investment banks. The lawyer had the power to do so because he only needed the permission of the committee chairman to issue a subpoena. As the two chairmen who oversaw the investigation, Peter Norbeck and Duncan Fletcher, wanted it to be vigorous, this requirement presented few meaningful obstacles. When, for example, financial institutions under investigation seemed to delay producing documents requested by the Committee, Pecora did not hesitate to issue subpoenas.¹⁶⁷

The original bill to create an independent commission to investigate the financial crisis (S. 298), provided that the commission was authorized to issue subpoenas, but placed no limits on its power to do so.¹⁶⁸ Service of subpoenas was by “any person designated by the Commission.”¹⁶⁹ The absence of any limitation on issuing subpoenas combined with the delegation of authority for service implied that the commission could by simple majority vote delegate power to the staff director to issue subpoenas. This would have been much closer to the power Pecora exercised. When the sponsors of S. 298 offered an amendment to FERA creating a similar commission, the language regarding subpoena power was substantially similar.¹⁷⁰

The provisions regarding subpoena power changed substantially when the bill went to the House of Representatives. The bill that passed the House on May 6, 2009 now required that for the Commission to issue a subpoena it either had to have the agreement of the chairman and vice-chairman or a vote by a majority of the ten commissioners, including at least one member of the

¹⁶⁶ See May, *supra* note 74, at 34.

¹⁶⁷ See PERINO, *supra* note 5, at 88-94.

¹⁶⁸ See S. 298, 111th Cong., § 5(a)(2) (2009).

¹⁶⁹ *Id.* at § 5(b).

¹⁷⁰ 155 CONG. REC. S4591 (daily ed. Apr. 22, 2009).

minority.¹⁷¹ This provision was modeled on one contained in H.R. 74, an earlier bill to create an independent commission that was offered by Republican Senator Daryl Issa, who later proved to be a bitter critic of the FCIC.¹⁷² A similar limitation on subpoena power appeared in the legislation that created the 9/11 Commission. That provision was inserted at the suggestion of the Bush administration, and, of course, its primary concern was to weaken the commission that it had originally opposed.¹⁷³

FERA retained this substantial limitation on the FCIC's subpoena power.¹⁷⁴ It was a cumbersome procedure and it made subpoenas highly unlikely given the prevailing ethos in Washington that subpoenas are a last resort and not a first step.¹⁷⁵ Politicians, like Thomas Kean, view subpoenas as extraordinary and potentially counterproductive.

A subpoena is something you hold out there and it's the big hammer. If you use it too often, it loses its effectiveness. I thought its effectiveness, in fact, was more in the threat of it than it was in the actual use of it.¹⁷⁶

Angelides shared this perspective, announcing early in the life of the FCIC that he was "not eager" to use subpoenas and preferred "voluntary" cooperation.¹⁷⁷ Lawyers serving on independent commissions often see subpoenas differently—they are considered routine rather than hostile and punitive.¹⁷⁸

Ultimately, the limitations on the 9/11 Commission's subpoena power were relatively unimportant for another reason. Some of the most critical documents in the investigation—the intelligence briefings given to Presidents Clinton and Bush and internal White House documents—were subject to claims of executive privilege.¹⁷⁹ The Bush administration, with its strong views of executive power, could reasonably be expected to launch court challenges to subpoenas that sought these documents. The 9/11 Commission faced a substantial risk that its investigation would get bogged down in lengthy legal battles, battles the commission could very well lose. Even if it did prevail, the

¹⁷¹ Fraud Enforcement and Recovery Act of 2009, S. 386, 111th Cong. § 5(d)(2)(B)(iii) (2009) (citing the House passed Amendments to S. 386 on May 6, 2009).

¹⁷² H.R. 74, 111th Cong., § 6(a)(2)(A) (2009). See *infra* notes 193 through 197 and accompanying text.

¹⁷³ LUNDBERG, *supra* note 96, at 3.

¹⁷⁴ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 5(d)(2)(B)(iii), 123 Stat. 1617, 1625 (2009).

¹⁷⁵ SHENON, *supra* note 60, at 93-94, 201-08.

¹⁷⁶ *Id.*

¹⁷⁷ Hirsch, *supra* note 14.

¹⁷⁸ See LUNDBERG, *supra* note 96, at 33, 39-40 (referring to the views of 9/11 commissioners Jamie Gorelick and Richard Ben-Veniste).

¹⁷⁹ Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003) § 1.1 (a)(4) (stating that information pertaining to "transnational terrorism" could be classified as national security information).

commission might get access too late in order to meaningfully analyze those documents.¹⁸⁰

Kean and Hamilton concluded that using subpoenas created too great a risk of alienating the administration and destroying all potential for cooperation. Their alternative strategy was to rely instead on the power of the bully pulpit. When agencies delayed or defied complying with document requests, the chairs held press conferences and issued interim reports to highlight these problems, always firmly but diplomatically. Kean, fellow commissioner Jaime Gorelick observed, “did not pop off, he was always gentlemanly, always courtly.” Given the commission’s high profile and the political risks of appearing to obstruct its investigation, jawboning was usually sufficient. It was only in a few cases of outright refusal and obstruction that the 9/11 Commission resorted to issuing subpoenas.¹⁸¹

As a result of the statutory and political restraints on subpoenas, it is not surprising that Angelides announced his preference that firms voluntarily cooperate with the probe.¹⁸² He probably had little choice, but it proved to be the wrong decision. Angelides was not primarily investigating government agencies or the administration with their extreme sensitivities to subpoenas and the threat that they could avoid compliance through claims of executive privilege. He was investigating firms in the financial industry, which are subpoenaed on a regular basis in governmental investigations and lawsuits. That distinction should have been enough to counsel for a routine use of subpoenas. At the very least, the FCIC could have used a bifurcated approach in which it subpoenaed private firms and used document requests and moral suasion for governmental actors. Without subpoenas, firms and their lawyers naturally sought to run out the clock.

It was only when foot dragging grew excessive that the FCIC appeared able to issue a subpoena, and even then it frequently met with obstruction. The first subpoena was issued to Moody’s Investors Service in April 2010, nearly a year after the FCIC was formed and months after it held its first public hearing.¹⁸³ The panel complained that the credit rating agency had been slow in responding to its document requests.¹⁸⁴ The most high profile incident occurred in June 2010 and involved Goldman Sachs. The firm had been stalling since January, failing to provide specific answers to questions investigators had put to it and then inundating the FCIC with five terabytes of information—the equivalent of several billion pages of documents, none of it indexed. In this case, Angelides did not follow the 9/11 Commission’s diplomatic approach. “We did not ask them to pull up a dump truck to our offices and dump a bunch of rubbish,” he

¹⁸⁰ KEAN & HAMILTON, *supra* note 58, at 64.

¹⁸¹ *Id.* at 29-34.

¹⁸² Greg Gordon & Kevin G. Hall, *Financial Crisis Panel is Ready to Play Hardball*, HOU. CHRON., Nov. 16, 2009, at 1.

¹⁸³ Sewell Chan, *Fiscal Panel Subpoenas Documents of Moody’s*, N.Y. TIMES, Apr. 22, 2010, at B6.

¹⁸⁴ *Id.*

angrily complained.¹⁸⁵ Even Vice Chairman Bill Thomas grumbled that Goldman's actions were "deliberate and disruptive."¹⁸⁶ As the FCIC staff struggled through the voluminous material, they soon discovered that many key documents seemed to be missing. It was only in the face of those overtly obstructionists tactics that the committee was finally able to agree to issue a subpoena. "We're not going to let the American people be played for chumps here," Angelides fumed.¹⁸⁷

After the subpoena, word was that Goldman was, at least initially, much more cooperative. The firm immediately began to schedule interviews that had long been delayed. When Goldman president Gary Cohen appeared before the panel in July, he even apologized for the firm's earlier actions. But, as public attention turned away from the story, the firm's contrition seemed to melt away. Just a month later Angelides was again complaining about the slow pace with which documents were being provided to the committee and about Goldman's failure to provide specific responses to the panel's questions. And yet he resisted issuing more subpoenas, the one action that had succeeded in getting the firm's attention. "We've already asked Goldman for this information," he said. "I have every expectation they'll comply. They've told us they will, I believe them. And I'll believe them until they don't."¹⁸⁸ This was after passage of Dodd-Frank and after relations between Democratic and Republican members of FCIC had already begun to sour.¹⁸⁹ Prospects for obtaining bipartisan agreement on a subpoena were probably slim, so perhaps Angelides's only hope for compliance was his expectations and beliefs. Pecora never needed to be so patient when it came to wresting documents out of the targets of his investigation.

D. Political Interference with Independent Commissions

Political considerations and calculations are never far below the surface of the work of independent commissions. Often politicians will try to directly influence the work of those commissions. There were, for example, countless cases of attempted political interference in the operations of the 9/11 Commission.¹⁹⁰ Karl Rove, President Bush's chief political operative, made frequent telephone calls to the investigation's chief of staff, Philip Zelikow, apparently to keep tabs on the investigation. White House staff members, hoping to destroy the credibility of Richard Clarke, a witness hostile to the administration, helped to prepare questions for Republican commissioners. Then

¹⁸⁵ Sewell Chan & Gretchen Morgenson, *A Subpoena for Goldman In Inquiry*, N.Y. TIMES, Jun. 8, 2010, at B1.

¹⁸⁶ *Id.*

¹⁸⁷ Editorial, *What is Goldman Hiding?*, N.Y. TIMES, Jun. 8, 2010, at A26.

¹⁸⁸ Philip Angelides, *Chairman of the Financial Crisis Inquiry Commission Talks about Goldman Sachs/AIG Investigation on Bloomberg TV*, FINANCIAL MARKETS REGULATORY WIRE, Aug. 5, 2010, available at <http://www.bloomberg.com/news/2010-08-05/angelides-says-fcic-to-keep-pressing-goldman-for-data-video.html>.

¹⁸⁹ See Chan & Dash, *supra* note 20.

¹⁹⁰ See SHENON, *supra* note 60, at 106-07, 267, 280, 325-33.

attorney general John Ashcroft, in order to deflect criticism of his own failings in the months before September 11, cast blame on Jamie Gorelick, a member of the commission and a former high ranking Justice Department official in the Clinton administration. Vice President Cheney even attempted to have the report rewritten to remove material he thought would be damaging to President Bush's re-election campaign.

Other than the Oversight Report, little has been revealed about the inner workings of the FCIC. It will likely take years before we learn whether there were similar behind the scenes attempts to influence the FCIC as occurred with the 9/11 Commission. The FCIC records have been sent to the National Archives and Records Administration and will not be open to public view until 2016.¹⁹¹ Careful review of those records and interviews with individuals connected with the FCIC may reveal similar kinds of influence.

There were some overt steps. In April 2010, Angelides and Thomas reportedly disagreed over whether to release preliminary staff reports and documents produced to the FCIC in the investigation. When Angelides suggested releasing the material, one report claims that Republicans threatened to investigate the Commission if they took over the House in the mid-term elections.¹⁹² The threat to investigate the investigators looked like an attempt to quash disclosure.

The most prominent example of a member of Congress seeking to discredit the FCIC involved Republican Representative Daryl Issa of California. After passage of Dodd-Frank and while the FCIC's request for additional funding was pending before Congress, Issa, then ranking member of the House Committee on Oversight and Government Reform, dashed off a letter to Angelides. In it he expressed his concern "that the FCIC's own problems with financial mismanagement and partisanship may have resulted in a waste of taxpayer funds that does not warrant an additional appropriation."¹⁹³ Clearly, Issa was more concerned about Democratic partisanship than Republican partisanship. He discussed links between a commissioner and a staffer with a plaintiffs' class action law firm and was "troubled by the extensive ties of some of the senior staff at a putatively bipartisan commission to partisan Democrat politics."¹⁹⁴ Issa then began to make the case that the FCIC's report was likely to be a biased political document. "I am sure you will agree with me," he wrote Angelides, "that the FCIC's efforts will have been wasted if the American people come to believe that it has served as nothing more than a cheering section for the Administration and congressional Democrats in their efforts to defend a partisan

¹⁹¹ See *Financial Crisis Inquiry Commission Releases Additional Material and Concludes Work*, FINANCIAL CRISIS INQUIRY COMMISSION 1 (Feb. 10, 2011) (noting that FCIC records at NARA would be closed for five years), available at http://fcic-static.law.stanford.edu/cdn_media/fcic-news/Press_Release_2.10.11.pdf.

¹⁹² Chan & Dash, *supra* note 20, at B1.

¹⁹³ Letter from Darrell Issa, Representative, United States Congress, to Phil Angelides, Chairman, Financial Crisis Inquiry Commission (July 27, 2010), at 1.

¹⁹⁴ *Id.* at 2-3.

and ineffective financial regulatory reform bill.”¹⁹⁵ Issa demanded a raft of documents from the FCIC, a request that Angelides dismissed as “silly, stupid Washington stuff.”¹⁹⁶ Issa, however, was not deterred. After control of the committee shifted to the Republicans and just weeks before the FCIC was set to release its report, Issa announced that his committee would be investigating the Commission.¹⁹⁷

This series of actions is typical for Washington politics, but ironic given Issa’s comments on the House floor when FERA was being debated. “As with the 9/11 Commission,” Issa argued, “the Financial Markets Commission report should be free of accusations of political showmanship and a partisan slant that have tainted current investigations. This Commission is not the place for partisanship or Congressional meddling. It is a place for the American people to get answers.”¹⁹⁸

IV. CONCLUSION

Government investigations come in all sorts of shapes and sizes. Some, like the Pecora hearings, are innovative and path breaking, shaping laws and regulations for decades. Although there was a good deal of loose talk about the FCIC hearings replicating those results, the truth was that they never really had a chance. The political climate in which they operated was far different, and far too poisonous, to expect a dispassionate and searching inquiry into the causes of the financial crisis. From the way that Congress structured the Commission and from the limits placed on its investigatory tools, it should have been clear that the FCIC had no chance of replicating the success of the Pecora hearings. Like the 9/11 Commission before it, the FCIC seemed to have been set up to fail. Only the deft political touch of the 9/11 chairman kept that inquiry on track. The FCIC was not similarly blessed.

¹⁹⁵ *Id.* at 3-4.

¹⁹⁶ Chan & Dash, *supra* note 20.

¹⁹⁷ Philip Rucker, *House GOP Launching Widespread Investigations*, WASH. POST., Jan. 4, 2011, at A1.

¹⁹⁸ 155 CONG. REC. H5269 (daily ed. May 6, 2009).

