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## Designing Transparency: The 9/11 Commission and Institutional Form

Mark Fenster

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# Designing Transparency: The 9/11 Commission and Institutional Form

Mark Fenster\*

## *Abstract*

*Surpassing the low expectations established by previous investigatory commissions and overcoming the political and legal obstacles created by the Bush administration's opposition to its creation, the 9/11 Commission accomplished what appeared to be the impossible: an authoritative investigation, a widely-read final report, and direct influence on significant legislation. This Article argues that the 9/11 Commission represents an important institutional model for encouraging or forcing the Executive Branch to disclose information about an especially significant and controversial past event or future decision. It suggests that Congress or the President consider establishing such commissions when information held by the Executive Branch can help the public to hold the state accountable for past actions or decide whether to support important, irreversible decisions the state must imminently make. The 9/11 Commission demonstrates that transparency can be better achieved in a time of crisis through institutional design than through constitutional common law and statute. The Article is less sanguine, however, about the 9/11 Commission as a model for policy formation. With limited accountability and relative independence from the political branches, an ad hoc, independent institution can make errors or misjudgments that can in turn have undue influence over the legislative process. Congress or the President should therefore limit the legal authority granted to investigative advisory commissions established during times of crisis so that political actors can fully deliberate over their prescriptions.*

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## I. Introduction

Conceived by Congress when partisan recriminations appeared ready to thwart serious investigation, the National Commission on Terrorist Attacks Upon the United States (popularly known as the "9/11 Commission") fell within a long tradition of governmental efforts to use an independent advisory commission to study and explain a traumatic, tragic event of national import.<sup>1</sup> Given its generic institutional form, the 9/11 Commission should not have inspired great expectations as either an authoritative investigator of the attacks' causes or influential architect of national security reform. Similar investigatory advisory commissions have seen their conclusions questioned, repudiated, or both, and their reputations reduced to punch lines or conspiratorial bugaboos.<sup>2</sup> The aura of futility extends even to more common advisory commissions (or committees),<sup>3</sup> whether formed by the President, an Executive Branch agency, or Congress.<sup>4</sup> The ability of advisory commissions to influence government and

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1. See, e.g., Exec. Order No. 12,546, 51 Fed. Reg. 4,475 (Feb. 5, 1986) (establishing the Presidential Commission on the Space Shuttle Challenger Accident); Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (Aug. 1, 1967) (establishing the National Advisory Commission on Civil Disorders, popularly known as the Kerner Commission); Exec. Order No. 11,130, 28 Fed. Reg. 12,789 (Nov. 29, 1963) (establishing the President's Commission on the Assassination of President Kennedy, popularly known as the Warren Commission); Exec. Order No. 8,983, 6 Fed. Reg. 6,569 (Dec. 20, 1941) (establishing the Commission to Investigate the Japanese Attack of December 7, 1941).

2. The Warren Commission stands as the quintessential example; criticisms of its work are so voluminous and so much a part of popular political and cultural folklore as to render citation unnecessary. Less well-known, but still prominent, are criticisms of factual errors and political interference in the commission investigating Pearl Harbor, KENNETH KITTS, *PRESIDENTIAL COMMISSIONS AND NATIONAL SECURITY* 33–36 (2006), and criticisms of the Kerner Commission for its inability to affect the political order and the perception of public and political actors, MICHAEL LIPSKY & DAVID J. OLSON, *COMMISSION POLITICS: THE PROCESSING OF RACIAL CRISIS IN AMERICA* 137–48 (1977).

3. Throughout this Article, I will use the term "advisory commission" to refer to all advisory bodies that fall within the Federal Advisory Committee Act's definition, which includes advisory groups referred to as "committee, board, commission, council, conference, panel, [and] task force." 5 U.S.C.A. app. II § 3(2) (West 2007). I will use the term "commission" instead of "committee" (as the title of FACA does) because the Article's case study is of an institution called a "commission." All such bodies, including the 9/11 Commission, are "means of furnishing expert advice, ideas, and diverse opinions." *Id.* § 2(a).

4. I would distinguish the use of the advisory committee form in the negotiated rulemaking process, which is focused on finding and establishing consensus among interested parties, from the more traditional advisory commission or committee that provides advice through investigation and expert policy formation. See Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, § 581, 104 Stat. 4969, 4970 (1990) (codified as amended at 5 U.S.C. §§ 561–570a (2000)) (establishing a framework for the conduct of negotiated rulemaking with the purpose of "encourag[ing] agencies to use the process when it enhances the informal rulemaking by authorizing agencies to use the process when it enhances the informal rulemaking

public consciousness seems to fall within a narrow range—from marginal to nil—and rare is the commission whose proposals are actually adopted into law or regulatory rule.<sup>5</sup>

If the generic institutional form of the special commission was not sufficient to damn its pretension to effective, independent investigation, the 9/11 Commission also worked within a political environment that appeared positively paralyzing.<sup>6</sup> The White House and Congress initially opposed its creation;<sup>7</sup> when Congress finally relented, it limited the Commission's funding and imposed upon it a deadline for its final report that seemed nearly impossible to meet.<sup>8</sup> Then, as the investigation proceeded, the Executive Branch resisted many of the Commission's efforts to gain access to documents and personnel for interviews.<sup>9</sup>

process"); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 111 (1998) (highlighting the Negotiated Rulemaking Act as creating another "species of rulemaking by authorizing agencies to organize and conduct negotiations among parties interested in the formulation of a particular rule" and explaining its elements). The negotiated rulemaking process, which is subject to FACA, has proven relatively successful, especially when used in the early stages of environmental regulatory rulemaking. See 5 U.S.C.A. § 565(a)(1) (West 2007) (setting out the circumstances under which an agency may establish a negotiated rulemaking committee and mandating that "[i]n establishing and administering such a committee, the agency shall apply with the [FACA] . . . except as otherwise provided in [that] subchapter"); David J. Sousa & Christopher McGrory Klyz, *New Directions in Environmental Policy Making: An Emerging Collaborative Regime or Reinventing Interest Group Liberalism?*, 47 NAT. RESOURCES J. 377, 404–07 (2007) (discussing the potential of the Negotiated Rulemaking Act to improve rulemaking, which, at the time of the Act's passage, had fallen victim to "problems associated with the new social regulation" such as parties resisting enforcement or challenging rules in court).

5. Noting the futility of the advisory commission is a familiar trope in the academic literature. See, e.g., DAVID FLITNER, JR., *THE POLITICS OF PRESIDENTIAL COMMISSIONS* 1–2 (1986) (discussing the skepticism surrounding the appointment of commissions and noting that despite the "frequency of their use . . . commissions have suffered criticism and have often been ignored by those who appoint them"); KITTS, *supra* note 2, at 1 (noting that the warning and recommendations of "blue-ribbon commissions . . . often go unheeded"). American frustration with the futility of advisory commissions is not unique. See, e.g., *Attila the Hun*, ECONOMIST, Jan. 26, 2008, at 51 (describing recent French commissions and quoting one commission chair about the "feeble use made of his commission's work").

6. See THOMAS H. KEAN & LEE H. HAMILTON, *WITHOUT PRECEDENT* 14–33, 322 (2006) (discussing the political atmosphere and controversy surrounding the Commission's formation and operations).

7. See *infra* Part III.A (discussing Congress's and the President's opposition).

8. See *infra* note 181 (discussing the Commission's relatively low initial funding and unreasonable deadline for completion of its investigation).

9. See *infra* notes 201–18 and accompanying text (discussing the struggles of overcoming White House resistance to the Commission's requests to provide information and personnel for interviews and those elements of the Commission's composition and internal strategy which lead to the Commission's success in gathering information).

Despite these impediments to its success, the 9/11 Commission produced an unanimous report that forced a strong measure of transparency<sup>10</sup> on an administration committed to information control and executive prerogative and privilege, and offered an array of major legislative and regulatory proposals.<sup>11</sup> The Commission declared and attempted to maintain—and, equally importantly, *appeared* to maintain—independence from the political, military, intelligence, and regulatory institutions and actors it studied.<sup>12</sup> The news media and public followed the Commission's operations, and its final report was widely read.<sup>13</sup> Congress and the Executive Branch adopted many of its recommendations.<sup>14</sup> Working within an institutional form replete with commissions that accomplished little despite celebrated beginnings and prominent members, the 9/11 Commission may have had the greatest legislative impact in the form's history and appears to have provided the authoritative account of the 9/11 attacks.

The 9/11 Commission's anomalous success thus poses an institutional and historical puzzle for scholars of administrative law and political institutions: What was the nature of the Commission's success? How and why did this

10. In this Article, I use the term "transparency" with some caveats. First, as an abstract political and administrative norm, transparency is not an unmitigated good and can cause significantly adverse, unforeseen consequences. See KRISTIN M. LORD, *THE PERILS AND PROMISE OF GLOBAL TRANSPARENCY* 2–4 (2006) (arguing that there is a "darker side [to] global transparency" which can produce a variety of negative political and social consequences). Second, the way in which transparency proponents tend to deploy the concept ignores the complexity of communication, and therefore neglects to consider that government openness should serve as a means to the end of better governance rather than as an end in itself. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 921–32 (2006) (challenging presumptions underlying the "traditional account of transparency" such as the notion that government information is "discernable and can be transmitted in the form in which it is produced," as well as "the existence of an interested public that needs and wants to be fully informed"). Accordingly, I use the term to refer to targeted, effective means of providing comprehensible government information to the public. Cf. ARCHON FUNG ET AL., *FULL DISCLOSURE* 14–15 (2007) (developing the concept of "targeted transparency" in the regulatory context).

11. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (authorized ed., 2004) [hereinafter 9/11 COMMISSION REPORT].

12. KEAN & HAMILTON, *supra* note 6, at 49 (quoting the co-chairs' view that the commission would operate in a nonpartisan, independent, impartial, and thorough manner).

13. See *id.* at 142 (indicating the Commission's co-chairs were "struck by the extent of the public's interest"); Edward Wyatt, *For Publisher of 9/11 Report, a Royalty-Free Windfall*, N.Y. TIMES, July 28, 2004, at C11 (indicating that all 600,000 copies of the 9/11 Report's first printing were distributed to wholesalers and retailers and that a second printing was, at that time, underway, with a third being considered).

14. See *infra* note 15 (listing several pieces of legislation implementing the Commission's recommendations).

success occur? Is it replicable, and is it something worth trying to replicate? The answers depend upon how one regards both the 9/11 Commission itself and the advisory commission as an institutional form. Viewed one way, the Commission's success appears to be the unique result of a contingent combination of historical events—the trauma of the terrorist attacks, the political dynamics that shaped the latter years of President George W. Bush's first term, the internal operations of the Commission itself—that is unlikely to recur. Conversely, the Commission's success can be read as a demonstration of the advisory commission form's potential. Its deliberative, expert, and independent consideration of the attacks' causes, like its clear enumeration of the steps that the nation and government must take to prevent additional terrorist acts, proves that advisory commissions *can* deliver the intellectual and legislative goods that the administrative state supposedly offers.

But a third, more skeptical view suggests that no matter the cause of the Commission's success, its ability to capture the attention and shape the opinions of the public and lawmakers demonstrates the significant risk the commission form represents for democracy and governance. If the 9/11 Commission was wrong in its description of the attacks or, more troublingly, in its recommended legislative reforms, then its enormous influence would in fact be damaging to national security; indeed, the whirlwind of legislative and executive action that followed from its report might ultimately prove to have been a tragic mistake.<sup>15</sup> The suspicious view suggests somewhat perversely that the institutional form of the advisory commission—unelected, seemingly unaccountable, and capable of enormous influence over the political branches—poses the greatest threat precisely in the rare moment when it best captures the public's and political decisionmakers' attention.<sup>16</sup>

At stake in these competing views is the 9/11 Commission's historical legacy for the advisory commission form. At a time when legal scholars have committed themselves to the study of innovative institutional design,<sup>17</sup> the

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15. See Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1602, 121 Stat 266, 269 (2007) (codified in scattered sections of U.S.C.) (implementing several 9/11 Commission recommendations such as a risk based system for determining distribution of federal security funds and a requirement to screen all cargo on passenger planes); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 1001, 118 Stat. 3638, 3638 (2004) (codified in scattered sections of U.S.C.) (establishing the position of Director of National Intelligence, the National Counterterrorism Center, and the Privacy and Civil Liberties Oversight Board).

16. See Francis Rourke & Paul Schulman, *Adhocracy in Policy Development*, 26 SOC. SCI. J. 131, 140 (1989) (cautioning that ad hoc commissions are not immune from the pitfalls of public bureaucracy, but its members are immune from elections and the commissions usually operate out of sight, and thus, commissions might threaten democracy).

17. See, e.g., Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U.

formal legal innovations of the 9/11 Commission—including its position within the Legislative as opposed to the Executive Branch, and its consensus- and bipartisanship-forcing mechanisms<sup>18</sup>—present an important case study that allows us to understand the Commission’s success and consider whether and how it can serve as a model for similar institutions in the future. This Article argues that the 9/11 Commission indeed offers an important model for encouraging or forcing the Executive Branch to disclose information about an especially significant and controversial past event or future decision. As such, it suggests that Congress or the President consider establishing such commissions when information held by the Executive Branch can help the public to hold the state accountable for past actions or decide whether to support important, irreversible decisions the state must imminently make. The Article is less sanguine, however, about the 9/11 Commission as a model for policy formation. With limited accountability and relative independence from the political branches, an ad hoc, independent institution can make errors or misjudgments that can in turn have undue influence over the legislative process. Congress or the President should therefore limit the legal authority granted to investigative advisory commissions established during times of crisis so that political actors can fully deliberate over their prescriptions.

The first two parts of this Article provide a descriptive account of the commission form and the 9/11 Commission as legal, bureaucratic, and political entities. Part II explicates the form’s development and its flexible, nebulous position within the federal government, outlining alternative theories of its functions and relative control by the political branches, and identifying means to evaluate an individual commission’s performance. Part III presents a thorough history of the 9/11 Commission’s specific design and operations, moving from the political struggles over its creation, through its investigation, and then to the release and reception of its final report. Part IV evaluates the 9/11 Commission as an institutional form and agent of transparency and policy

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L. REV. 875, 876–78 (2003) (seeking to use innovative institutional design to overcome the problems caused by legal indeterminacy); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 557–73 (2007) (evaluating the effects of constitutional and legislative restrictions on the timing of decisions for purposes of crafting optimal institutional design); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 561–81 (2002) (evaluating existing public institutional design in terms of its success or failure to account for cognitive errors); Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Administrative Design*, 53 ADMIN. L. REV. 551, 554 (2001) (arguing that the varieties of state administrative law offer significant insight for the institutional design of government institutions and procedures).

18. See KEAN & HAMILTON, *supra* note 6, at 19–20, 23–24 (discussing negotiations over the process for selecting Commissions, the contours of the Commission’s power to subpoena, and its chairmen’s pursuit of unanimity through transparency and an integrated staff).



formation, in the process considering and largely lauding, with some reservations, its role as a democratic, bureaucratic, and historical institution. It then considers the risks of investigatory advisory commissions generally, and of the 9/11 Commission in particular. The Article concludes by arguing that the 9/11 Commission offers great promise as the model of an institution that can impose transparency, but that the uncertainties of at least one of its major legislative proposals, the reorganization of the intelligence community, suggests that a commission's legislative influence may outpace its abilities.

## II. *The Design and Position of the Independent Advisory Commission*

In the federal government,<sup>19</sup> the independent advisory commission enjoys no lawmaking power. No one is obligated to pay any attention to its conclusions, and it is held to minimal, if any, standards of legal or political accountability.<sup>20</sup> Yet, its proliferation throughout the twentieth century suggests that it fills a gap in the legislative's and executive's array of authorities by enabling deliberative, expert, and independent consideration of a controversial issue,<sup>21</sup> whether that issue arises from a traumatic event like the 9/11 attacks, from more quotidian policy issues that stymie legislative and regulatory action, or in response to symbolic issues that the President, Congress, or an Executive Branch agency wishes to acknowledge.<sup>22</sup> Although

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19. Although this Article focuses solely on federal advisory commissions, state and local governments also use the advisory commission form. Carl E. Singley, *The MOVE Commission: The Use of Public Inquiry Commissions to Investigate Government Misconduct and Other Matters of Vital Importance*, 59 TEMP. L.Q. 303, 313 (1986).

20. See 5 U.S.C.A. app. II § 2(b)(6) (West 2007) ("[T]he function of advisory committees should be advisory only . . ."); THOMAS R. WOLANIN, *PRESIDENTIAL ADVISORY COMMISSIONS: TRUMAN TO NIXON*, 73-95 (1975) (discussing the independence of commissions and the relatively few checks on their operation).

21. See CARL MARCY, *PRESIDENTIAL COMMISSIONS 1-101* (1945) (studying commissions in the 1900-1940 period); WOLANIN, *supra* note 20, at 6 (studying commissions in the 1945-1972 period). The advisory commission is not unique to the U.S., nor is it a twentieth-century innovation. See Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 ADMIN. L. REV. 1, 1 (1981) (recognizing the use of "advisory committees" in the United States government began with George Washington seeking advice sufficient to form a cabinet and convene committees at the founding of the United States government); Arthur L. Goodhart, *The Warren Commission from the Procedural Standpoint*, 40 N.Y.U. L. REV. 404, 412-14 (1965) (describing the Royal Commission and Ministerial Committees, two forms of investigations under English law).

22. See Amy B. Zegart, *Blue Ribbons, Black Boxes: Toward a Better Understanding of Presidential Commissions*, 34 PRESIDENTIAL STUD. Q. 366, 369-70 (2004) (arguing those commissions created by the President's "executive branch subordinates" are not systematically different, nor less important than those created by legislation or direct presidential action).

thoroughly consistent with administrative state commitments to independent expertise,<sup>23</sup> the form eludes easy understanding. The many academic studies of advisory commissions have struggled to understand why presidents, agencies, and Congress create them, and have investigated the conditions under which commissions appear to have some effect on the legislative and regulatory process, as well as the relationship between putatively independent commissions and their creators.<sup>24</sup> This scholarship focuses largely on description and categorization, whether it proceeds via the quantitative study of the entire universe or a subset of commissions,<sup>25</sup> or through small qualitative

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23. This longstanding faith in the American public administration emerged in the Progressive and New Deal Eras and provided the intellectual foundation for the development of American administrative law. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960* 224–25 (1992) (describing the context in which Progressives developed the "scientific or expertise justification of administrative power as an alternative to traditional ideas of legality"); Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 75–91 (2005) (describing how Progressive and New Deal Era traditions influenced the development of "first-generation" American administrative law scholarship). Indeed, the modern American use of the advisory commission form began with President Theodore Roosevelt's efforts to develop a federal conservation policy in the early twentieth century, and continued through efforts to reorganize the federal government during the Progressive, New Deal, and post-war periods. See EDWARD CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 71 (4th ed. 1957) (indicating Theodore Roosevelt was the first President to resort "on any scale" to the practice of "constituting 'volunteer unpaid commissions' for the purpose of investigating certain factual situations and reporting their finding to the President"); PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 488–92 (1968) (discussing the operation and impact of the public lands commission that Theodore Roosevelt appointed to investigate the problem of fencing on public lands, abuse of the Timber and Stone and Desert Land Acts, and the commutation clause in the Homestead Act); KAREN R. MERRILL, *PUBLIC LANDS AND POLITICAL MEANING* 45 (2002) (same); Gerald Garvey, *False Promises: The NPR in Historical Perspective*, in *INSIDE THE REINVENTION MACHINE: APPRAISING GOVERNMENTAL REFORM* 87, 93–95 (Donald F. Kettl & John J. DiIulio, Jr. eds., 1995) (recognizing four "landmark commissions"—beginning with Theodore Roosevelt's 1909 Keep commission and ending with the 1949 Hoover commission—which built on the Progressive legacy and prior studies). Although they lack the authority of independent regulatory commissions, which emerged during the same historical period as an institutional model of expertise and independence, advisory commissions share independent commissions' Progressive Era historical pedigree. On the history of independent commissions, see MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 13–73 (1955); ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 19–416 (1941).

24. See Haoran Lu, *Presidential Influence on Independent Commissions: A Case of FTC Staffing Levels*, 28 *PRESIDENTIAL STUD. Q.* 51, 51 (1998) (examining "the use of staffing levels by presidential administrations to control independent commissions").

25. See, e.g., TERRENCE R. TUTCHINGS, *RHETORIC AND REALITY: PRESIDENTIAL COMMISSIONS AND THE MAKING OF PUBLIC POLICY* 17–114 (1979) (providing a quantitative study of a subset of commissions using a model of the policymaking process that includes demands, decision and information costs, and policy results and outcomes); Kevin D. Karty, *Closure and Capture in Federal Advisory Committees*, 4 *BUS. & POL.* 213, 213 (2002) (examining observed correlations between interest group membership, sources of authorization,

case studies.<sup>26</sup> This Part reviews the legal and political status of advisory commissions in order to conceptualize the relationship between the commission as ideal—an institutional form enabling independent expertise—and its immersion within the political world the idealistic view would prefer it to avoid.

### A. *The Advisory Commission as an Ad Hoc Institutional Form*

The President, Congress, or an Executive Branch official may create an advisory commission by official act: the President by executive order, directive, or instruction; the Congress by statute; and an Executive Branch official by action taken under statutory authority.<sup>27</sup> By design and law, an

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and meeting closure in federal advisory committees in order to ascertain the root cause of those committees' influence); Daniel A. Smith et al., *Predicting the Outcomes of Presidential Commissions: Evidence from the Johnson and Nixon Years*, 28 PRESIDENTIAL STUD. Q. 269, 270 (1998) (analyzing the "fates of the commission reports issued during the Johnson and Nixon administrations" and contending the success and failure of "ad hoc presidential commissions" are predictable); Zegart, *supra* note 22, at 366 (developing "hypotheses comparing how presidents use commissions in foreign versus domestic policy" and testing those hypotheses with a data set of all presidential commissions between 1981 and 2001).

26. See, e.g., KITTS, *supra* note 2, at 1 (examining five "blue-ribbon" commissions in order to explain "the role and function of presidential commissions in the context of United States national security policy"); LIPSKY & OLSON, *supra* note 2, at xi (examining the racial crisis in America in the 1960s in an effort "to account for the structural arrangements and political processes that develop in the management of racial crisis"); Steven J. Balla & John R. Wright, *Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy*, 45 AM. J. POL. SCI. 799, 799–800 (2001) (employing data on the appointment of members to the National Drinking Water Advisory Council in support of the authors' contention that "Congress controls the flow and content of information to the bureaucracy by creating federal advisory committees with membership rights for general categories of interests"). A third variety offers an overview of the form and how it functions. See FLITNER, *supra* note 5, at 28–29 (proposing a commission typology that classifies a commission as procedure-oriented, situation-oriented, or crisis-oriented); FRANK POPPER, THE PRESIDENT'S COMMISSIONS 5–6 (1970) (describing and evaluating "the special presidential commission as an institution of the American political system"); W. Timothy Coombs, *Commissions as Organizations: Characteristics, Functions, and Context*, in GOVERNMENT COMMISSION COMMUNICATION 51, 51 (Christine M. Miller & Bruce C. McKinney eds., 1993) (seeking to illuminate how commissions operate by examining them as organizations, possessing "unique characteristics and operat[ing] within a sociopolitical context"). Some combine these genres, offering a mix of quantitative and qualitative methodologies. See WOLANIN, *supra* note 20, at 13–24 (delineating the various purposes for which presidential commissions are formed, and examining individual commissions as illustrations of each purpose).

27. See COLTON C. CAMPBELL, DISCHARGING CONGRESS 3 (2002) (indicating that under the Federal Advisory Committee Act, commissions are established by statute, by executive order, by agencies, and by law directing or authorizing the executive to establish one); Coombs, *supra* note 26, at 50–54 (highlighting five "essential characteristics" of commissions that

advisory commission is severely limited in authority, jurisdiction, and lifespan—it can do no more than gather and process information, it focuses on one or a small number of related issues (which may nevertheless be broadly defined), and its existence is brief (although its lifespan may be extended by its creator if circumstances warrant).<sup>28</sup> As part of its mandate to gather information, commissions may be granted the power to issue subpoenas to compel the appearance of witnesses and the production of information.<sup>29</sup> On rare occasions, commissions are granted apparent authority to influence law and policymaking, such as when Congress commits itself by statute to accept a commission's recommendations unless both the Senate and House of Representatives take affirmative action to reject them.<sup>30</sup> But these are

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distinguish them from other political bodies); Zegart, *supra* note 22, at 369 (identifying the official nature of its creation as an essential characteristic of presidential commission). In 1998, the last year for which complete figures have been collected and made public, 43% of the 939 federal advisory commissions then in existence were required by statute, 5% were created by presidential directive, 24% were specifically authorized by statute but created by an agency, and 28% were created by an agency under its general statutory authority. GEN. SERV. ADMIN., TWENTY-SEVENTH ANNUAL REPORT OF THE PRESIDENT ON FEDERAL ADVISORY COMMITTEES 6 (1998).

28. See Smith et al., *supra* note 25, at 269 (discussing President Clinton's Task Force on National Health Care Reform, which worked for nine months to create a health care reform bill); Zegart, *supra* note 22, at 369–70 (identifying an essential characteristic of a presidential commission is that it be ad hoc, meaning it not last for more than one presidential term and must focus on a discrete task); see also 5 U.S.C.A. app. II § 5(b) (West 2007) (indicating that any legislation creating an advisory committee shall contain provisions limiting the authority, jurisdiction, and lifespan of such committee); *id.* § 6(c) (indicating the president must annually give Congress a report on committees in existence, which must contain *inter alia* the committee's functions and its termination date); *id.* § 14(a)(2) (indicating an advisory committee shall terminate not later than two years after its establishment unless the committee is renewed by the President or an officer of the Federal Government or if an Act of Congress provides otherwise).

29. See Singley, *supra* note 19, at 325 (indicating that public inquiry commissions may be legislatively granted subpoena powers to compel the appearance of witnesses and the production of witnesses).

30. Such commissions are examples of what Elizabeth Garrett has called "framework legislation," statutes that structure congressional lawmaking by establishing "internal procedures that will shape legislative deliberation and voting with respect to certain laws or decisions in the future." Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 718 (2005). The Commission on Base Closure and Realignment, for example, played a key role in the politically charged decisions to identify military bases that could be closed. In one version, enacted as part of the Defense Authorization Amendments and Base Closure and Realignment Act of 1988, the commission submitted its recommendations to the Secretary of Defense, and if the Secretary approved, Congress could only block the recommendations by a joint resolution that rejected all of the proposed closures (and that was, in turn, subject to a presidential veto). Pub. L. No. 100-526, §§ 201–203, 102 Stat. 2623, 2627–28 (1988) (codified at 10 U.S.C. § 2687 note (1988)). A later version, enacted in the Defense Base Closure and Realignment Act of 1990, required the commission to present its recommendations first to the President for his approval in whole or part; Congress then could

exceptional, high-profile commissions whose recommendations may still be rejected,<sup>31</sup> and whose authority is sufficiently limited that they raise no issue that Congress has unconstitutionally delegated its legislative power.<sup>32</sup>

Lacking significant delegated authority, commissions operate as formally separate institutions outside of the established structure of the branches in which they are located.<sup>33</sup> The advisory commission form is thus institutionally "ad hoc" in three senses: a commission is created only to serve a clearly defined purpose, typically related to an issue in current controversy; each

only block the entire list of recommendations by joint resolution. Pub. L. No. 101-510, § 2901(b), 104 Stat. 1485, 1808 (1990); *id.* §§ 2903(b), (d), (e). *See also* Garrett, *supra*, at 762 (describing the respective authorities of the Commission, the President, and the Congress in the military base closure framework); Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. COLO. L. REV. 331, 333-40 (1991) (discussing the evolution of Congressional influence in military base closure decisionmaking). Congress has also handled pay increases for its members in a similar way, through a commission whose recommendations Congress was required affirmatively to reject or else the recommendations would become law. *See* LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 153-55 (2000) (discussing Congress's handling of its own pay levels and the role of the commission in the process); Garrett, *supra*, at 726 (noting the similarity between the base closure process and the processes used to determine Congressional pay increases). *See generally* Dalton v. Specter, 511 U.S. 462, 464-65 (1994).

31. Although the Base Closure and Realignment Commission's recommendations were approved by the President and not rejected by Congress, in 1989, facing tremendous popular sentiment against congressional pay increases, Congress voted overwhelmingly to reject the Quadrennial Pay Commission's recommended pay raises. *See Dalton*, 511 U.S. at 466 (indicating the President agreed that the Philadelphia Naval Shipyard should be closed and the House of Representatives rejected a proposed joint resolution of disapproval); Hanlon, *supra* note 30, at 339-40, 343-44 (indicating that the House of Representatives supported the base closure plan by rejecting the resolution to disapprove the Commission's recommendations, whereas both the House and Senate rejected the Quadrennial Pay Commission's pay raise recommendations).

32. If Congress confers decisionmaking authority upon executive agencies, it "must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). Even commissions that have the most influence on congressional lawmaking and agency decisionmaking have not been delegated direct authority—rather, their advice must be accepted and acted upon by those with the constitutional authority to implement them. *See Dalton*, 511 U.S. at 470 (observing that the President, rather than the Base Closure Commission, made the decision and took the final action to close military bases); *Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988) (indicating that the Quadrennial Pay Commission merely advised the President, while Congress had the authority to reject or modify the President's recommendations).

33. *See Coombs, supra* note 26, at 50-54 (recognizing an essential characteristic of commissions is the expectation that they be "outside of and therefore independent from the government," meaning "physically outside of the governmental structure . . . [with] no permanent position within the government's organizational chart"); Zegart, *supra* note 22, at 369 (recognizing a criterion of presidential commissions is that they function at least partially outside of government).

commission is created in unique political circumstances, with a distinct mandate; and commissions vary widely in importance and in number across presidential administrations.<sup>34</sup> This "ad hocery" produces a flexible, generic institutional form capable of covering virtually any subject matter for any established federal governmental actor that has the legal authority and resources to create one.<sup>35</sup> Rather than a permanent and swelling bureaucracy with an expansive mandate, a commission operates as an independent subsidiary with a small, temporary workforce that provides just-in-time work product on a narrow issue.<sup>36</sup> Upon delivery of its final report at a designated deadline, the commission disappears.<sup>37</sup>

But this does not explain why and when the President, the Congress, or an agency creates an advisory commission. After all, none of them *needs* to create a formal entity to gather information and provide advice—each has sufficient resources to study an issue itself or delegate its study to existing personnel and

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34. See TUCHINGS, *supra* note 25, at 115 (noting that across five presidential administrations, commissions were used with increasing frequency); WOLANIN, *supra* note 20, at 63 (discussing the relationship between the choice of instrument used to create a commission—statute, executive order, or announcement—and the relative importance of a commission); Zegart, *supra* note 22, at 384 (providing a table with the number of presidential commissions per presidential term since President Ronald Reagan came to office).

35. See Balla & Wright, *supra* note 26, at 802 (discussing the aspects in which advisory committees vary, such as the instrument of their creation and the purpose for which they are created); Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 533–35 (1997) (discussing how FACA gives agencies flexibility to form commissions for different purposes, such as negotiated rulemaking and advisement of agencies). More advisory commissions concern domestic issues as compared to those that concern foreign and national security issues, although many of the commissions devoted to the latter assume a high profile when they respond to major administration scandals (such as the Iran-Contra scandal) or significant issues (such as arms control or the intelligence community). See KITTS, *supra* note 2, at 9–11 (indicating that historically, commissions focused heavily on domestic policy, but as issues such as arms control and Iran-Contra "loomed large on the public agenda . . . presidential commissions began to play a more visible role in national security debates"); Zegart, *supra* note 22, at 384 (providing statistical support for the proposition that more domestic policy commissions are formed than foreign policy commissions).

36. See, e.g., DENNIS D. RILEY & BRYAN E. BROPHY-BAERMANN, *BUREAUCRACY AND THE POLICY PROCESS* 165 (2006) (asserting that presidential advisory commissions are "generally issue—occasionally agency—specific, of fairly short duration, and don't do much that would appear managerial" and indicating such entities are composed of "a group of citizens with the time and interest" to temporarily assist the President); WOLANIN, *supra* note 20, at 32 (indicating the "[t]emporariness" of commissions "means that [commissions are] a new institution whose members are brought together specifically to serve in it and will disband after a limited and specified time").

37. See 5 U.S.C.A. app. II § 2(b)(3) (West 2007) (indicating that "advisory committees should be terminated when they are no longer carrying out the purposes for which they were established").

institutions in its own branch or organization.<sup>38</sup> Moreover, private interests constantly offer the political branches information and, of course, advice.<sup>39</sup> In addition to its flexibility, then, the commission form also offers a degree of independence from existing public and private institutions.<sup>40</sup> Because it includes individuals from outside of the federal government,<sup>41</sup> the commission can provide perspectives that are unburdened by—or at least dissociated from—those that dominate the political branches and the federal bureaucracy.<sup>42</sup> Operating from above the political fray in which the Executive and Legislative Branches are presumed to exist, a commission can reach—or can appear to reach—conclusions that are unaffected by the powerful private interests, personal self-interest, and ideological biases that influence politically-derived policy decisions.<sup>43</sup> As a result, the institutional form itself may bring a sense of legitimacy and authority to the conclusions and substantive advice that a commission provides.<sup>44</sup> Indeed, one empirical study has found that when a

38. See Singley, *supra* note 19, at 308–09 (discussing the use of legislative investigating committees as a form of government inquiry).

39. See KEVIN M. ESTERLING, *THE POLITICAL ECONOMY OF EXPERTISE* 247–49 (2004) (arguing that the "use of expertise in democratic politics depends heavily on interest group pressure" and that "Congress's capacity to use expertise to reform public policy depends heavily on the quality of debate among interest groups").

40. See, e.g., WOLANIN, *supra* note 20, at 31 (highlighting the independence of commission members and their perceived lack of a "vested interest in the programs and policies of the Executive Branch").

41. The Federal Advisory Committee Act (FACA) exempts from its definition of an advisory committee "any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C.A. app. II § 3(2)(i) (West 2007). See *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 912 (D.C. Cir. 1993) (recognizing an "exception[]" to FACA's inclusion of all presidential advisory groups . . . where the group is composed wholly of full-time government officials").

42. See, e.g., RILEY & BROPHY-BAERMANN, *supra* note 36, at 165 (arguing commissions are "a way of dealing with" the lack of differing perspectives which the President and agencies can apply to issues they might face); WOLANIN, *supra* note 20, at 31 (highlighting "outside judgment and outside thinking" as defining characteristics of commissions). They can also provide perspectives as a means of achieving political demobilization and removing decisions from political pressure. See BENJAMIN GINSBERG & MARTIN SHEFTER, *POLITICS BY OTHER MEANS* 227 (3d ed. 2002) (arguing that the majority of "political expedients adopted and the solutions proposed in recent years for the nation's problems" follow the path of "political isolation and demobilization").

43. WOLANIN, *supra* note 20, at 40 (arguing commissions can be effective persuaders because they are "at once intra- and extragovernmental," free of the taint of politics yet enjoying the "aura of officiality and authoritativeness").

44. See RILEY & BROPHY-BAERMANN, *supra* note 36, at 165–66 (arguing that commissions address two significant problems which presidents confront: a lack of "time, knowledge or interest to take a serious look at more than a handful of issues at a time" and a lack of "different perspectives"); Rourke & Schulman, *supra* note 16, at 133–41 (discussing the

President proposes legislation that follows and is based on the recommendations of a presidentially-created advisory commission, it is more likely to become law than when a President proposes legislation without a commission's sanction.<sup>45</sup>

In sum, advisory commissions promise a means to solve problems (or appear to solve them) effectively, inexpensively, and without creating a permanent new organization. They constitute a second best institutional solution to the need for an investigation when the conditions of a best solution—a full investigation by an existing, permanent institution capable of utilizing existing authority, holding individuals accountable, making necessary reforms, and being held accountable for its mistakes—cannot be obtained.<sup>46</sup>

### B. Legal Constraints on Advisory Commissions

This somewhat idealistic conception of advisory commissions is tempered by widespread popular and governmental concern that advisory commissions are unnecessary, waste public money, and constitute a secret repository of power and influence on regulatory policy.<sup>47</sup> Congress and the Executive Branch have responded to their concerns by trying to curb and regulate commissions' use.<sup>48</sup> Most significantly, Congress enacted the Federal Advisory Committee Act (FACA) in 1972<sup>49</sup> as part of its concerted effort to impose open

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rise of commissions as bodies that supplement public sector bureaucracy and the attendant implications for policy-making).

45. TUTCHINGS, *supra* note 25, at 77.

46. On the concept of second best institutions, see Bruce Talbot Coram, *Second Best Theories and Institutional Change*, in *THE THEORY OF INSTITUTIONAL DESIGN* 90, 92 (Robert E. Goodin ed., 1996).

47. See, e.g., 5 U.S.C.A. app. II § 2(a), (b)(1) (West 2007) (indicating Congress's understanding—at the time it passed FACA—was that there were many advisory committees whose usefulness was never assessed); CAMPBELL, *supra* note 27, at 16 (indicating "vocal critics charge that commissions represent improper delegation"); Balla & Wright, *supra* note 26, at 460 (indicating concern over government waste was a motivating factor in passage of FACA).

48. *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 459 (1989) (stating that "FACA's principal purpose was to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them" and that "there is considerable evidence that Congress sought nothing more [when it passed FACA] than stricter compliance with reporting and other requirements"). On the pre-1972 efforts by Congress to use its appropriations power to curb advisory commissions, see WOLANIN, *supra* note 20, at 65–66. On efforts made within the Executive Branch to curb commissions by executive order and guidelines issued by the Justice Department, see Croley & Funk, *supra* note 35, at 458–60; Richard O. Levine, Note, *The Federal Advisory Committee Act*, 10 HARV. J. ON LEGIS. 217, 219–22 (1973).

49. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C.A. app. II



government requirements on the Executive Branch.<sup>50</sup> FACA's most prominent provisions require that the broad category of entities defined as advisory committees<sup>51</sup> be created in a relatively uniform manner,<sup>52</sup> assume a relatively consistent form,<sup>53</sup> and hold open meetings and make their records available within a framework similar to that established by the Freedom of Information Act<sup>54</sup> and the Government in the Sunshine Act.<sup>55</sup> The statute also imposes the substantive requirement that advisory committee membership be "fairly balanced in terms of the points of view represented," thus making explicit Congress's intent that Executive Branch commissions should be at least minimally insulated and nonbiased.<sup>56</sup>

FACA's applicability is limited and its effects are unclear, however. Congress frequently supplements FACA's general exemptions by specifically exempting new advisory commissions from FACA's requirements.<sup>57</sup> An underlying constitutional issue makes the statute's reach uncertain as well. If strongly enforced against presidential advisory commissions, FACA may represent an unconstitutional intrusion by Congress into the "the constitutional working of presidential decisionmaking,"<sup>58</sup> and specifically into the internal

§§ 1–16 (West 2007)).

50. See Croley & Funk, *supra* note 35, at 464–65 (maintaining that it "reflect[ed] the legal culture of the time, midway between the passage of the [Freedom of Information Act] and the Government in the Sunshine Act" that FACA addressed the problem of commissions operating in relative secrecy).

51. See 5 U.S.C.A. app. II § 3(2) (West 2007) (defining "advisory committee").

52. See *id.* § 2(b)(4) (stating that "standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees").

53. *Id.*

54. See 5 U.S.C.A. app. II § 10(b) (West 2007) (requiring advisory committees to comply with the Freedom of Information Act, 5 U.S.C. § 552).

55. Compare 5 U.S.C.A. app. II § 10(a) (2007), the FACA provision requiring advisory committees to hold open meetings and provide public notice of meetings, with 5 U.S.C.A. § 552b(b), (e) (2007), the Government in the Sunshine Act provisions requiring, with exceptions, that agencies hold open meetings and provide public notice of their meetings.

56. See 5 U.S.C.A. app. II § 5(b)(2) (2007) (applying "fairly balanced" requirement to legislation creating or authorizing advisory committees); *id.* § 5(c) (specifying that the guidelines established in subsection (b) "shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee").

57. See Croley & Funk, *supra* note 35, at 490–93 (discussing statutory exemptions to FACA, both within the Act itself and in other statutes).

58. Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 97 (1994). Bybee offers the strongest argument against FACA's constitutionality by reading the statute broadly; for a more nuanced view, see Croley & Funk, *supra* note 35, at 468–71. Two recent student notes argue strongly in favor of FACA's constitutionality. See Carolyn Bingham Kello, Note, *Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act*, 69 BROOKLYN L. REV. 345,

operations of the Executive Branch. To date, majorities of the Supreme Court and D.C. Circuit have avoided this separation of powers issue,<sup>59</sup> but minority opinions in both courts have argued against the constitutionality of applying FACA to high-profile commissions that provide advice directly to the president, asserting that the statute infringes upon the President's freedom "to investigate, to be informed, to evaluate, and to consult" while performing his constitutional duties.<sup>60</sup> Statutory uncertainty adds to the doubt that this

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347–48 (2003) (examining FACA's origin and purpose, the recent claim against Vice President Cheney and the National Energy Policy Development Group, and arguing that FACA has been relatively successful and can continue to achieve its purpose, although recent judicial and executive actions threaten the Act's continued success); Michael J. Mongan, Note, *Fixing FACA: The Case for Exempting Presidential Advisory Committees from Judicial Review Under the Federal Advisory Committee Act*, 58 STAN. L. REV. 895, 900–05 (2005) (discussing FACA's origin and purpose, noting that Congress was motivated by practical policy considerations when it included presidential advisory commissions in FACA's scope, but concluding that Congress ignored constitutional concerns and should now fix FACA by exempting such committees from judicial review).

59. See *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 455–65 (1989) (choosing to "avoid deciding difficult constitutional questions," and finding the ABA Standing Committee on the Federal Judiciary not subject to FACA because it was established and run by a private organization and thus not "utilized" by the President); *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 910–11 (D.C. Cir. 1993) (finding President Clinton's Task Force on National Health Care Reform was not subject to FACA because all of its members, including the First Lady, were full-time officers or employees of the federal government).

60. See *Pub. Citizen*, 491 U.S. at 488 (Kennedy, J., concurring) (quoting the district court's opinion, 691 F. Supp. 483, 493 (D.D.C. 1988)); *Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 925 (Buckley, J., concurring) (finding it "hard to imagine conditions better calculated to suppress the 'candid, objective, and even blunt or harsh opinions,' that the President was entitled to receive from the twelve advisors he had appointed" (quoting *U.S. v. Nixon*, 418 U.S. 683, 708 (1974))). These same issues arose more recently in litigation over Vice President Cheney's National Energy Policy Development Group (NEPDG), to which various nongovernmental organizations claimed FACA applied. In part because of the case's strange procedural posture—it reached the Supreme Court as a mandamus action by which the Vice President asked the Court to vacate a discovery order issued by the U.S. District Court—the Court failed to resolve the issue, but the majority and a concurring and dissenting opinion authored by Justice Thomas (and joined by Justice Scalia) suggested that in some instances, FACA could constitute an unconstitutional overreaching by Congress into presidential prerogative. See *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 384–85 (2004) (declaring, in dicta, that congressional objectives in enacting FACA must give way if its mandates would overstep congressional authority and violate the President's privilege of confidentiality in his communications); *Cheney*, 542 U.S. at 394–95 (Thomas, J., concurring in part and dissenting in part) (doubting constitutionality of applying FACA in this context); see also *In re Cheney*, 406 F.3d 723, 727 (D.C. Cir. 2005) (en banc) ("Although we do not reach the question whether applying FACA to Presidential committees such as the NEPDG would be constitutional, separation-of-powers considerations have an important bearing on the proper interpretation of the statute."). On the Cheney energy policy group saga, see Eric R. Dannenmaier, *Executive Exclusion and the Cloistering of the Cheney Energy Task Force*, 16 N.Y.U. ENVTL. L.J. 329 (2008); Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV.

constitutional uncertainty creates. The statute's "fairly balanced" requirement provides no applicable standard that would allow a commission, its creator, or a court to ascertain whether a committee's composition passes statutory muster.<sup>61</sup> Given this degree of ambiguity, it is perhaps unsurprising that FACA also fails to specify who would determine whether a balance is "fair" and whether a challenge to a commission's composition would be a justiciable issue for a court to decide.<sup>62</sup> It is also unclear whether FACA has improved or forced any significant changes to advisory commission practice. Empirical studies by political scientists have found that the fairly balanced standard has frequently been ignored and unenforced in the composition of commissions.<sup>63</sup>

More significantly, the statute's consequences contradict its purpose.<sup>64</sup> By attempting to force balance and impose transparency on advisory commissions, the statute might in the process curb whatever benefits advisory commissions are intended to provide.<sup>65</sup> Some have argued, not unpersuasively, that FACA's open meetings and fair balance requirements impede deliberation and consensus-building by adversely affecting commission membership and the quality of commission discussion,<sup>66</sup> while

197, 208–13 (2008).

61. 5 U.S.C.A. app. II § 5(b)(2) (West 2007).

62. *Compare* Cargill, Inc. v. United States, 173 F.3d 323, 336–40 (5th Cir. 1999) (applying FACA's "fair balance" standard to a commission's functions and points of view, after finding the standard justiciable), *with* Colo. Envtl. Coal. v. Wenker, 353 F.3d 1221, 1231–32 (10th Cir. 2004) (concluding the "fair balance" standard is nonjusticiable and fails to provide a meaningful standard of review). *See generally* Croley & Funk, *supra* note 35, at 500, 517–22 (discussing justiciability issue and whether the "fair balance" standard can be applied).

63. *See* Balla & Wright, *supra* note 26, at 802 (reviewing studies inspired by FACA's balance provision).

64. *See* 5 U.S.C.A. app. II § 2 (West 2007) (conceding the usefulness of advisory commissions, but stating the congressional purpose of FACA to regulate their excesses).

65. I have suggested elsewhere that transparency requirements impose inevitable costs and have unintended, adverse consequences on the deliberative process. *See* Fenster, *supra* note 10, at 906–10 (discussing "unintended consequences" imposed by disclosure requirements).

66. David Faure, Note, *The Federal Advisory Committee Act: Balanced Representation and Open Meetings in Conflict with Dispute Resolution*, 11 OHIO ST. J. ON DISP. RESOL. 489, 497–507 (1996). At least one agency agrees with this complaint, especially if the advisory committee is involved in dispute resolution activities. *See* BUREAU OF LAND MANAGEMENT NATIONAL POLICY FOR THE FEDERAL ADVISORY COMMITTEE ACT 6 (2005), available at [http://www.blm.gov/publications/adr/ADR-FACA\\_Guide.pdf](http://www.blm.gov/publications/adr/ADR-FACA_Guide.pdf) (noting that FACA compliance has benefits, but explaining also that following its requisite procedures "is time-consuming and may unduly restrict the scope of an ADR-based collaborative community working group's discussions").

the vagueness of FACA's mandates and its definition of the entities that it covers can impede a commission's ability to operate.<sup>67</sup>

At bottom, competing visions of the advisory commission form drive the debate over FACA. To believe in FACA's necessity is to assume that if unregulated, commissions' influence will be too great, their operations too secretive, and their advice skewed toward special interests and political interests rather than the public good (however that is defined); it is to assume as well that FACA's procedural and disclosure-related obligations make commissions function more fairly, openly, and accountably—that is, as traditional members of the branch in which they are situated.<sup>68</sup> To decry FACA's commands, in turn, is to assert that excessive formalities and disclosure requirements will spoil the advantages the commission form offers by making commissions operate more like institutionalized government agencies than as specialized, expert, and independent entities. Heavily regulated commissions will adversely affect the President's ability to exercise his enumerated powers because they will limit his use of a key tool for gathering information and recommendations.<sup>69</sup> Underlying these arguments are radically different perceptions of the extent to which commissions threaten or can contribute to the public interest; of the degree of control that creators can and will wield over commissions; and, conversely, of commissions' ability to operate semi-autonomously from the political branches. These fundamental, even epistemological, disagreements demonstrate that efforts to understand and regulate advisory commissions presuppose not only a theory of how advisory commissions are designed and operate, but also a theory of administrative law and bureaucracy—an issue that is considered in the next section.

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67. Vernon R. Hayes, Jr., *Trying to Obey the Law: The Federal Advisory Committee Act, the Courts, and the Common Sense*, 32 ADMIN. & SOC. 183, 209–10 (2000).

68. In this sense, FACA represents a hopeful, almost idealistic effort to reform what its proponents considered a form that could serve the public interest. On the reformism of "optimistic activists" who critiqued the regulatory state during the good government reform era in which FACA emerged, see JERRY MASHAW, *GREED, CHAOS, AND GOVERNANCE* 21–23 (1997); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1688–1813 (1975).

69. See, e.g., *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 488 (1989) (Kennedy, J., concurring) (arguing that FACA interferes with the President's ability to gather information and recommendations for nominating federal judges); Bybee, *supra* note 58, at 103–10 (discussing the effect of FACA on the President's ability to gather information and recommendations).

C. *Two Views of the Advisory Commission: Agents and Administrators*

The FACA debate suggests two extreme positions regarding the relative position of the advisory commission: It is either a mere political instrument of its executive or legislative creator (and, likely, the private interests that have captured it),<sup>70</sup> or it enables an idealistically independent, expert body capable of divining an optimal, nonpolitical solution to a problem previously mired in political muck.<sup>71</sup> Both extremes fail to capture the complex legal, political, and bureaucratic dynamics in which advisory commissions typically find themselves. Whether convened by the President, Congress, or a federal agency, commissions are not independent in any strict sense.<sup>72</sup> At least as a formal matter, they sit in the Executive or Legislative Branch—and usually in the former, even when they are created by statute.<sup>73</sup> Nor are they answerable only to their creators. They depend on other government entities for their funding, authority, and access to the information they need to provide advice; in addition, they need to persuade others besides their creators of both their understanding of the issue they study and the wisdom of the advice they offer.<sup>74</sup>

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70. The instrumental theory posits that advisory commissions either adopt their creators' preferred, pre-determined conclusion or are intended to delay action and defuse a public controversy. See, e.g., LIPSKY & OLSON, *supra* note 2, at 443–59 (arguing that the Kerner Commission and other commissions established to study the race riot crisis of the late 1960s and early 1970s served to reduce the public's sense that a crisis existed); David Michaels et al., *Advice Without Dissent*, SCIENCE, Oct. 25, 2002, at 703 (criticizing the Bush Administration's tendency to choose only scientific experts that agree with the President's philosophy for its regulatory and advisory commission appointments); Statement of Carl Pope, Sierra Club Director, *Public Remains in the Dark as Court Dismisses Cheney Energy Task Force Case*, <http://www.sierraclub.org/pressroom/releases/pr2005-05-10.asp> (May 10, 2005) (last visited Nov. 24, 2008) (decrying the Bush Administration's use of secretive policy task force as a means for "dirty, secret backroom dealing between the administration and Enron, Exxon and other energy CEOs") (on file with the Washington and Lee Law Review).

71. Cf. Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953, 979–80 (2007) (describing relative advantages of advisory commissions over constitutional courts, which include commissions' independence and "persuasive authority" with the citizenry).

72. Cf. WOLANIN, *supra* note 20, at 73–95 (arguing commissions are independent, but providing support for the proposition that they are not strictly independent by describing their formation, member selection, mandates, liaisons with the White House, and other "indices" of independence).

73. See, e.g., National Park Service Guide to the Federal Advisory Committee Act, <http://www.nps.gov/policy/DOrders/facaguide.html> (Jan. 3, 2005) (last visited Nov. 25, 2008) (noting that Congress creates most of the advisory committees in the National Park Service, but the Service itself manages the committees' operations) (on file with the Washington and Lee Law Review).

74. See 5 U.S.C.A. app. II § 5(b)(5) (West 2007) (indicating Congress—and the President, agency heads, and federal officials to the extent the guidelines are applicable to

Whip-sawed by multiple pressures in historically contingent political environments, advisory commissions are neither purely instrumental nor purely ideal; rather, they vary depending on the extent of presidential and legislative interest in their subject matter and the suggestions they propose.<sup>75</sup> I want to suggest two organizational metaphors to better understand their position within the State: the advisory commission as agent and as administrator.

The agent metaphor flows from positive political theory (PPT)<sup>76</sup> and views a commission's creator as a rational political principal who creates an advisory commission as an agent that can help it achieve some goal, likely on behalf of an interest group or groups who themselves seek a legislative or regulatory result. Because the agent may stray from its creator/principal (whether one or more of the Congress, the President, or an Executive Branch agency), the principal establishes *ex ante* and *ex post* legal mechanisms that enable it to impose its political will on the commission's work.<sup>77</sup> Congressional *ex ante* control mechanisms include statutory constraints on the commission's authority and charge, as well as commission-specific and generally applicable procedural rules that affect its operations,<sup>78</sup> including

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them—shall assure adequate staffing, funding, and lodging); *id.* § 9(b) ("Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government."); WOLANIN, *supra* note 20, at 158–84 (discussing the importance of a commission garnering either Executive Branch support, Congressional support, or both for its recommendation to be enacted.)

75. See Smith et al., *supra* note 25, at 271 (maintaining that a "relatively high level of prior presidential interest in the subject matter of the commission's report is a necessary . . . condition for enactment of the commission's suggestions").

76. The simplest one-sentence declaration of PPT's principles states that "[p]ositive political theory describes regulatory policymaking as a part of a world in which political actors function within institutions rationally and strategically in order to accomplish certain goals." Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 43 (1994).

77. See Balla & Wright, *supra* note 26, at 803 (empirically testing the theory that "Congress designs advisory committees to ensure correspondence in the representation of interests, and thus information, across institution").

78. See Mathew D. McCubbins, Roger Noll, & Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989) (discussing legislative attempts to assure that agencies comply with the desires of their creators); Mathew D. McCubbins, Roger Noll, & Barry Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987) (indicating that administrative procedures are a mechanism for inducing agencies into compliance with congressional desires by limiting agencies' "range of feasible policy action"); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 182 (1999) (identifying the "puzzle" that the Administrative Procedure Act poses for PPT); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267,

FACA.<sup>79</sup> Congress may also retain and use its power to appoint commissioners to allow favored interests to monitor and control a commission.<sup>80</sup> If the commission then engages in some behavior that it disapproves of, Congress can correct its performance by using its appropriation power or, less likely (given the short lifespan of a commission), by amending its statutory authority.<sup>81</sup> The President and an Executive Branch agency can play this game, too—even with commissions that Congress creates, so long as Congress is willing to cede some or all of its control to others.<sup>82</sup> The President or an agency can use the appointment power to influence agency management, organize where and how the commission sits in the Executive Branch bureaucracy, and set up mechanisms to oversee agency performance.<sup>83</sup>

The principal-agent model on which this approach is based only goes so far, however, when it is applied to advisory commissions.<sup>84</sup> Quantitative

268 (John E. Chubb & Paul E. Peterson eds., 1989) (analyzing the structural choices political actors make when they build bureaucracies); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984) (singling out the principal-agent model as the "dominant framework for the formal analysis of hierarchy").

79. 5 U.S.C.A. app. II §§ 1–16 (West 2007); see *infra* Part III.B (discussing the statutory design of the 9/11 Commission).

80. See Balla & Wright, *supra* note 26, at 810–11 (finding support for the hypothesis that Congress retains and uses the power of appointing members of advisory commissions to allow interest groups to control them).

81. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165 (1984) (discussing forms of Congressional oversight over administrative bodies, and arguing that what appears to be a neglect of oversight is, in fact, the manifestation of Congress's preference for a more passive form); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control?: Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 766 (1983) (developing and testing "a model of agency decision making based on the premise that agencies are controlled by the legislature").

82. Cf. Balla & Wright, *supra* note 26, at 803 (indicating that although Congress has the power to appoint individual members, it often delegates that responsibility to agencies); see FLITNER, *supra* note 5, at 43 (indicating the "President may fund his commission from his emergency fund or from the budgets of various Cabinet departments and executive agencies with an interest in the commission's study").

83. See WOLANIN, *supra* note 20, at 75–76 (describing the appointment power as the "most important mechanism of White House control over commissions"). Influential examples of the literature on presidential control over executive agencies include Terry M. Moe & Scott A. Wilson, *Presidents and Political Structure*, 1994 LAW & CONTEMP. PROBS. 1 (1994); Terry M. Moe, *The Politicized Presidency*, in THE NEW DIRECTION IN AMERICAN POLITICS 235 (John E. Chubb & Paul E. Peterson eds., 1985); THOMAS J. WEKO, THE POLITICIZING PRESIDENCY: THE WHITE HOUSE PERSONNEL OFFICE (1995); DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 26 (2003); JOHN P. BURKE, THE INSTITUTIONAL PRESIDENCY 24–49 (1992); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

84. This is true in the context of administrative agencies as well. See KENNETH J. MEIER

studies have shown that principals only variably attempt to control commissions. One study found that principals are motivated by a variety of goals to create commissions and frequently, although not always, attempt to use them to achieve a pre-determined outcome;<sup>85</sup> another concluded that the extent of control exercised over a commission varies based on the extent of the principal's interest.<sup>86</sup> The creators of a commission sometimes have neither a clear, singular reason for creating a commission nor a firm commitment to a resolution of the issue the commission studies, besides preferring that certain interests and perspectives are considered or have greater influence than others.<sup>87</sup> Due in part to the limits of principals' interest, the weakness of their outcome preferences, and the character of their form, advisory commissions frequently face minimal constraints in their operations besides their finite quantity of time and money.<sup>88</sup> The generic form of the statutes and charters creating advisory commissions provides an efficient, but also nonparticularized, means of chartering and designing a commission, and few new commissions will stray far from the regulatory requirements to provide additional, explicit means for control.<sup>89</sup> Advisory commissions seldom face strict, explicit *ex ante* mandates, constant *ex post* oversight, or correction from above; as a result, a commission

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& LAURENCE J. O'TOOLE, *BUREAUCRACY IN A DEMOCRATIC STATE* 131 (2006) (discussing the centrality of bureaucratic values—compared to political values—to the implementation of government programs, and noting that "[n]othing in the theory on the principle/agent models suggests that principals and agent have conflict on every value").

85. See Zegart, *supra* note 22, at 390 (finding a variety of motivations in political principals' creation of commissions and, as a result, a range in the types of commissions that are created).

86. See Smith et al., *supra* note 25, at 283–84 (focusing on the relationship between the extent to which a president is interested in the issues for which the commission was created and the tendency of the president to adopt the commissions' proposals).

87. See CAMPBELL, *supra* note 27, at xvi (discussing the "puzzle of congressional delegation," and noting that "the circumstances that surround the creation of ad hoc commissions are complex and vary widely"); WOLANIN, *supra* note 20, at 89–90 (noting reasons that the president cannot control commissions, including that there is often "no clear idea in the White House of what course of action they favor").

88. See *id.* at 73 (arguing that commissions are largely unconstrained in their operations).

89. The charter requirements for advisory committees created in the Executive Branch appear at Federal Advisory Commission Management, 41 C.F.R. § 102-3.75 (2008). On the extent to which institutional forms are rarely designed without reference to existing forms developed in the past, see Robert E. Goodin, *Institutions and Their Design*, in *THE THEORY OF INSTITUTIONAL DESIGN* 1, 28–30 (Robert E. Goodin ed., 1996). On the use of existing generic forms for new institutions, and the layering of new institutions over existing ones that perform similar functions, see ERIC SCHICKLER, *DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS* 15–17 (2001); Kathleen Thelen, *How Institutions Evolve*, in *COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES* 208, 225–26 (James Mahoney & Dietrich Rueschemeyer eds., 2003).



charged with reviewing and giving advice about a complex and politically charged problem is unlikely to face strong and direct political control.<sup>90</sup> It is possible, in short, that the form allows for significant agent independence, and that the concept of a principal, and the inherent control over the agent that the concept assumes to exist, may not explain a large number of advisory commissions.

Formal principals are not the only forces affecting commissions, which are also accountable to numerous formal and informal external entities.<sup>91</sup> Although additional entities to which a commission is accountable may not make a commission unbiased, they will at least make the commission's operations more independent of its formal principal.<sup>92</sup> A commission may need to placate other governmental and private institutions or individuals in order to gather information and gain the confidence of others; it may also have recourse to others for support if it strays from its principal's preferences.<sup>93</sup> Commissioners may informally represent one or more of these constituencies through their institutional affiliations, biographies, or career trajectories, while other constituencies may be forced to use external pressure and lobbying to make their opinions heard within the commission.<sup>94</sup> Public participation in a commission's work, along with media and widespread public attention to it, may increase commission accountability to external actors, while it may also allow a commission to develop popular support for its actions and

90. Cf. JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* 215–16 (2002) (identifying the narrow conditions under which Congress may impose strict *ex ante* legislative controls over administrative agencies); MASHAW, *supra* note 68, at 125 (explaining that detailed studies of administrative agencies find that congressional legislation tends to create generic and relaxed controls, rather than detailed and individualized ones); MEIER & O'TOOLE, *supra* note 84, at 28 (characterizing congressional controls on agencies as "blunt instruments" that delegate authority broadly); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 250–51 (1989) (noting wide variance in the degree of congressional control among different agencies and over time).

91. See DAN WOOD & RICHARD WATERMAN, *BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY* 101–02 (1994) (arguing that bureaucracies are "continually adapting to multiple, concurrent, and diverse stimuli," some direct and some indirect, coming from different branches and nongovernmental constituencies).

92. See *id.* at 102 (arguing that "various tools for democratic control of the bureaucracy" allow for greater accountability).

93. See *id.* (referring to government branches and the media as various tools that "produce effects" over time).

94. See Coombs, *supra* note 26, at 57–61 (describing the "constituencies" of commissions); cf. MEIER & O'TOOLE, *supra* note 84, at 133–34 (describing "representative bureaucracies")

conclusions.<sup>95</sup> Even assuming the importance of political controls over a commission, then, any single source of accountability is merely one among a number of accountabilities that condition a commission and its members' work.<sup>96</sup> Indeed, control may run in the opposite direction, from agent to principal: If a commission appears credible and its report authoritative, it may bind the political branches or an administrative agency to follow its conclusions—thereby making the advisory commission a driving force behind legal or regulatory change in some instances.<sup>97</sup>

Commissions are thus only partially agents of their principals—and frequently they are only relatively weak agents that are likely to be affected by the preferences and pressures of others.<sup>98</sup> In identifying characteristics shared by what it described as "successful commissions," the National Academy of Public Administration concluded that an advisory commission's performance is affected by the abilities and commitment of its commissioners; the narrow specificity of its mandate; the support it receives from the political branches, interest groups, and the media; and the quality of its staff.<sup>99</sup> In this sense, a second metaphor seems apt for their operations and their position within the federal state and bureaucracy: Commissions serve as administrators of informational mandates to investigate and provide advice. Viewed this way, they are not passive agents of an active principal.<sup>100</sup> To the extent that a

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95. See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 214–15 (1997) (explaining that an agency's choices regarding procedures it uses for rulemaking affect its relationship with the public).

96. See CHARLES T. GOODSELL, *THE CASE FOR BUREAUCRACY* 128 (4th ed. 2004) (concluding that bureaucracies are subject to "external political control, but [are] not politically supine"); Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES* 115 (Michael Dowdle ed., 2006) (arguing that "accountability regimes" exist); Barbara Romzek & Melvin Dubnick, *Accountability in the Public Sector: Lessons from the Challenger Disaster*, 47 PUB. ADMIN. REV. 229, 230 (1987) (describing accountability systems as bureaucratic, legal, professional, and political).

97. See Singley, *supra* note 19, at 323–24 (finding that "the court of public opinion" can prove persuasive).

98. See WOLANIN, *supra* note 20, at 73 (advocating that "commissions are independent").

99. See Alan L. Dean, *Organization and Management of Federal Departments*, in *MAKING GOVERNMENT MANAGEABLE* 143, 171 (Thomas H. Stanton & Benjamin Ginsberg eds., 2004) (summarizing the conclusions of Murray Comarow, vice chairman, National Academy of Public Administration Standing Panel on Executive Organization and Management, as requested by Senator Fred Thompson, chairman, Senate Committee on Governmental Affairs, June 12, 2000).

100. *Supra* note 70 and accompanying text.

commission can design its own internal organizational structure,<sup>101</sup> develop its own internal culture that establishes and holds to its own logic and internal sense of appropriateness,<sup>102</sup> and shape its operations through the external norms of practice and worldview that the professions to which commissioners and their staff belong,<sup>103</sup> it can establish some measure of independence.<sup>104</sup>

Conceptualizing the advisory commission as an administrative body with its own internal norms that operates within a broad matrix of bureaucratic and external actors offers a more complex portrait of the advisory commission form than one that sees the commission as subject to the control of its principal.<sup>105</sup> Hierarchical control, achieved through institutional design and in the direct and

101. See Nancy C. Roberts, *Innovation by Legislative, Judicial, and Management Design: Three Areas of Public Entrepreneurship*, in PUBLIC MANAGEMENT REFORM AND INNOVATION 89, 102–04 (H. George Frederickson & Jocelyn M. Johnston eds., 1999) (distinguishing between "legislative design" and "management design" of agencies). On the process by which agencies process external signals internally, see Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283 (1996).

102. See JAMES MARCH & JOHAN OLSEN, DEMOCRATIC GOVERNANCE 29–30 (1995) (describing the formation of political institutional identity).

103. See HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 79–84 (1947) (explaining the concept of "bounded rationality" and the "zone of acceptance" within which bureaucrats are willing to accept orders from someone above them in a hierarchy); Marissa Martino Golden, *Exit, Voice, Loyalty, and Neglect: Bureaucratic Responses to Presidential Control During the Reagan Administration*, 2 J. PUBLIC ADMIN. RES. & THEORY 29, 58 (1992) (arguing that the background of a bureaucrat influences behavior). Commissioners and their staff are also likely to carry with them biases from their class position, status, and prejudices. See TUTCHINGS, *supra* note 25, at 12 (criticizing the selection of commissions from groups of elites).

104. Commissions' short life-spans make them resistant to the tendency towards bureaucratic conservation and entrenchment that the "life-cycle" theory of public administration would predict; instead, under the life-cycle theory, their management and employees are more likely to be composed of entrepreneurs and "climbers" whose commitment to a commission's project (as well as to using it to advance their own career interest) will be stronger. See ANTHONY DOWNS, INSIDE BUREAUCRACY 5–23 (1967) (describing the typical "life cycle of bureaus"); RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY 4–9 (1994) (postulating that patronage lingers even as political institutions move to merit based systems); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 451–52 (1999) (explaining the autonomy and limitations granted by internal agency norms). Temporary organizations may, however, lack the bureaucratic foundation and independence that permanence or long-term existence provides, and may, therefore, be more likely to be the instrumental tools of their principal and of elites. See MICHAEL T. HANNAN & JOHN FREEMAN, ORGANIZATIONAL ECOLOGY 33 (1989) (theorizing that "inertia" insulates organizations from manipulation); PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND POLITICAL ANALYSIS 108–09 (2004) (limiting the effect of designers on actors of institutional organizations).

105. See Coombs, *supra* note 26, at 70–71 (concluding that "characteristics, functions, constituencies, and context" impact the understanding of how commissions operate).

indirect interactions between principal and agent, is thus merely one condition affecting commissions' operations.<sup>106</sup> In the first instance, commissions are designed at least to some degree as the agents of an informational mandate set by their principal(s).<sup>107</sup> But as they administer that mandate, commissions are likely to be determined—if not overdetermined—by a network of intersecting and overlapping forces beyond those of the Executive and Legislative Branch principals that create them.<sup>108</sup>

#### *D. Evaluating Commission Performance and Influence*

An advisory commission's charge, typically, is to investigate, inform, and advise its creator and, by implication or design, the public about a single issue or a narrow range of issues.<sup>109</sup> One could evaluate a commission's relative success or failure, then, in terms of its influence on legislative and executive decisionmakers as well as the extent to which it shapes public debate.<sup>110</sup> "Influence" in this context is inevitably a mix of both substance and perception—that is, a commission's success is the result not only of the content of its investigation and advice, but also of the extent to which the commission's operations appeared to be consistent with the broader normative and procedural values that apply to public institutions.<sup>111</sup> Success thus comes both from a commission's formal efforts to prove expertise and independence, and its functional success in meeting the goals articulated in its original charge. I want to suggest two broad sets of criteria for evaluating a commission's formal and functional success: Its success in meeting formal democratic values during the

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106. See WOOD & WATERMAN, *supra* note 91, at 102 (arguing that the President, Congress, the Judiciary, and the public all influence bureaucracy).

107. See Coombs, *supra* note 26, at 61–66 (detailing the "investigatory function" of commissions as the means with which to provide information).

108. See WOLANIN, *supra* note 20, at 89–91 (answering the question: "Why can the White House not control [the commissions]?"). This view builds on Edward Rubin's description of administrative agencies as part of a larger network of governance in which hierarchies are established by signals sent downward (from Congress to an agency via a statute, for example), but undercut at the same time by the multiplicity of signals sent across and within institutions and from outside the state. EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 59–63 (2005).

109. See Federal Advisory Committee Act, 5 U.S.C.A. app. II § 9 (West 2007) (stating the purpose of federal advisory committees).

110. *Id.*

111. See Coombs, *supra* note 26, at 66–70 (using both substantive outcomes as well as "determining whether appropriate procedures were followed" to measure the success of a commission).

period of its existence and the material, bureaucratic influence its report or reports have on government actors.

For purposes of defining the democratic values of an institution, Adrian Vermeule has helpfully articulated four core values of democratic constitutionalism that could apply to a commission's investigative process: *impartiality*, an institutional commitment to frustrate officials' tendency to engage in self-interested behavior and instead encourage them to promote the public good; *accountability*, an institutional design that requires officials to answer for their actions; *transparency*, a commitment to limit institutional secrecy and promote the publicity of an institution's actions; and *deliberation*, an institutional capacity for "useful talk by which democratic actors exchange information and opinions."<sup>112</sup> Commissions achieve "democratic success" if by design and in practice they can collect, sort, and deliberate impartially over all information and perspectives relevant to their mandate, publicize their findings and recommendations, and in the process be held accountable for their actions.<sup>113</sup> These quite idealistic values, which Vermeule develops in the context of institutional design rather than operation, offer no clear quantitative measures.<sup>114</sup> For example, a case study will likely be unable to discern between actual impartiality and deliberation and the mere appearance that the commission was impartial and deliberative. Nevertheless, Vermeule suggests a number of criteria that can prove especially helpful in evaluating the performance of high-profile commissions that receive media and public attention, when democratic values of transparency and public accountability are more important.<sup>115</sup>

Given its charge to provide advice to a branch of government, a commission may be more easily evaluated in terms of its administrative and bureaucratic success, which could be defined as the extent to which the commission's investigation, final report, and proposals inform the public and play an observable role in one or more legal or policy decisions.<sup>116</sup> This would indicate the commission's ability to manage the administrative state sufficiently to process a maximum amount of information, and to come up with pragmatic advice about the tasks to which it was assigned that proves persuasive to

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112. ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* 4–7 (2007).

113. *See id.* at 4 (applying "democratic values" as a model for democratic success).

114. *See id.* at 246–47 (asserting that these values are theoretical in nature).

115. *See id.* at 4 (enumerating the "mechanisms that advance . . . democratic constitutionalism").

116. *See* Coombs, *supra* note 26, at 66–70 (evaluating the success of a commission based upon its functions).

political or regulatory decisionmakers.<sup>117</sup> In this context, influence and success are also as much the products of public perception as they are the result of administrative competence.<sup>118</sup> A commission that gains political support for its report may do so not because its conclusions and proposals are objectively correct and optimal, but because the commission *appeared* to have conducted itself professionally and independently, and/or because its report confirmed decisionmakers' pre-existing and preferred conclusions.<sup>119</sup> Bureaucratic success, in other words, does not mean the commission was competent; it means merely that the commission provided information and advice that shaped political and regulatory decisionmaking—no matter the cause of that shaping.<sup>120</sup>

One final consideration is necessary to recognize the historical significance of individual advisory commissions. A commission may not have any immediate impact on decisionmakers or public debate, and may not reflect prevailing normative democratic and administrative values, but may nevertheless prove over the long term to have significant influence either through direct or indirect influence on later governmental decisions.<sup>121</sup> Conversely, a commission's report may have proven immediately influential, but its investigation, report, and/or prescription may prove in the long-term to have been incorrect or unwise, or may lose the confidence of the public or the government.<sup>122</sup> A successful and influential commission, in short, will have not only immediate bureaucratic effects or be embraced for representing and furthering contemporary political norms, but will also produce a report and

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117. *But see* WOLANIN, *supra* note 20, at 131 (suggesting the failures or lack of impact of commissions).

118. *See* ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 4–6 (1998) (identifying heuristics that lead voters to trust and believe some candidates and not others regarding complicated policy choices).

119. *See* Coombs, *supra* note 26, at 66 (arguing that the appearance of the "procedural nature of the investigatory function" affects the determination of a commission's success).

120. *See id.* at 66–70 (measuring success by either "symbolic reassurance" or "policy influence").

121. For example, the U.S. Commission on National Security/21st Century, popularly known as the Hart-Rudman Commission, an advisory commission established in 1998, issued a series of reports prior to September 11, 2001, about emerging terrorist threats to the U.S. and strategies for protecting homeland security. Largely ignored when they were issued, these reports eventually had long-term, indirect influence on the government's response to the 9/11 attacks. *See* William W. Ellis, *Terrorism in the United States: Revisiting the Hart-Rudman Commission*, *MEDITERRANEAN Q.* 15(2), at 25 (2004) (summarizing the policy aims of the Hart-Rudman Commission); Jake Tapper, *Commission Warned Bush* (SALON.COM, Sept. 12, 2001), available at <http://archive.salon.com/politics/feature/2001/09/12/bush/> (questioning why the Hart-Rudman Commission was ignored until it was too late).

122. *See, e.g.,* KITTS, *supra* note 2, at 33–40 (describing long-term controversy of the commission studying Pearl Harbor attacks).

historical record that maintains its reputation. To the extent that commissioners concern themselves for personal or collective reasons with the historical reputation of the commission with which they are affiliated, their concern constitutes a form of accountability—one that is thinner than the direct political or bureaucratic accountability in which poor performance could lead to a lost election or lost employment, but one that might nevertheless affect commissioners' performance.<sup>123</sup>

Flexible and ad hoc in their creation, narrowly focused in substance, both tied to a principal and potentially independent from it, advisory commissions represent a longstanding institutional solution to informational problems facing Congress and/or the Executive Branch.<sup>124</sup> As the next Part describes, the surprise attacks of 9/11 offered precisely the type of stimulus that typically leads one or both political branches to turn to an investigative advisory commission in order to learn about the attack's circumstances and causes, and to offer proposals about how best to respond. Part III offers a narrative institutional history of the 9/11 Commission, focusing both on the design of its form and its operations, while Part IV uses the framework that this Part developed to evaluate the Commission's performance and success as a model for future advisory commissions.

### *III. The 9/11 Commission: Design, Operations, and Influence*

President Bush did not initiate an independent investigation into the 9/11 attacks and resisted initial congressional efforts and public calls for one.<sup>125</sup> The White House's stance set in motion a chain of political events that resulted in a congressionally-created commission with limited presidential input.<sup>126</sup> Working within the conditions created by the statute's design and its political moment, the Commission would successfully establish itself as authoritative and "independent"—although that independence was based on the Commission's web of dependent relationships with the political branches—and issue a widely celebrated and influential final report.<sup>127</sup> The 9/11

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123. See WOLANIN, *supra* note 20, at 184 (stating that commissioners know that "[o]ne of the most important things a commission can do is to do its job well").

124. See Federal Advisory Committee Act, 5 U.S.C.A. app. II § 2 (West 2007) (describing the need for and history of federal advisory committees).

125. See KITTS, *supra* note 2, at 139 (charting the delay after 9/11 compared to the delay of presidential action for other crises in the 20th century).

126. *Id.* at 155 (describing the structural effect Bush's delay had on the commission).

127. See *id.* at 151 (reporting that the media reaction was "decidedly positive" and that the report "became a national bestseller").

Commission's history reveals the role that the design process and the resulting form play in a commission's operation, as well as the varieties of institutions and events that affect a controversial commission's work.<sup>128</sup> The Commission's design and operations, I suggest, are as significant as its final product in determining the Commission's ultimate success, both in terms of the quality of its output and the legitimacy that it enjoys. Most importantly, the Commission's ability to extract information from the Bush Administration—and the public perception that it was willing to fight to extract that information—enabled the Commission to gain both widespread public acceptance and the moral authority to influence Congress and the President.<sup>129</sup>

#### A. *The Faults of Interbranch Investigation: The Congressional Joint Inquiry*

Although the idea of an independent investigatory commission was first expressed on the Senate floor soon after the attacks,<sup>130</sup> Senators Joseph Lieberman and John McCain initiated the first formal efforts to establish a commission in December 2001.<sup>131</sup> While the White House actively opposed these efforts,<sup>132</sup> members of both parties believed early on that a congressional investigation into the intelligence failures that allowed the attacks to succeed would provide sufficient information for Congress to understand these failures

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128. See generally KEAN & HAMILTON, *supra* note 6 (detailing the inside story of the 9/11 Commission).

129. See *id.* at 339 (quoting President Bush as stating that the changes implemented after the commission marked "the most dramatic reform of our nation's intelligence capabilities . . . since 1947").

130. See 147 CONG. REC. 16,865, 16,895 (2001) (statement of Senator Robert Toricelli) (calling for "a board of general inquiry" to investigate 9/11 attacks); H.R. REP. NO. 107-219, at 4 (2001) (supporting H.R. 2883, sponsored by Representative Nancy Pelosi, proposing to establish a "Commission on Preparedness and Performance of the Federal Government for the September 11 Acts of Terrorism").

131. See John Lancaster, *Special Board of Inquiry Sought for Attacks*, WASH. POST, Dec. 21, 2001, at A8 (reporting the call for an investigation of the September 11 attacks).

132. See PHILIP SHENON, *THE COMMISSION* 25–26 (2008) (establishing the White House's opposition as both practical and political); Susan Cornwell, *Daschle: Bush, Cheney Urged No Sept. 11 Inquiry*, REUTERS NEWS SERVICE, May 26, 2002 (reporting that Daschle was told by Bush and Cheney not to push for an investigation); Andrew Jacobs, *Traces of Terror*, N.Y. TIMES, June 12, 2002, at A25 (indicating that the Democrats were the only ones pushing for an investigation); David E. Rosenbaum, *Bush Bucks Tradition*, N.Y. TIMES, May 26, 2002, at A18 (recognizing that Bush was breaking with tradition by not ordering an independent investigation).



and adjust federal laws accordingly.<sup>133</sup> A joint inquiry conducted by the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence ("Joint Inquiry") began in February 2002, and was the most significant investigation Congress would undertake into the attacks.<sup>134</sup> Because it was conducted by congressional intelligence committees, however, the Inquiry narrowly focused only on issues related to intelligence failures and, therefore, did not study the failures of counter-terrorism policies in the Clinton and Bush administrations on federal and local responses to the attacks.<sup>135</sup> It tried, but failed, to obtain sensitive information from the Executive Branch, which refused some congressional requests for documents.<sup>136</sup> Worse, the White House refused to declassify some documents it did disclose, which resulted in a heavily redacted final report that failed to satisfy public demand for an open investigation into the attacks.<sup>137</sup> The report itself acknowledged the limitations of the Joint Inquiry's investigation and viewed an independent commission as a necessary corrective measure.<sup>138</sup>

By September 2002, after the Joint Inquiry had completed its hearings but before it had issued its final report, key Republican senators expressed their

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133. See Lancaster, *supra* note 131 and accompanying text; Richard Simon, *Bush Reverses Stand on 9-11 Panel*, ORLANDO SENTINEL, Sept. 21, 2002, at A1 (indicating that Congress continued to support an investigative commission, but only after Bush changed his stance in "opposition to the establishment of an independent commission"); Michael Vazquez, *Sept. 11 Families Join Call for Probe; Some Congressmen at Rally Also Seek an Independent Panel*, WASH. POST, June 12, 2002, at B8 (explaining that families were calling for an independent investigation along with members of Congress); see also KITS, *supra* note 2, at 134-35 (summarizing history of efforts made between late 2001 and spring 2002 to establish investigatory commission).

134. See H.R. REP. NO. 107-792, at 1 (2002); S. REP. NO. 107-351, at 1 (2002) (conducting a Joint Inquiry into the activities of the U.S. Intelligence Community in connection with the terrorist attacks perpetrated against the United States on September 11, 2001).

135. See *id.* at 1-2 (setting out the scope of the commission).

136. See Dana Milbank, *Barriers To 9/11 Inquiry Decried; Congress May Push Commission*, WASH. POST, Sept. 19, 2004, at A14 (highlighting the Bush administration's failure to cooperate with the congressional inquiry).

137. An entire section in the *Report* concerning potential links between Saudi intelligence officials and the 9/11 hijackers appeared with lines blacked out. See James Risen & David Johnston, *Report on 9/11 Suggests a Role by Saudi Spies*, N.Y. TIMES, Aug. 2, 2003, at A1 (declassifying the *Report* through anonymous sources); Susan Schmidt, *Broader Probe of Terror Threat Underway; Panel Looks Beyond Intelligence Failures, into U.S. Government's Response*, WASH. POST, July 27, 2003, at A10 (indicating the need for further investigations); see also SHENON, *supra* note 132, at 51-54 (describing the frustrations of Senator Bob Graham of the Senate Intelligence Committee with the White House).

138. See H.R. REP. NO. 107-792 (2002); S. REP. NO. 107-351 (2002), Appendix: Access limitations encountered by the Joint Commission, at 1 (detailing the limitations faced by the Joint Commission).

frustration with the Executive Branch's interference in the Joint Inquiry and publicly announced their support for an independent commission.<sup>139</sup> At the same time, the President himself began to signal his willingness to allow one to go forward.<sup>140</sup> Victims' families in particular acted as an effective public voice and lobby in favor of a more thorough investigation.<sup>141</sup> The details of the Commission's design and the scope of its authority, however, remained in dispute, and while competing bills made their way through both houses of Congress, the White House continued to work quietly to restrain the proposed commission's powers.<sup>142</sup> The Congress and the White House finally reached a compromise following the 2002 midterm elections, when Republicans recaptured control over the Senate and gained a stronger majority in the House.<sup>143</sup> The Intelligence Authorization Act for Fiscal Year 2003, passed in mid-November 2002 by a lame-duck Congress, created the new commission, whose official title was the National Commission on Terrorist Attacks Upon the United States.<sup>144</sup>

### *B. Negotiated Innovation: Statutory Design of the Commission*

The statute attempted to design a bipartisan commission that would be independent of the President and capable of conducting an investigation with

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139. See 148 CONG. REC. 17,663, 17,564 (2002) (remarks of Sen. Kyl) (supporting the creation of an independent commission); 148 CONG. REC. 17,663, 17,564–65 (2002) (remarks of Sen. Specter) (complaining of the FBI's investigation of leaks coming from Congressional intelligence committees that ran concurrently with committees' efforts to investigate the intelligence community); 148 CONG. REC. 17,663, 17,565–66 (2002) (remarks of Sen. Shelby) (complaining of the Joint Inquiry's narrow focus and resistance by intelligence agencies' staff to congressional efforts to obtain documents and gain access to witnesses).

140. See Simon, *supra* note 133, at A1 (indicating that the President had changed his position regarding a commission).

141. See KITTS, *supra* note 2, at 136–37 (quoting a 9/11 widow as saying, "I want a real investigation. I don't want lip service. I'm angry, and I'm not going away").

142. See Helen Dewar, *Bush Doubted on 9/11 Panel*, WASH. POST, Oct. 12, 2002, at A6 (suggesting that Bush did not want an independent commission); Michael Isikoff & Tamara Lipper, *Cheney: Investigators, Keep Out*, NEWSWEEK, Oct. 21, 2002, at 10 (indicating that Cheney played a "behind-the-scenes role" in attempting to thwart the formation of an independent commission).

143. See ALVIN S. FELZENBERG, GOVERNOR TOM KEAN: FROM THE NEW JERSEY STATEHOUSE TO THE 9-11 COMMISSION 408 (2006) (examining the numbers game involved in the compromise allowing the commission to move forward); KITTS, *supra* note 2, at 137–38 (describing the changing "political calculus" in October of 2002).

144. See Intelligence Authorization Act for Fiscal Year 2003 §§ 601–611, 6 U.S.C. § 101 (Supp. IV 2004) (creating the commission, defining its scope, and charging its mandate).

minimal assistance and interference from the political branches.<sup>145</sup> It explicitly stated that the Commission was "established in the legislative branch,"<sup>146</sup> and it strictly limited the President's appointment powers—he could name only the chairman—while it granted various members of the congressional leadership the power to appoint the other nine commissioners.<sup>147</sup> It also declared that the FACA did not apply to the Commission.<sup>148</sup> By situating the Commission within the Legislative Branch, the Commission's creators distinguished it, at least formally, from similar independent commissions in the past, even as they cited these past commissions as historic precedents, including the commissions created to investigate the 1941 surprise attacks on Pearl Harbor.<sup>149</sup> All of these commissions that Congress cited, including those that studied the assassination of President John F. Kennedy in 1963 and the 1986 mid-air explosion of the Challenger space shuttle, however, were created by presidents, each of whom also exercised their authority to name all of the commissions' members.<sup>150</sup> Indeed, President Johnson wrested control of the Kennedy assassination investigation from Congress (and from a proposed investigation by the state of Texas) to make certain that no investigations competed with the one conducted by his commission—an effort that has not helped the resulting commission's historical credibility.<sup>151</sup>

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145. *See id.* § 603 (allowing the President only to appoint the chairman, with the other appointments selected through a bipartisan process).

146. *Id.* § 601.

147. *Id.* § 603(a).

148. *Id.* § 606(a). On FACA, *see supra* Part III.B.

149. *See, e.g.*, 148 CONG. REC. 8617, 8711–12 (2002) (statement of Rep. Miller) (citing a *Washington Post* editorial calling on President Bush to establish an independent commission similar to the Pearl Harbor Commission); 148 CONG. REC. 17,253, 17,286 (2002) (statement of Sen. Lieberman) (noting that many compared his proposed commission to the Pearl Harbor Commission); 148 CONG. REC. 8012, 8036 (2002) (statement of Sen. Torricelli) (citing the commissions created to study Pearl Harbor, the Kennedy assassination, and the Challenger disaster).

150. *See* Exec. Order No. 12,546, 51 Fed. Reg. 4475 (Feb. 5, 1986) (creating commission to study Challenger commission); Exec. Order No. 11,130, 3 C.F.R. 206 (1963) (creating commission to study Kennedy assassination); Exec. Order No. 8,983, 3 C.F.R. § 321 (1941) (creating commission to study Pearl Harbor). Congress later granted subpoena power to the Warren Commission by joint resolution. "Joint Resolution Authorizing the Commission established to report upon the assassination of President John F. Kennedy to compel the attendance and testimony of witnesses and the production of evidence," Pub. L. No. 88-202, 77 Stat. 362 (1963).

151. *See* GERALD D. MCKNIGHT, *BREACH OF TRUST: HOW THE WARREN COMMISSION FAILED THE NATION AND WHY* 30–59 (2005) (describing how the Warren Commission was created). Although Johnson viewed his efforts to gain executive control over the investigatory process as a means to encourage a sense of public closure and promote the authority of the newly sworn-in President, he also sought to quash a congressional investigation that might have

The Commission's "legislative branch" status also reveals some of the political dynamics operating at the time of its creation.<sup>152</sup> The statute's language clearly claims the 9/11 Commission as a *congressional* creation, even though nothing in the legislative history explains what prompted the decision to house the Commission in the Legislative Branch.<sup>153</sup> It may thus reflect Congress's desire to make clear that the Commission should enjoy formal legal independence from the Executive Branch in order both to quell public concern about the need for an authoritative and independent investigation and to respond to the Executive Branch's apparent desire, shown in the Joint Inquiry, to control the flow of information about the attacks.<sup>154</sup> Left open by this declaration was the issue of whether Congress in fact could constitutionally locate the Commission in the Legislative Branch.<sup>155</sup> This issue arose briefly when the White House tried to assert that the Commission's chairman, as a presidential appointee, was in fact an Executive Branch officer to whom congressional ethics rules would not apply.<sup>156</sup> Congress responded with a memo issued by the Congressional

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descended into partisan debate, and a Texas-based investigatory effort that might reveal sensitive information about CIA operations. See MAX HOLLAND, *THE KENNEDY ASSASSINATION TAPES*, 87–88, 108, 120–21, 125 (2004) (describing the formation of the commission and the CIA issue); Robert F. Cushman, *Why the Warren Commission?*, 40 N.Y.U. L. REV. 477, 492 (1965) (explaining why the President was justified in taking control of the commission away from Congress). And the Johnson White House, like members of Congress who sought to create the 9/11 Commission, viewed the Pearl Harbor Commission as historic precedent—which is ironic, as it turns out, because the reports of *both* commissions have failed to gain credibility as authoritative studies. HOLLAND, *supra* at 86–87 (aspiring to the Pearl Harbor Commission); see also *supra* note 141 and accompanying text.

152. See Intelligence Authorization Act for Fiscal Year 2003 § 601, 6 U.S.C. § 101 (Supp. IV 2004) ("There is established in the legislative branch the National Commission on Terrorist Attacks Upon the United States.").

153. See Victoria S. Shabo, Recent Development, *"We Are Pleased to Report that the Commission Has Reached Agreement with the White House": The 9/11 Commission and Implications for Legislative-Executive Information Sharing*, 83 N.C. L. REV. 1037, 1044–45 (2005) (assigning importance to how the commission was "institutionally situated").

154. Section 606 of the enabling statute established limited openness requirements on the Commission by mandating that it "hold public hearings and meetings to the extent appropriate" and release and make public a final report. Intelligence Authorization Act for Fiscal Year 2003 § 606, 6 U.S.C. § 101 (Supp. IV 2004); see also *id.* § 610 (a)–(b) (permitting interim reports and requiring a final report).

155. See U.S. DEPARTMENT OF JUSTICE, OFFICE OF LEGAL COUNSEL, MEMORANDUM FOR THE GENERAL COUNSELS OF THE FEDERAL GOVERNMENT, FROM WALTER DELLINGER 56–57 (1996), reprinted at 63 LAW & CONTEMP. PROBLEMS 514, 566 (2000) ("Congress cannot define away an anti-aggrandizement problem simply by declaring that a given entity is within or without the legislative branch.").

156. See Dan Eggen, *Kissinger to Withhold Client List*, WASH. POST, Dec. 13, 2002, at A43 (describing efforts by Kissinger to reassure the public that his interests would not be conflicted,

Research Service which argued that the Commission was thoroughly legislative rather than executive in character and authority.<sup>157</sup> The White House never again raised the issue.<sup>158</sup>

The statute established a partisan method of appointment that resulted in an equal number of five commissioners named by Republicans and Democrats.<sup>159</sup> While the President appointed only the Commission's chairman, the Democratic leader of the Senate, in consultation with the Democratic leader of the House, appointed the vice chairman.<sup>160</sup> The Senate and House leadership of both parties each appointed two members, accounting for the remaining eight commissioners.<sup>161</sup> The scheme encouraged the appointing authorities to choose commission members who would pledge some degree of party loyalty, as neither party would want to appoint nonpartisan commissioners who would be more willing to compromise than those nominated by the opposition.<sup>162</sup> The appointments process, therefore, appeared to contradict Senator McCain's stated desire that it would occur in "nonpartisan—not bipartisan, *nonpartisan*—fashion."<sup>163</sup>

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but that he would not disclose his client list). The White House's motive was to protect the President's initial appointee as chairman, Henry Kissinger, from being required to disclose a list of the clients in his private consulting firm. *Id.*

157. See Memorandum from Jack Maskell, Congressional Research Service, to Senate Committee on Governmental Affairs on Supervising Ethics Agency for Purposes of Ethics in Government Act Disclosures for Members of the National Commission on Terrorist Attacks upon the United States (Dec. 11, 2002), at 2, [http://www.senate.gov/~gov\\_affairs/911crsreport.pdf](http://www.senate.gov/~gov_affairs/911crsreport.pdf) (declaring that the commission "clearly falls within those entities of a legislative character"). The Constitution empowers Congress to establish a commission that conducts investigatory and information-gathering work within its own branch, and allows interbranch appointments. See *Morrison v. Olson*, 487 U.S. 654, 670–77 (1988) (outlining the Appointments Clause of Article II of the U.S. Constitution); *Buckley v. Valeo*, 424 U.S. 1, 137–38 (1975) (defining "[t]he Commission's Powers").

158. See *Shabo*, *supra* note 153, at 1045–46 (suggesting that neither the White House nor Congress realized the significance of the designation issue).

159. See Intelligence Authorization Act for Fiscal Year 2003 § 603(a), 6 U.S.C. § 101 (Supp. IV 2004) (detailing the "Composition of the Commission").

160. *Id.* When Congress creates advisory commissions, it usually requires bipartisan membership and establishes an appointments scheme that is "set up for dialogue between the legislative and executive branches." CAMPBELL, *supra* note 27, at 4. The 9/11 Commission was bipartisan, but insofar as the President appointed only one of ten commissioners, the congressionally-created appointments process limited "dialogue" between the branches. *Id.*

161. Intelligence Authorization Act for Fiscal Year 2003 § 603(a), U.S.C. § 101 (Supp. IV 2004).

162. See KEAN & HAMILTON, *supra* note 6, at 30 (remarking that "consensus would not always be easy coming").

163. See 148 CONG. REC. 17,253, 17,289 (2002). (statement of Sen. McCain) (emphasis added) (desiring appointments to lack an air of partisanship). Earlier drafts of the legislation had proposed more complicated appointment methods that would have forced compromises

The Commission's nominal "independence" thus did not immunize it from politics.<sup>164</sup> Nor did the statute encourage, or even allow, commissioners who would be isolated (and therefore perhaps more "independent") from the professional and social world of the nation's capital.<sup>165</sup> The statute required that the Commission's ten members be "prominent United States citizens," which it defined as those who had gained "national recognition and significant depth of experience in such professions as government service, law enforcement, the armed services, law, public administration, intelligence gathering, commerce (including aviation matters), and foreign affairs."<sup>166</sup> Thus commissioners' approaches to their work would necessarily be shaped not only by the parties to which they were tied, but also by the perspectives of their professions and the institutions through which they had achieved their prominence.<sup>167</sup> While nominally "independent," then, the commission would

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across party lines. The Roemer Amendment to the House version of the Intelligence Reauthorization Act, for example, envisioned a ten-member commission where six appointments would be designated to the majority party of Congress and the remaining four to the party in opposition, but provided that no more than five members of the Commission could be of the same political party. 148 CONG. REC. 14,240, 14,335 (2002) (reprinting § 602 of the Roemer Amendment). The Roemer Amendment was further amended by Representative Smith during the House floor debate to mandate that a member of the victims' families be allowed representation on the commission. *Id.* at 14,343. A similar amendment to the Senate bill was eventually removed from the Homeland Security Bill by Senate Republicans, reportedly at the urging of the White House. See Thomas Frank & Ann Q. Hoy, *Democrats Lose on Port Security; and 911 Panel Unlikely too*, NEWSDAY, Nov. 14, 2002 at A17 (indicating Republican resistance to the formation of a commission). By contrast, an early Senate proposal would have granted the President four appointments in a fourteen-member Commission that was split evenly among Republican and Democratic members, with the remaining members chosen by the majority leaders of the House and Senate "in consultation with the minority leader[s]" of each house, from a pool of candidates nominated by various Congressional committees. S. REP. NO. 107-150, at 3-5 (2002) (Conf. Rep.).

164. See KEAN & HAMILTON, *supra* note 6, at 30 (describing the possibility that "the commission would splinter down partisan lines").

165. See Intelligence Authorization Act for Fiscal Year 2003 § 603(b)(3), 6 U.S.C. § 101 (Supp. IV 2004) (requiring that commissioners have ties to Washington in one way or another).

166. See *id.* (detailing the "[c]omposition of the Commission").

167. This is clear in the résumés of the individuals who ultimately served as commissioners. Seven of the eleven commissioners had been elected officials (including both former Senators Max Cleland, who resigned as Commissioner to take a position in the Export-Import Bank, and Bob Kerrey, who replaced him, as well as former Senator Slade Gorton, former governors Thomas Kean and James Thompson, and former Representatives Lee Hamilton and Timothy Roemer). Of the remaining four commissioners, John Lehman had served as Secretary of the Navy under Ronald Reagan, while Jamie Gorelick, Richard Ben-Veniste, and Fred Fielding had all served as attorneys in prominent positions either for presidents, important Congressional committees, or, in Ben-Veniste's case, as chief of the Watergate Task Force of the Watergate Special Prosecutor's Office. At the time of their nomination, Gorelick, Ben-Veniste, and Fielding were partners in the Washington offices of

be composed of individuals with strong professional and social ties to the political institution that appointed them (whether the President or Congress), to the political parties with which they were affiliated, and to the federal government they would study.<sup>168</sup>

The statute broadly defined the Commission's duties: Its charge was to "conduct an investigation" into the "relevant facts and circumstances" of the government's performance relating to the attacks, and to "identify, review, and evaluate the lessons learned" from this investigation.<sup>169</sup> Congress also instructed the Commission to provide "findings, conclusions, and recommendations" about current laws, regulations, and governmental organizations and practices, and to propose legal, regulatory, and organizational reforms.<sup>170</sup> The Commission would perform these tasks with a deadline that promised political controversy: The statute required the Commission to issue its report within eighteen months, which placed the deadline in the middle of the presidential election season.<sup>171</sup>

Significantly, the statute granted the Commission significant legal authority to conduct its investigation, but imposed a scheme to limit the exercise of that authority that mirrored the formal bipartisanship of the Commission's appointment process.<sup>172</sup> The Commission could secure information directly from federal agencies and individuals—information that agencies were required to furnish "to the extent authorized by law"—but only commissioners acting with authority granted by a majority of the Commission could make the requests necessary to obtain the information.<sup>173</sup> The statute also granted the Commission the power to issue subpoenas to enforce its will against a recalcitrant agency or individual—a somewhat controversial authority that was opposed by some Republicans in Congress and that the White House sought to limit.<sup>174</sup> The statute required that

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major law firms. See <http://www.9-11commission.gov/> (click on the commissioners' names to obtain their biographies); Maxwell Cleland—biography, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C001034>. For an inside account of the decisions to appoint individual commissioners, see SHENON, *supra* note 132, at 25–27, 32–34, 163–65 (describing the selection processes for Kean, Mitchell, and Kerrey).

168. See KEAN & HAMILTON, *supra* note 6, at 30–33 (providing a biography of the appointed commissioners selected on party lines).

169. Intelligence Authorization Act for Fiscal Year 2003 § 604(a)(1)–(2), 6 U.S.C. § 101 (Supp. IV 2004).

170. *Id.* § 604(a)(3).

171. *Id.* § 604(b)(c).

172. *Id.* § 603.

173. *Id.* § 605(c)(1).

174. See, e.g., 148 CONG. REC. 14,240, 14,337–38 (2002) (remarks of Rep. LaHood) (suggesting that the subpoena power would serve no purpose and could be harmful to national security); see also Dewar, *supra* note 142, at A6 (describing the collapse of negotiations between the White House and Congress over the number of members' votes that would trigger

either a minimum of six of its ten members or its chairman and vice chairman agree to issue a subpoena, thereby mandating the consent of at least one committee member from each party.<sup>175</sup> These rules were intended to have an important braking effect: The Commission could not force an Executive Branch agency or current or former Executive Branch officer to provide information if all of the commissioners nominated by one of the political parties, but no commissioner nominated by the other party, voted in favor of issuing a subpoena.<sup>176</sup> The power-sharing scheme would either force bipartisan agreement and compromise or render the commission unable to act.<sup>177</sup>

This, then, was the "independent" institution Congress created: The Commission would be formally independent and accountable to no one during its brief lifespan.<sup>178</sup> Politically, however, it would be tied to both political parties equally through the appointments process, especially if the President and congressional leaders nominated partisan commissioners.<sup>179</sup> In this sense, the Commission was bipartisan—that is, composed of individuals with party identification—rather than nonpartisan.<sup>180</sup> The Commission would need to seek congressional approval for additional funding and time to complete its investigation from Congress<sup>181</sup>—a Congress held by Republicans that supported and might seek

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the Commission's subpoena power). After the 2002 midterm elections gave congressional Republicans majorities in both houses, the White House succeeded in limiting the Commission's authority to instances when commissioners from both parties agreed, thereby granting each party a right to veto a proposed subpoena if the Commission broke down into partisan camps. See Isikoff & Lipper, *supra* note 142, at 10 (explaining Cheney's direct involvement in the subpoena veto issue). Congressionally-created advisory commissions are often given subpoena authority. See CAMPBELL, *supra* note 27, at 6 (concluding that subpoenas are particularly prevalent in commissions "set up to investigate alleged wrongdoing, malfeasance, or catastrophe").

175. See Intelligence Authorization Act for Fiscal Year 2003 § 605(a)(2)(A)(i), 6 U.S.C. § 101 (Supp. IV 2004) (allowing for the conditional issuance of a subpoena); see also *id.* § 605(a)(2)(B)(ii) (extending the same requirement to the Commission's authority to forward facts to a United States attorney to enforce a subpoena).

176. See SHENON, *supra* note 132, at 71 ("Democrats had little hope of mustering the Republican support they would need to issue [a subpoena].").

177. See KEAN & HAMILTON, *supra* note 6, at 19–20 (concluding that "bipartisan agreement would be needed" for subpoenas).

178. See *id.* at 17 (addressing the congressional proposal and the need for "an independent, bipartisan commission").

179. See *id.* at 20 ("It would be hard to design a more partisan way to appoint a commission.").

180. See KITTS, *supra* note 2, at 140 (describing the commission as "respectably bipartisan").

181. The Commission was originally granted \$3 million in funding, and in spring 2003 sought an additional \$11 million, which it ultimately received. See KEAN & HAMILTON, *supra* note 6, at 43–46 (explaining the new draft budget of \$14 million, "necessitating an increase of



to protect their Republican President. And although the Commission was located formally in the Legislative Branch and the President could appoint only its chairman, the Executive Branch retained one key form of control over the Commission: It could refuse or delay the release of information crucial to the Commission's investigation.<sup>182</sup> As a practical and popular political matter the Commission was also likely to be held informally and indirectly accountable by a wide variety of private sources and institutions, including most prominently the organized groups of victims' families and the press.<sup>183</sup> These interests would expect the Commission to appear thoroughly independent from the President and Congress.<sup>184</sup> Thus, the Commission would have to walk a fine line: The more independence it claimed, the more it would threaten the President (who might want to withhold information that would make him appear blameworthy) and Congress (which might want to protect its institutional or partisan interests)—and the more difficult the Commission's job would become.

### C. *Executing and Demonstrating Independence: The Commission in Action*<sup>185</sup>

The Commission's first weeks of existence did not make this dilemma appear any easier.<sup>186</sup> First, the initial chairman and vice chairman, former Secretary of

\$11 million"); David Firestone & Philip Shenon, *Hands Out for Shares of War Budget*, N.Y. TIMES, Mar. 27, 2003, at A20. Both the initial appropriation and the additional funding compared quite unfavorably to the funds appropriated to study the Columbia Shuttle disaster in 2003. See Frank Oliveri, *NASA Gets \$50 Million for Shuttle Investigation*, FLORIDA TODAY, Feb. 21, 2003 at 3, available at <http://billnelson.senate.gov/news/details.cfm?id=244274>. The Commission was originally required by statute to submit its report 18 months from passage of the statute (which would have meant May 27, 2004), with 60 days after that date to conclude its work prior to the Commission's legal termination. See Intelligence Authorization Act for Fiscal Year 2003 § 610 (codified at 6 U.S.C. § 101 (Supp. IV 2004)) (outlining the time-frame for reports and termination of the commission); Philip Shenon, *Bush Vows to Answer All Questions Posed by 9/11 Panel*, N.Y. TIMES, Mar. 10, 2004, at 18 (reporting that the commission received a sixty day extension).

182. See KEAN & HAMILTON, *supra* note 6, at 70–75 (outlining the commission's frequent negotiations with the White House).

183. *Infra* note 192 and accompanying text.

184. See KEAN & HAMILTON, *supra* note 6, at 54 (indicating that these forces were constantly "pushing" the commission).

185. See generally FELZENBERG, *supra* note 143; KEAN & HAMILTON, *supra* note 6; KIRSTEN LUNDBERG, PILOTING A BIPARTISAN SHIP: STRATEGIES AND TACTICS OF THE 9/11 COMMISSION, Case Reference 1813.0, Kennedy School of Government Case Studies in Public Policy and Management (Boston, 2005); SHENON, *supra* note 132; Ernest R. May & Philip D. Zelikow, *Correspondence: Sins of Commission?*, 29 INT'L SEC. 208 (2005); Ernest R. May, *When Government Writes History*, NEW REPUBLIC, May 23, 2005, at 30.

186. See KITTS, *supra* note 2, at 138 (describing the commission's "rough start").

State Henry Kissinger (appointed by President Bush) and former Senator George Mitchell (appointed by Democratic Senator Tom Daschle), resigned to avoid disclosing information about the clients they had represented in their post-government careers.<sup>187</sup> Then, Senator Trent Lott reneged on a commitment (made to Senators McCain and Richard Shelby during negotiations over the statute) to name former Senator Warren Rudman to the commission, allegedly because Lott and other Senate Republicans feared that Rudman might prove *too* independent.<sup>188</sup> In mid-December 2002, the President named former New Jersey Governor Thomas Kean as chairman and Senator Daschle named former Representative Lee Hamilton as vice-chairman.<sup>189</sup> Given this inauspicious start, as well as the structural obstacles to the Commission's ability to perform an independent investigation, it is little wonder that Kean and Hamilton have stated that they believe the institution they led was "set up to fail."<sup>190</sup>

Kean and Hamilton probably meant "fail" in three senses: an internal failure of the commissioners and their staff to function cohesively as an institution; a practical failure to obtain information and resources caused by the actions—or inactions—of the Executive Branch and Congress; and a perceived failure of the Commission to perform its duties independently of the Executive Branch and Congress, leading the public and press to dismiss the Commission's work regardless of its substance. These failures would likely interact with each other—internal squabbling among commissioners, for example, might affect the willingness of Congress to fund the Commission or the Executive Branch to cede documents to it, which in turn would lead the media and public to ignore or criticize the Commission and its report.

Responding to its difficult position, the Commission sought simultaneously to assure the public of its independent professionalism and to

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187. See KEAN & HAMILTON, *supra* note 6, at 5–6, 12–13 (describing how Kean & Hamilton came to be involved); Editorial, *A New Chairman for 9/11 Review*, N.Y. TIMES, Dec. 17, 2002, at A34 (applauding the naming of Kean to replace Kissinger); David Firestone, *Kissinger Pulls Out as Chief Of Inquiry Into 9/11 Attacks*, N.Y. TIMES, Dec. 14, 2002, at A1 (reporting that Kissinger resigned because he would be unable to reveal his client list).

188. The commitment to appoint Rudman was characterized as an unwritten "gentlemen's agreement" reached during the bill's conference negotiations. 148 CONG. REC. 22,339, 22,402 (2002) (statement of Representative Roemer) (emphasizing that the "gentlemen's agreement . . . is in this bill and the legislation's intent"). On Rudman's "fierce independence," see Amy Goldstein, *9/11 Panel Gets New Chairman; Ex-N.J. Governor Kean Named to Replace Kissinger*, WASH. POST, Dec. 17, 2002, at A01 (reporting that Rudman was independent but Kean "has a background of 'moderation and reaching across the aisle.'").

189. See KEAN & HAMILTON, *supra* note 6, at 5, 12 (recounting by Kean and Hamilton as to their selections).

190. *Id.* at 14.

assure its principals and those it would investigate that its professionalism did not make it excessively independent.<sup>191</sup> Given the extent of media and public scrutiny, especially from victims' families,<sup>192</sup> the commissioners and their staff understood that presenting themselves as a legitimate, independent entity would not only affect the ultimate perception of their final product by the political branches and the public, but would color the Commission's historical reputation as well.<sup>193</sup> The Commission resolved to present its work and demonstrate its independence in numerous public hearings, press conferences, and press interviews,<sup>194</sup> and undertook, in *USA Today's* words, "a public-relations campaign unprecedented for the type of 'blue ribbon' commission usually consigned to the back pages of newspapers."<sup>195</sup> At the same time, the Commission sought to negotiate Washington's political and bureaucratic bogs by hiring familiar Washington faces and veterans of the federal bureaucracy.<sup>196</sup> As an important first step, the Commission hired a staff with experience in national security and knowledge of the agencies it would be studying.<sup>197</sup> The commissioners chose as their Executive Director Philip Zelikow, an academic who had served in earlier Republican administrations as well as on the George W. Bush transition team—a controversial choice, given his ties to the Bush administration and especially to then-National Security Advisor Condoleezza Rice.<sup>198</sup> Many of the commission staff members whose work Zelikow directed

191. See *id.* at 8 (indicating the opposing tensions facing the Commission as between the public and the White House).

192. See Gail Russell Chaddock, *A Key Force Behind the 9/11 Commission*, CHRISTIAN SCIENCE MONITOR, Mar. 25, 2004, at 3 (reporting the influence of family and victims' groups on the commission). On the Commission's good but at times contentious relations with the victims' families, see LUNDBERG, *supra* note 185, at 27–29 (describing effect and influence of families on the commission's work).

193. See KEAN & HAMILTON, *supra* note 6, at 6 (focusing on the historical legacy of the commission as viewed through the eyes of the public).

194. The commissioners agreed from the beginning that they should speak to the press in order to explain and publicize their work, but always in bipartisan pairings in order to emphasize the Commission's nonpartisan approach. See LUNDBERG, *supra* note 185, at 14–15 (describing the intention of the Commission to be open with the public through the media). The desire for publicity and transparency pervaded the Commission's early discussions about whether they should hold open hearings. See *id.* at 25 (describing some of the staff's reluctance to open hearings).

195. Mimi Hall, *9/11 Commission Seeking out the Spotlight*, USA TODAY, May 18, 2004, at 15A. The Commission also retained a public relations firm. FELZENBERG, *supra* note 143, at 419.

196. *Supra* note 167 and accompanying text.

197. See Intelligence Authorization Act for Fiscal Year 2003 § 603(b)(3), 6 U.S.C. § 101 note (Supp. IV 2004) (requiring specific types of people and experiences for the commission).

198. On the suspicion with which the victims' families viewed Zelikow, see KRISTEN

were former congressional oversight committee staff members or former employees of the federal agencies whose performance the Commission would review, or they were detailed from national security agencies.<sup>199</sup>

Paradoxically, the Commission's insider nature enabled it to procure records and interviews while retaining its nominal independence.<sup>200</sup> Its greatest successes in hard-fought battles with the White House over information resulted in part from many of the commissioners' reputations as trustworthy Washingtonians, at once above the political fray and respectful of political propriety.<sup>201</sup> The Commission reinforced this reputation by limiting the exercise of its subpoena power and therefore avoiding direct confrontation with the Executive Branch—a strategy that would also allow it to avoid intra-commission battles over authorizing the issuance of subpoenas.<sup>202</sup> Its statutory design and its commitment to bipartisan consensus among the commissioners thus led the Commission to try to avoid taking votes when the outcome was uncertain and would lead to conflict<sup>203</sup>—an effort that did not always prove successful, as the Commission did come to at least one nonunanimous agreement to issue subpoenas.<sup>204</sup> But Kean and Hamilton also feared that

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BREITWEISER, *WAKE-UP CALL: THE POLITICAL EDUCATION OF A 9/11 WIDOW* 145–51 (2006) ("I was skeptical about Zelikow from day one. I didn't like him."); KEAN AND HAMILTON, *supra* note 6, at 27–28, 98 (providing Zelikow's professional history); *see also infra* notes 294–97 and accompanying text (discussing recent revelations about Zelikow's controversial relationship with the Bush administration).

199. *See* LUNDBERG, *supra* note 185, at 16 (adding that most of the staff already had security clearance); SHENON, *supra* note 132, at 86 (describing the Staff members as "smart, experienced investigators"). An additional reason for hiring experienced staff was that many already possessed the security clearances they needed to review classified documents—an important concern given the Commission's brief mandate and the delays that security checks cause. May, *supra* note 185.

200. *See* KEAN & HAMILTON, *supra* note 6, at 30 (equating success with having "commissioners with political clout").

201. *See id.* at 23–24, 57, 63, 288–89, 322 (describing the balancing methodologies used by the commissions members).

202. *See id.* at 20 (providing perspective to the gravity of the subpoena issue). Democratic commissioners Richard Ben-Veniste and Jamie Gorelick, both of whom had prosecutorial experience, favored issuing subpoenas regularly to agencies with all commission requests for information. *See* SHENON, *supra* note 132, at 70, 201 (describing a purposeful intention not to seek subpoenas). Kean rejected this approach, and refused to hire a candidate for commission general counsel that Gorelick had recommended because the candidate stated in her interview that the commission should issue subpoenas at the earliest sign of Executive Branch resistance to a document request. *See id.* at 93–94 (highlighting the drastically different views they shared on the subpoena issue).

203. *See* LUNDBERG, *supra* note 185, at 34–35 (describing the decision not to call votes as an "effective" strategy).

204. In the decision to issue a subpoena to the North American Aerospace Defense

contested subpoenas, followed by litigation against a White House committed to a broad conception of Executive Branch privilege, would prove time-consuming and, in all likelihood, would not be resolved before the Commission's statutory mandate ended.<sup>205</sup> Thus, while the Commission eventually did issue subpoenas to the least cooperative agencies—the Federal Aviation Administration (FAA), the North American Aerospace Defense Command (NORAD), and the City of New York<sup>206</sup>—its preferred method of obtaining information was to use political pressure.<sup>207</sup> It exerted this pressure in a number of ways: by having a commissioner, usually one of the chairmen, complain to the press about a lack of access; by issuing interim reports to Congress in order to publicize its complaints; by rallying allies in Congress to seek support; and by persuading or encouraging prominent members of the victims' families to complain in public and to the press.<sup>208</sup>

In a telling example of the Commission's struggles with the White House and its ultimate, though limited, success in securing information, the Commission was only able to persuade Condoleezza Rice to testify in a public hearing after Richard Clarke, former special advisor to the National Security Council, harshly criticized the Bush administration's pre-9/11 counter-terrorism efforts in a widely televised commission hearing.<sup>209</sup> Defending herself and the administration, Rice acknowledged the existence of an August 6, 2001,

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Command (NORAD), Slade Gorton and Tom Kean joined all of the Democratic commissions except for Lee Hamilton, who voted against the proposal. SHENON, *supra* note 132, at 207.

205. See KEAN & HAMILTON, *supra* note 6, at 65, 99–101 (explaining the risk of the subpoena issue, but that public pressure could work in the Commission's favor without having to resort to subpoenas). The Bush White House had already demonstrated its willingness to fight legal efforts to force disclosure of Executive Branch information, most famously in litigation over Vice President Cheney's National Energy Policy Development Group. See *generally* Cheney v. U.S. Dist. Court for Dist. of Columbia, 542, U.S. 367, 384–85 (2004).

206. See Dan Eggen, *9/11 Panel Issues Third Subpoena; New York Told to Turn over Tapes of Emergency Calls*, WASH. POST, Nov. 21, 2003, at A16 (cataloguing the road to the eventual subpoena for the tapes of New York); Philip Shenon, *9/11 Panel Issues Subpoena to Pentagon*, N.Y. TIMES, Nov. 8, 2003, at A13 (recording the history of the second subpoena for NORAD documents); Philip Shenon, *Commission on 9/11 Attacks Issues Subpoena to the F.A.A.*, N.Y. TIMES, Oct. 16, 2003, at A16 (reporting the first subpoena, but with concerns about legal delays).

207. See KEAN & HAMILTON, *supra* note 6, at 75 (explaining how "going public" allowed the commission to exert "pressure").

208. See *id.* at 75–81, 94–95, 148–49 (discussing numerous methods by which the Commission was able to elicit information); LUNDBERG, *supra* note 185, at 29–35 (chronicling the Commission's use of interim reports, negotiations, and subpoenas); SHENON, *supra* note 132, at 216 (describing the results of the reports and negotiations).

209. See SHENON, *supra* note 132, at 289–92 ("[I]n the panicked aftermath of Clarke's testimony... Rice grew uncharacteristically frantic... 'Condi desperately wanted to [testify].'" ).

Presidential Daily Briefing ("PDB") titled "Bin Ladin Determined to Strike in U.S."<sup>210</sup> The Commission used this opportunity to argue successfully that the document be declassified.<sup>211</sup> And when the White House agreed to allow Rice to testify, it also agreed to allow the full Commission to meet the President, accompanied by the Vice President, in closed session.<sup>212</sup> The Commission had gained public attention through its well-publicized efforts to secure information and its open hearings,<sup>213</sup> which seemed to be conducted independently from the political branches and in good faith. The hearings in turn produced sensational, controversial testimony, which pressured the White House to respond by granting the Commission's request for additional access to information and officials that it had been previously denied, and the declassification of what had been one of the most highly protected documents in the Executive Branch's possession, a PDB.<sup>214</sup>

Despite such successes, however, the Commission could not fully insulate itself from Washington's partisan politics,<sup>215</sup> nor could it gain

210. *See id.* at 298 ("Rice confirmed officially . . . that the August 6 PDB was an explicit warning from the CIA . . . that al-Qaeda was going to try to strike on American soil.").

211. *See* KEAN & HAMILTON, *supra* note 6, at 175–82 ("Having seen the August 6 PDB, we knew there was no reason why it could not be declassified and made available to the public . . .").

212. *See* Philip Shenon & Elisabeth Bumiller, *Bush Allows Rice to Testify on 9/11 in a Public Session*, N.Y. TIMES, Mar. 31, 2004, at A1 ("The decision . . . came as the White House also agreed to drop the strict terms it sought on the panel's private interviews with Mr. Bush and Vice President Dick Cheney."); KEAN & HAMILTON, *supra* note 6, at 175 ("Gonzales shifted . . . and proposed one joint meeting with President Bush, Vice-President Cheney, and the full commission.").

213. *See* SHENON, *supra* note 132, at 96–104 (describing one such hearing and attempt to elicit information).

214. For a discussion on the earlier struggles between the Commission and the White House over access to all of the terrorist-related PDBs, see SHENON, *supra* note 132, at 214–19. *See also* Dan Eggen, *9/11 Panel to Have Rare Glimpse of Presidential Briefings*, WASH. POST, Nov. 16, 2003, at A9 (calling the release a "watershed moment in the long history of battles between the executive branch and outside investigators"). To understand the somewhat overblown significance of PDBs, see Thomas S. Blanton, *The President's Daily Brief*, The National Security Archive (2004), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB116/index.htm> (last visited Aug. 27, 2008) (on file with the Washington and Lee Law Review).

215. Partisan politics emerged in the Commission's own dealings with external actors, as well as internally among members on the Commission. *See, e.g.*, SHENON, *supra* note 132, at 280–89, 293–302 (describing partisan efforts of commissioners during the public testimony of Richard Clarke and Condoleezza Rice); KEAN & HAMILTON, *supra* note 6, at 194–203 (chronicling efforts of Attorney General John Ashcroft to attack Jamie Gorelick, a Democrat on the Commission, during his testimony before the Commission).

perfectly unfettered access to Executive Branch documents and officials.<sup>216</sup> The White House resisted the Commission's efforts to access important documents—including the Presidential Daily Briefings and memos from the National Security Council—and placed restrictions on its interviews with White House officials and other Executive Branch officials and employees.<sup>217</sup> A number of federal agencies also frustrated the Commission with delays or outright refusals to comply with its requests.<sup>218</sup> From a public relations standpoint, these losing battles burnished the Commission's public reputation, legitimating its investigation.<sup>219</sup> Indeed, its struggle to gain access to information likely contributed to its high approval ratings,<sup>220</sup> even if those struggles delayed, and perhaps even adversely affected, its final report.

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216. See SHENON, *supra* note 132, at 151 ("Apart from Philip Zelikow, the commission's staff was never granted access to Bush's PDBs . . .").

217. See LUNDBERG, *supra* note 185, at 35–44 (describing the limits the White House placed on meetings and the "hard line" put on the commission); Shabo, *supra* note 153, at 1053–57 (describing the restrictions to the PDBs and reluctance to permit interviews). The administration mandated that agency representatives would be present when the Commission interviewed current federal employees—a softening of the administration's original stance, when it required that representatives attend even the interviews of *former* employees. KEAN & HAMILTON, *supra* note 6, at 104.

218. See KEAN & HAMILTON, *supra* note 6, at 258–60 ("[T]he delays and caps in document release significantly set back the work of our staff team assigned to the day of 9/11."). The Commission suspected that NORAD and the FAA were not merely unforthcoming with documents and information but affirmatively deceptive—a controversy that continued even after the Commission's dissolution. *Id.*; Dan Eggen, *9/11 Panel Suspected Deception by Pentagon*, WASH. POST, Aug. 2, 2006, at A3 ("For more than two years after the attacks, officials with NORAD and the FAA provided inaccurate information about the response to the hijackings in testimony and media appearances."). In addition, the release of a staff monograph scrutinizing civil air security before, during, and after the attacks was delayed until after the final *Report* was issued while federal agencies were reviewing the monograph, a process that frustrated the Commissioners. Jim Dwyer, *Part of 9/11 Report Remains Unreleased; An Inquiry Is Begun*, N.Y. TIMES, Oct. 30, 2004, at A11. A version that was released in January 2005 to the public included a large number of redactions, while a final version, with much fewer redactions, did not appear until September 2005. *Id.*

219. See LUNDBERG, *supra* note 185, at 52 ("[E]very time we ran into any kind of difficulty and went to the press, [the White House] ended up surrendering.").

220. According to a Pew Research Center poll conducted in the weeks prior to the *Report's* release in July 2004, a majority of those surveyed, and nearly equal percentages of self-identified Democrats (61%), Republicans (62%), and independents (60%), approved of the job the Commission had done, while a much smaller percentage of each category disapproved (24% of Democrats and Republicans and 26% of independents). Pew Research Center for the People and the Press, *9/11 Commission Has Bipartisan Support* (July 20, 2004), <http://people-press.org/reports/display.php3?PageID=851> (last visited Aug. 27, 2008) (on file with the Washington and Lee Law Review).

### D. The Commission's Report

The Commission released its unanimous report<sup>221</sup> in late July 2004 to immediate popular and critical success.<sup>222</sup> Aware of the document's likely historical significance, the commissioners had hoped that the *Report* would offer the "foundational narrative" that would become a "solid and authoritative foundation of the story" to which additional facts could later be added and upon which later interpretations would build.<sup>223</sup> The *Report* was self-consciously textual and literary—indeed, the opening sentence in its Preface declares itself a "narrative" with "recommendations that flow from it."<sup>224</sup> A distinctly literary sensibility also extended to its publication: The Commission granted the commercial publisher W.W. Norton the right to produce an "authorized edition" of its report in exchange for assurances that the publisher would make the volume widely available in bookstores across the country on the official release date.<sup>225</sup>

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221. The commissioners had evidently decided early in the Commission's operations to achieve unanimity. See FELZENBERG, *supra* note 143, at 410 ("Kean stated from the outset of his tenure that he hoped and expected that the commission would be unanimous in its findings and in its recommendations."); LUNDBERG, *supra* note 185, at 11–12 ("[I]f the commission could not issue a unanimous report, 'we were wasting our time and the government's money . . . .'"); SHENON, *supra* note 132, at 160, 402, 413 (discussing the hope for a unanimous report). The one commissioner who threatened to dissent was former Senator Max Cleland. *Id.* at 160. Cleland resigned in December 2003 to accept an appointment on the board of the Export-Import Bank—an appointment that "was rather suspicious" given Cleland's public attacks on both the White House and the commission." SHENON, *supra* note 132, at 160–62; see also Eric Boehlert, *The President Ought to Be Ashamed*, SALON.COM, Nov. 21, 2003, <http://dir.salon.com/story/news/feature/2003/11/21/cleland/index.html> (last visited Aug. 27, 2008) (interviewing Cleland about his criticism of the Bush administration) (on file with the Washington and Lee Law Review).

222. See Edward Wyatt, *Bookstores Counting Strong Sales for the Commission's Report*, N.Y. TIMES, July 24, 2004, at A8 (discussing the book's strong popularity). The report sold 600,000 copies in its initial few months of release and dominated nonfiction best-seller lists; its commercial publisher printed 1.5 million copies, despite the fact that the entire *Report* was available free for download from the Commission's website. See SHENON, *supra* note 132, at 416 (discussing demands on publisher); Joanna Glasner, *Free Content Still Sells*, WIRED.COM, Sept. 20, 2004, <http://www.wired.com/techbiz/media/news/2004/09/64828> (last visited Aug. 27, 2008) (chronicling book's sales despite availability online) (on file with the Washington and Lee Law Review). It was even nominated for a National Book Award. Edward Wyatt, *9/11 Report Is National Book Award Finalist*, N.Y. TIMES, Oct. 14, 2004, at E1.

223. KEAN & HAMILTON, *supra* note 6, at 29, 278.

224. 9/11 COMMISSION REPORT, *supra* note 11, at xv.

225. See KEAN & HAMILTON, *supra* note 6, at 271 ("Norton's proposal allowed for the lowest-priced paperback, quick turnaround, and nationwide distribution."). By gaining a head start on its commercial competition, Norton gained what proved to be a valuable market advantage. The agreement caused some controversy, as Norton paid nothing for the rights to publish the *Report*'s "authorized edition"—but did agree to publish the book quickly, make 500,000 copies, price the book at \$10, and donate part of the proceeds to charity—and Philip



The *Report* in fact tells two distinct narratives about 9/11. The first is of the hijackings themselves, which the *Report* recounts in a journalistic, at times even novelistic, style—a distinct departure from the workman-like prose that characterizes most government reports.<sup>226</sup> It draws the reader into the narrative by scrambling the chronology of events, beginning with a dramatic description of the attacks before flashing back in time from 9/11 to the earliest days of al-Qaeda.<sup>227</sup> The *Report* then slowly moves forward again as "The Attack Looms" (Chapter 7)<sup>228</sup> but is not stopped; "The System Was Blinking Red" (Chapter 8)<sup>229</sup> but no one reacts in time; and the aftermath of the attacks provoke both "Heroism and Horror" (Chapter 9).<sup>230</sup> The escalating tensions of the early chapters are then punctuated by "Wartime" (Chapter 10).<sup>231</sup> A tale of dread whose denouement the reader already knows (from the memory of the event as well as from the *Report's* dramatic opening), this first narrative presents 9/11 as an almost unavoidable tragedy notwithstanding its foreshadowing.<sup>232</sup> Al-Qaeda acts; America (barely) reacts.<sup>233</sup>

The second narrative, which emerges from the analysis and policy prescriptions in the *Report's* final three chapters, describes a widespread administrative disaster and an uncertain future.<sup>234</sup> The Commission's

Zelikow had a pre-existing relationship with the publisher that he allegedly did not disclose to all of the commissioners. See Philip Shenon, *9/11 Panel Chooses Publisher for Report*, N.Y. TIMES, May 25, 2004, at A20 (describing Zelikow's relationship with Norton as "longstanding"). But see Alan Wolper, *Who Is "Sore Loser" in 9/11 Book Deal?*, EDITOR & PUBLISHER, July 2004, at 26 (quoting competing publishers who stated that the bidding process for the publication rights was fair). For an institutional account of the Commission's Report, see Oz Frankel, *The 9/11 Commission Report as a Chapter in the History of the Book*, paper delivered to the Society for the History of Authorship, Reading, and Publishing, Minneapolis, Minn., July 2007 (on file with the Washington and Lee Law Review).

226. See, e.g., 9/11 COMMISSION REPORT, *supra* note 11, at 1 (opening *Report* with the sentence, "Tuesday, September 11, 2001, dawned temperate and nearly cloudless in the eastern United States"). For a discussion on the Commission's stylistic choices for its Report, see KEAN AND HAMILTON, *supra* note 6, at 272–74, and May, *supra* note 185, at 30–35.

227. See 9/11 COMMISSION REPORT, *supra* note 11, at 1–70 (recounting the September 11 terrorist attacks and history of al-Qaeda and its leaders).

228. *Id.* at 215.

229. *Id.* at 254.

230. *Id.* at 278.

231. *Id.* at 325.

232. See Alison Young, *Images in the Aftermath of Trauma: Responding to September 11th*, 3 CRIME MEDIA CULTURE 30, 34–39 (2007) ("[T]he Report sets up the attacks as . . . inevitable . . .").

233. See 9/11 COMMISSION REPORT, *supra* note 11, at 277 ("[D]uring the summer of 2001, [o]fficials . . . were doing everything they possibly could to respond to the threats. Yet . . . [t]he U.S. government was unable to capitalize on mistakes made by al Qaeda. Time ran out.").

234. See *id.* at 353 (discussing "symptoms of the government's broader inability to adapt how it manages problems to the new challenges of the twenty-first century").

investigation, the *Report's* preface explains, found no specific, remediable cause for the attacks and revealed that no particular individual could or should be blamed for the country's vulnerability to terrorism.<sup>235</sup> Instead, the Commission identified an underlying and overdetermined institutional cause in the actions and inactions of the vast parts of the administrative state currently entrusted with overseeing military, intelligence, law enforcement, diplomatic, and public safety agencies.<sup>236</sup> The unprecedented disasters of 9/11 were the result, ultimately, of nothing more dramatic than widespread bureaucratic inertia and risk aversion—albeit a particularly vivid instance of them, both in degree and in effect.<sup>237</sup> This second narrative is a depressing tale—less spectacular and far more banal than the narrative of the attack, and as a result even more frightening. Incapable of organizing and controlling its scattered operations and agents,<sup>238</sup> the state itself seemed to have no agency. The *Report's* two contrasting narratives thus implicitly contrast two diametrically opposed regimes. In the first we see the perpetrators, an entrepreneurial band of religiously and politically extremist fanatics capable, thanks to skill, luck, and the incompetence of its adversaries, of carrying out the most successful terrorist act in American history.<sup>239</sup> The terrorists' threat is especially grave because they fail to conform to the rational game-theoretic models of behavior on which international relations and modern bureaucracies depend.<sup>240</sup> By contrast, the second narrative documents a sclerotic, turf-protecting bureaucracy incapable of coordinating its actions or of understanding the world it needs to interpret.<sup>241</sup> The clashing sets of narrative actors vividly convey the *Report's* most serious message, even as they illustrate the Commission's reason for

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235. See 9/11 COMMISSION REPORT, *supra* note 11, at xvi ("Our aim has not been to assign individual blame.").

236. See *id.* ("We have been forced to think about the way our government is organized. The massive departments and agencies that prevailed in the great struggles of the twentieth century must work together in new ways, so that all the instruments of national power can be combined.").

237. See *id.* ("We learned of fault lines within our government . . . . We learned of the pervasive problems of managing and sharing information across a large and unwieldy government . . . .").

238. See *id.* at 266–67 (detailing one "example of how day-to-day gaps in information sharing can emerge").

239. See *id.* at xvi ("We learned about an enemy who is sophisticated, patient, disciplined, and lethal."); *id.* at 3 (describing one instance of airport officials' incompetence); *id.* at xv (describing the attacks as "unprecedented").

240. See *id.* at 341 (describing the nontraditional operations of terrorists).

241. See *id.* at 348 ("The road to 9/11 again illustrates how the large, unwieldy U.S. government tended to underestimate a threat that grew ever greater.").

being: If the national security state lacks agency, how can it be reformed to defeat this nebulous and exceptionally dangerous foe?<sup>242</sup>

Inside accounts of the drafting process make clear that the commissioners came to this troubling conclusion from their extensive review of the evidence and the reports prepared diligently by the Commission's staff.<sup>243</sup> These accounts also suggest, however, that the Commission's desire to achieve unanimity and appear nonpartisan—that is, to be both independent from the political branches and to avoid partisan politics—also motivated its factual conclusions.<sup>244</sup> A telling paragraph in Kean and Hamilton's institutional memoir declares, "unity of effort was . . . what was needed in the country—a sense of national unification and resolve that could cut across partisan lines."<sup>245</sup> Seeking to differentiate itself from the sluggish and unresponsive bureaucracy it was reporting on, the Commission sought to cut through the "entrenched ideological attitudes" that permeate Washington.<sup>246</sup> To succeed in countering the threat that emerged on September 11, the Commission and the entire nation needed to "put[] aside those attitudes, to get the job done," to unify around an explanation that saw institutions, bureaucracy, and partisan politics as the underlying causes of the nation's vulnerability.<sup>247</sup> At the same time, however, the Commission's refusal to identify particular elected or appointed officials as culpable appears also to have resulted from efforts by commissioners affiliated with one party to review carefully and criticize portions of the *Report* that might have appeared to find their allies blameworthy.<sup>248</sup> A similar but more self-critical comment made by Ernest May, a prominent historian at Harvard who played a key role in drafting the *Report*, suggests that the staff also sought

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242. See *id.* at 361 (imploping Americans to question not only "*what to do*—the shape and objectives of a strategy" but also "*how to do it*—organizing their government in a different way").

243. See KEAN & HAMILTON, *supra* note 6, at 272–78 (describing the editing process). For a discussion on the staff's work and the "statements" of the evidence, produced by teams of staff members, see generally LUNDBERG, *supra* note 185, and SHENON, *supra* note 132.

244. See SHENON, *supra* note 132, at 413 ("We did pull our punches on the conclusions because we wanted to have a unanimous report.").

245. KEAN & HAMILTON, *supra* note 6, at 288.

246. *Id.*

247. *Id.*

248. See LUNDBERG, *supra* note 185, at 58 ("Democratic commissioners . . . felt a special burden to be vigilant . . . [T]he Clinton Administration did not [have a chance to argue over facts]."); SHENON, *supra* note 132, at 386–87, 405 ("Democrats pushed . . . to support President Clinton, while Republicans pushed . . . to support President Bush. . . [W]e finally cut all adjectives . . ."); May & Zelikow, *supra* note 185, at 208–09 ("Keeping peace within a large and diverse staff and avoiding the appearance of partisan tilt sometimes required muting interpretation.").

both to rise above partisanship and to defend their allies in the federal government.<sup>249</sup> Veterans of particular agencies, May laments, ultimately succeeded in maintaining good relations with their former and possible future employers by softening the *Report's* censure of the agencies' performance.<sup>250</sup>

Housed in the Legislative Branch but structurally outside the federal bureaucracy and political system, the Commission tempered its seemingly independent criticism of political and bureaucratic actors by offering a nonpartisan, abstract condemnation of everything but of no one in particular.<sup>251</sup> Nevertheless, it presented a number of proposals to answer what it described as the substantive question of "*what to do*" and the organizational question of "*how to do it.*"<sup>252</sup> The substantive question requires a "global strategy" to counter terrorism, the *Report* found, and it offered a series of measures to improve foreign policy and homeland security, many of them organizational in nature and based on the presumption that consolidating competing and overlapping agencies under a single executive was critical to post-9/11 national and homeland security.<sup>253</sup> As key components of its answer to the question of how to accomplish the strategic goals, the *Report* proposed five significant changes: create a National Counterterrorism Center (NCTC) to coordinate efforts across agencies to plan counterterrorist operations and share intelligence;<sup>254</sup> reorganize the Intelligence Community (IC) under a Director of National Intelligence (DNI), who would impose a "unity of effort" in gathering and analyzing intelligence;<sup>255</sup> improve information sharing across governmental

249. See May, *supra* note 185, at 34 ("[T]he report is probably too balanced."). At least one high-ranking Commission staff member strongly disagrees with May's assessment. See generally E-mail from Daniel Marcus, former General Counsel, 9/11 Commission, to author (Oct. 13, 2008) (on file with author).

250. See *id.* ("Collective drafting led to the introduction of passages that offset criticism of an agency with words of praise.").

251. See 9/11 COMMISSION REPORT, *supra* note 11, at xv (describing the Commission as nonpartisan and aiming not "to assign individual blame").

252. *Id.* at 361.

253. See *id.* at 361–98 (providing a "broad political-military strategy" in response to the attacks); GOODSSELL, *supra* note 96, at 42–43 (analyzing studies of bureaucracies and reporting on relative differences among similarly situated organizations). The tendency to rely on government reorganization to solve a substantive problem of governance is a longstanding trope of American public administration generally; it is also a proposal typically offered by advisory commissions. See PAUL LIGHT, THE TIDES OF REFORM 15–32 (1997) (providing a detailed history and analysis of governmental reform); HAROLD SEIDMAN, POLITICS, POSITION, AND POWER 4–5 (5th ed. 1998) ("Rare indeed is the . . . committee with the self-restraint to forgo recommending organizational or procedural answers to the problems it cannot solve.").

254. See 9/11 COMMISSION REPORT, *supra* note 11, at 401–06 (recommending the "establishment of a National Counterterrorism Center").

255. See *id.* at 407–19 (describing a strategy entitled "Unity of Effort in the Intelligence

agencies;<sup>256</sup> reorganize congressional oversight of intelligence and homeland security;<sup>257</sup> and improve the performance of the FBI and the Departments of Defense and Homeland Security in gathering and analyzing domestic counterterrorism intelligence.<sup>258</sup>

Thanks to the Commission's successful efforts to present itself as an independent, authoritative investigative body and the *Report's* critical and commercial success, these proposals enjoyed significant political momentum.<sup>259</sup>

Community"). Numerous predecessors had made similar recommendations about reorganization and consolidation of the IC—including most recently the congressional Joint Inquiry and a classified commission overseen by Brent Scowcroft (national security advisor under the President George H.W. Bush), whose work began before the attacks and whose report was delivered after them—all of them largely without success. See COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, FINAL REPORT, at 6 (2005) [hereinafter WMD REPORT] ("[C]ommission after commission has identified some of the same fundamental failings we see in the Intelligence Community, usually to little effect."); ARTHUR S. HULNICK, KEEPING US SAFE 187–91 (2004) (analyzing the Bush administration's intelligence reforms and the response to the Scowcroft Report); Richard A. Best, Jr., *Proposals for Intelligence Reorganization, 1949–2004*, CRS REPORT RL32500 (Sept. 24, 2004) ("Proposals to reorganize the Intelligence Community emerged in the period immediately following passage of the National Security Act of 1947 . . ."); Richard K. Betts, *The New Politics of Intelligence: Will Reforms Work This Time?*, FOREIGN AFF., May/June 2004, at 2 ("Previous controversies over the quality of intelligence have . . . [led] to only minor reforms at best.").

256. See 9/11 COMMISSION REPORT, *supra* note 11, at 416–19 ("Information procedures should provide incentives for sharing, to restore a better balance between security and shared knowledge.").

257. See *id.* at 419–23 (recommending that Congress should address the dysfunctional intelligence oversight); Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721, 756–57 (2007) ("The . . . report largely concerned the conduct of the Intelligence Community, though it did address the oversight role of Congress.").

258. See 9/11 COMMISSION REPORT, *supra* note 11, at 423–28 (recommending the establishment of a specialized workforce trained in intelligence and national security issues).

259. The *New York Times*, for example, published numerous editorials in the months leading up to passage of the Intelligence Reform Act. See, e.g., Editorial, *The G.O.P. vs. President Bush*, N.Y. TIMES, Dec. 6, 2004 at 22 ("The blocked measure—a product of the independent 9/11 commission and a two-house conference compromise—would create a powerful new intelligence director to cut through gridlock."); Editorial, *Start Spending Some of that Capital*, N.Y. TIMES, Nov. 13, 2004, at 14 ("[I]t is not enough for the president to stand by and let his House leaders return to business as usual by compromising the heart out of the worthy Senate bill endorsed by the 9/11 commission."); Editorial, *True Intelligence Reform, Or None*, N.Y. TIMES, Oct. 25, 2004, at 20 ("If the House were more responsible, the work of the bipartisan 9/11 commission would be successfully concluded by now."); Editorial, *Unfinished Intelligence Work*, N.Y. TIMES, Oct. 11, 2004, at 22 ("The bipartisan Senate bill does far more to fulfill the 9/11 commission's mandate for overhauling the intelligence agencies that so gravely failed the nation before the Sept. 11 attacks . . ."); see also Editorial, *The Best-Selling Post-Mortem*, N.Y. TIMES, Nov. 1, 2004, at 24 (celebrating *Report's* nomination for a National Book Award and describing it as "a lean and stunning narrative" derived from the Commission's

Released during a heated presidential campaign that turned on national security issues, the *Report's* recommendations were quickly endorsed first by Democratic nominee John Kerry, and then by President Bush.<sup>260</sup> Although the Commission ceased to exist as a matter of law thirty days after the submission to Congress of its final report,<sup>261</sup> Kean, Hamilton, and their fellow commissioners established "The Public Discourse Project," a nongovernmental organization that could lobby Congress and the President to adopt the *Report's* recommendations, educate the public about the *Report*, and evaluate the federal government's performance post-9/11.<sup>262</sup> Congress or the relevant Executive Branch agency quickly adopted the most uncontroversial proposals (if they had not already been adopted before the *Report* was released),<sup>263</sup> including creation of the NCTC.<sup>264</sup> Although Congress has thus far made only minimal efforts to reorganize its oversight of the IC,<sup>265</sup> it has continued to pass legislation based

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"exhaustive investigation").

260. See Helen Fessenden, *The Limits of Intelligence Reform*, FOREIGN AFF., Nov.–Dec. 2005, at 106 ("[T]he Intelligence Reform and Terrorism Prevention Act . . . was signed by President George W. Bush in December 2004 and . . . included . . . two recommendations of the 9/11 Commission . . ."); Walter Pincus & Dana Milbank, *Bush Plan Draws on Advice of 9/11 Panel*, WASH. POST, Sept. 9, 2004, at A1 (quoting Kerry as saying, "[i]f George W. Bush were serious about intelligence reform, he'd stop taking half-measures and wholeheartedly endorse the 9/11 Commission recommendations and work for their immediate passage by Congress"); Jim VandeHei, *9/11 Panel Roiling Campaign Platforms*, WASH. POST, Aug. 9, 2004, at A1 ("Kerry, the Democratic presidential nominee, has seized on the report to bolster his anti-terrorism message and beat back accusations from Republicans that he is indecisive.").

261. See Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 610(c), 116 Stat. 2408 (2002) (codified at 6 U.S.C. § 101 (Supp. IV 2004)), amended by Act of Mar. 16, 2004, Pub. L. No. 108-207, 118 Stat. 556 (codified at 6 U.S.C. § 101 note (Supp. IV 2004)) (establishing the National Commission on Terrorist Attacks Upon the United States).

262. See FELZENBERG, *supra* note 143, at 437–38 (discussing the assembly of a "skeletal operation" so as to "remain part of the policy process"); KEAN & HAMILTON, *supra* note 6, at 327–46 ("[W]e decided to create a small private, nonprofit foundation, the 9/11 Public Discourse Project, to carry on and support our work."). This was not the first instance of a commission with an afterlife: The President's Water Resources Policy Commission, for example, not only went beyond its mandate and formulated a draft statute, but its members made the draft public one year after the commission's sunseting. See KENNETH TROMBLEY, *THE LIFE AND TIMES OF A HAPPY LIBERAL: A BIOGRAPHY OF MORRIS LLEWELLYN COOKE* 243 (1954) ("[T]he easiest way [to point out changes to laws that should be made] was to draft a bill.").

263. See Richard A. Falkenrath, *The 9/11 Commission Report: A Review Essay*, 29 INT'L SEC. 170, 182–85 (2005) ("Many of the commission's recommendations are already being put into practice . . .").

264. See Exec. Order No. 13,354, 69 Fed. Reg. 53,589 (Aug. 27, 2004) ("There is hereby established a National Counterterrorism Center . . .").

265. See RICHARD A. BEST, JR., INTELLIGENCE ISSUES FOR CONGRESS, CONG. RES. SERV. REP. No. 33,539, at 10 (May 16, 2007) ("The 9/11 Commission concluded that congressional oversight of intelligence activities was 'dysfunctional.'"); 9/11 PUBLIC DISCOURSE PROJECT, FINAL REPORT ON 9/11 COMMISSION RECOMMENDATIONS 2 (Dec. 5, 2005) (awarding a "D" to

on the Commission's proposals, even more than three years after the *Report's* publication.<sup>266</sup> Most prominently, the *Report* inspired enactment of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), the most significant reorganization of the intelligence community since the National Security Act of 1947.<sup>267</sup> Kean and the Public Discourse Project played a crucial role in pressuring Congress and the President to pass the legislation.<sup>268</sup> Having made such a dramatic legislative impact, the Commission proved itself an anomaly—an advisory committee with a high profile, broad public approval, and direct influence over lawmakers.

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Congress for its reform of intelligence oversight); Steven Aftergood, *Intelligence Oversight Deflected by Appropriators*, *SECURITY NEWS*, (Nov. 26, 2007), [http://www.fas.org/blog/secretcy/2007/11/intelligence\\_oversight\\_deflect.html](http://www.fas.org/blog/secretcy/2007/11/intelligence_oversight_deflect.html) (last visited Aug. 28, 2008) ("The efficacy of intelligence oversight in the Senate has been drastically undermined.") (on file with the Washington and Lee Law Review). Another of the Commission's recommendations, that the full extent of spending on intelligence be disclosed to the public, also remains unadopted by Congress. See 9/11 COMMISSION REPORT, *supra* note 11, at 416 ("The specifics of the intelligence appropriation would remain classified, as they are today."); Richard A. Best Jr. & Elizabeth B. Bazan, *Intelligence Spending: Public Disclosure Issues*, *CONG. RES. SERV. REP.* No. 94-261 (updated Feb. 15, 2007) ("[N]either Congress nor the executive branch has regularly made public the total extent of intelligence spending.").

266. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (2007) (codified at 6 U.S.C.A. § 101 note (West 2007)). The consensus in Washington, from the Republican White House to liberal think tanks, appears to favor implementing even more of the Commission's recommendations. See Statement of President George W. Bush on Signing Implementing Recommendations of the 9/11 Commission Act of 2007, 2007 U.S.C.C.A.N. S5 (Aug. 3, 2007) (exhorting Congress to "act on the outstanding 9/11 Commission recommendations to reform the Legislative Branch's oversight of intelligence and counter-terrorism activities"); P.J. Crowley, *TIME TO ACT: 14 STEPS IN 2007 TO FURTHER IMPLEMENT THE 9/11 COMMISSION RECOMMENDATIONS* (2007), available at <http://www.americanprogress.org/issues/2007/01/911.html> (publication by Senior Fellow and Director of National Defense and Homeland Security, Center for American Progress) (last visited Aug. 29, 2008) ("While Congress addressed many 9/11 Commission recommendations through the Intelligence Reform and Terrorism Prevention Act of 2004, more needs to be done.") (on file with the Washington and Lee Law Review).

267. See Intelligence Reform & Terrorism Prevention Act (IRTPA) of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3638 (2004) (codified as amended in scattered sections of 5 U.S.C., 8 U.S.C., 22 U.S.C., 28 U.S.C., 46 U.S.C., 49 U.S.C., and 50 U.S.C.) (stating as its purpose "[t]o reform the intelligence community and the intelligence and intelligence-related activities of the United States Government"). Senators from both parties named the Commission as the key catalyst for what became the IRTPA. See, e.g., 150 CONG. REC. S9700, 9700-01 (daily ed. Sept. 24, 2004) (statement of Sen. Collins); *id.* at 9703-04 (statement of Sen. Lieberman); *id.* at 9707 (statement of Sen. Rockefeller); *id.* at 9709 (statement of Sen. McCain).

268. See FELZENBERG, *supra* note 143, at 439-42 (chronicling the evolution of President Bush's attitude after Kean and Hamilton's public appearances).

*IV. The 9/11 Commission as an Institution of Governance:  
Design and Operational Lessons*

In September 2005, a little more than two weeks after Hurricane Katrina made landfall in New Orleans and across the Gulf Coast, members of the House of Representatives debated how best to investigate governmental failures in responding to the hurricane and its devastation.<sup>269</sup> During the partisan floor debate, Republican House members argued that Congress should conduct its own inquiry while Democrats proposed an independent investigation conducted by an institution patterned on the 9/11 Commission.<sup>270</sup> For Republicans, delegating investigatory responsibility to an unelected and unaccountable commission would be "fundamentally unsound and undemocratic," because politically elected representatives must take responsibility for enacting and overseeing legislative and regulatory reform;<sup>271</sup> for Democrats, a congressional inquiry run by a Republican majority would be a "sham," while following the 9/11 Commission's model of bringing "transparency" and "finding the truth and holding people accountable" would enable a "truly independent" investigation, and therefore a more legitimate and capable one.<sup>272</sup> Such debates—in this instance won by the Republican congressional majority—are likely to recur, given the 9/11 Commission's apparent success and its appeal as a model for future independent investigations.<sup>273</sup>

This Part evaluates the Commission's potential as such a model. It considers how well the Commission performed its simultaneous roles as a bureaucratic, quasi-independent institution within the administrative state and as a public institution within a democratic government, while it also considers the risks to government and the public that advisory commissions like the 9/11

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269. See *Pro & Con: Should a Congressional Committee Be Established to Investigate the Preparation for and Response to Hurricane Katrina?*, CONG. DIG., Nov. 2005, at 278, 280 (statement of Rep. Tom Cole) (supporting H.R. 437, establishing the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina).

270. See *id.* at 273, 275 (statement of Rep. Nancy Pelosi) ("[W]e must have a truly independent commission, again, in the manner of the 9/11 Commission.").

271. *Id.* at 278, 280 (statement of Rep. Tom Cole).

272. *Id.* at 273, 275 (statement of Rep. Nancy Pelosi).

273. In August 2008, for example, doubts about the FBI's most recent identification of the alleged perpetrator of the anthrax-laced mailings from late 2001 led at least one commentator to call for an investigation "along the lines of what the 9/11 Commission was charged with doing." See Glenn Greenwald, *Journalists, Their Lying Sources, and the Anthrax Investigation*, SALON.COM, Aug. 3, 2008, <http://www.salon.com/opinion/greenwald/2008/08/03/journalism/index.html> (last visited Sept. 12, 2008) (questioning the sources of misleading information regarding the anthrax scares over the last decade) (on file with the Washington and Lee Law Review).



Commission represent. It concludes that any future body modeled after the Commission should be understood and designed primarily as an institution capable of collecting, organizing, and presenting information, and viewed only secondarily—and with caution—as a policy-making institution.

### *A. The 9/11 Commission as an Administrative and Democratic Institution*

#### *1. Administrative Success*

To the extent that the 9/11 Commission is considered a success as an investigatory advisory commission, that success is defined above all by its ability to meet its informational mandate of gaining access to information, producing a comprehensible and comprehensive final report, and providing useful advice for its principal. Indeed, the Commission successfully obtained an enormous quantity of information from the Executive Branch—certainly more than Congress had been able to extract from the Bush administration during its Joint Inquiry—including documents typically held closely by presidential administrations of both parties.<sup>274</sup>

The Commission's influential proposals have led to significant legislative, Executive Branch, and regulatory reforms.<sup>275</sup> A year and a half after the end of the Commission's existence, the Public Discourse Project, the NGO created by Kean and the other ex-commissioners to lobby Congress, released its "final report card" evaluating the extent to which the federal government had adopted and instituted the Commission's proposals.<sup>276</sup> Although it assigned the government a fairly low grade point average,<sup>277</sup> the fact that an advisory commission could be able to identify a range of issues on which it had any significant effect seems quite remarkable.

The most prominent governmental reform that the Commission proposed was the reorganization of the intelligence community ("IC"). One of the most outspoken proponents of the 9/11 Commission's proposals, Amy Zegart, an academic whose work focuses on the relationship between the organization of national security agencies and their performance,<sup>278</sup> views the Commission's

274. See *supra* note 214 and accompanying text.

275. See *infra* note 281 and accompanying text.

276. See 9/11 Public Discourse Project, Final Report on 9/11 Commission Recommendations (Dec. 5, 2005), [http://www.9-11pdp.org/press/2005-12-05\\_report.pdf](http://www.9-11pdp.org/press/2005-12-05_report.pdf) (last visited Aug. 29, 2008) (grading, on an A–F scale, the government on its institution of the 9/11 Commission's recommendations) (on file with the Washington and Lee Law Review).

277. The report card gave only one A (an A-), and more Ds and Fs than Bs. *Id.*

278. See AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC*

*Report* as one of several converging factors that pushed Congress to initiate the wide-ranging, structural reform of the security state that was necessary in the wake of the 9/11 attacks.<sup>279</sup> For Zegart, the Commission came to the correct conclusions about the institutional failures that allowed the attacks to succeed;<sup>280</sup> unfortunately, she argues, the Commission's wise and well-considered suggestions were defeated during the statute's drafting and implementation by a powerful combination of the national security agencies' bureaucratic inertia and status quo bias, competition among agencies and internecine battles over their turf, and a lack of political will and attention.<sup>281</sup> The Commission's institutional independence, and the moral and political authority it earned during its investigation, enabled its optimal reorganization proposal to get the attention it deserved—even if, in the end, Congress's adoption of it was less than perfect.<sup>282</sup>

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223–36 (1999) (applying public choice theory and new institutionalist theory to identify the bureaucratic and political dynamics that create the nearly infallible resistance to adaptation and reform that national security agencies reflexively offer to any external threat of reform).

279. See AMY B. ZEGART, *SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11 178–79* (2007) (naming the 9/11 Commission's *Report* as one of the impetuses for intelligence reform).

280. See *id.* at 39 ("Investigations . . . reveal that the organizational deficiencies highlighted by reports in the 1990s turned out to be the crucial ones.").

281. See *id.* at 178–82 (describing why "intelligence reform still made little headway"); Intelligence Reform & Terrorism Prevention Act (IRTPA) of 2004, Pub. L. No. 108-458, §§ 1011, 1014, 118 Stat. 3638, 3638 (2004), amending §§ 102A, 1014 of National Security Act of 1947 (codified as amended in scattered sections of 5 U.S.C., 8 U.S.C., 22 U.S.C., 28 U.S.C., 46 U.S.C., 49 U.S.C., and 50 U.S.C.) (granting the DNI budgetary and personnel authority that the Director of Central Intelligence lacked, but strictly limiting the DNI's authority over agencies located within the Department of Defense); see also ZEGART, *supra* note 278, at 21–28 (1999) ("Congress has little reason to oversee [intelligence agencies] once they arise."); Michael A. Turner, *Intelligence Reform and the Politics of Entrenchment*, 18 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 383, 383–84 (2005) ("The legislation . . . provided for only superficial and cosmetic changes in intelligence that cannot possibly spark the comprehensive reform envisaged by the 9/11 Commission . . ."). See generally Gordon Nathaniel Lederman, *Restructuring the Intelligence Community*, in THE FUTURE OF AMERICAN INTELLIGENCE 65, 86–89 (Peter Berkowitz ed., 2005) (describing major provisions of IRTPA); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1663–76 (2006) (analyzing "proposals for agency reorganization"). The entrenchment and inertia represented by Congress's adoption of only parts of the 9/11 Commission's proposals for IC reorganization are longstanding.

282. See, e.g., DEBORAH G. BARGER, *TOWARD A REVOLUTION IN INTELLIGENCE AFFAIRS* 46 (2005), available at [http://www.rand.org/pubs/technical\\_reports/2005/RAND\\_TR242.pdf](http://www.rand.org/pubs/technical_reports/2005/RAND_TR242.pdf) ("Heightened congressional scrutiny, establishment of the Joint Inquiry and Kean Commission investigations into the 9/11 attacks . . . are a direct result of increased public interest in intelligence."); ZEGART, *supra* note 279, at 178–79 ("[T]he intelligence reform bill was nearly derailed and ultimately diluted by the same forces that had defeated similar efforts for years . . ."); Arthur S. Hulnick, *Does the U.S. Intelligence Community Need a DNI?*, 17 INT'L

Viewed this way, the Commission enjoyed enormous—if not complete—bureaucratic success as an administrative institution by organizing public examination of the event and galvanizing official and public opinion around remedial action.<sup>283</sup> A catalyst at a moment of crisis that forced Congress to seize the opportunity afforded by catastrophic intelligence failure, the Commission managed its conditions of existence in order to contribute to a period of significant organizational transformation.<sup>284</sup> By any objective measure, the Commission influenced public opinion, law, and government policy far beyond what could have been expected based on the past performance of other advisory commissions.

## 2. *Democratic Process and Values*

Although the Commission was not itself an elected, representative body, it operated as Congress's agent, performing oversight functions of agency performance and proposing legislation that Congress would ultimately enact.<sup>285</sup> It also explicitly attempted to hold itself accountable to the public and to the Executive Branch, and to make its investigation and final report appear to be the legitimate process and product of a public agency.<sup>286</sup> It was thus an institution of governance, one whose success in meeting its substantive administrative mandate was in large part attributable to its apparent ability to meet and promote the "democratic values" of impartiality, accountability, transparency, and deliberation.<sup>287</sup>

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J. INTELLIGENCE & COUNTERINTELLIGENCE 710, 710–12 (2004–05) ("Bush announced that he would create the position of Director of National Intelligence . . . to oversee and coordinate the IC, but his proposal seemed weak to some and unnecessary to others.").

283. See 9/11 COMMISSION REPORT, *supra* note 11, at 399–400 (listing specific remedial recommendations for the government to consider); FELZENBERG, *supra* note 143, at 437 ("Our goal is to prevent future attacks.").

284. For a discussion on the theory of "punctuated equilibrium," in which exogenous events bring forth significant historical change, and the theory of "unsettled periods," when opportunities for consequential political, cultural, and social change become possible, see Ira Katznelson, *Periodization and Preferences: Reflections on Purposive Action*, in *COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES* 270, 281–82 (James Mahoney & Dietrich Rueschemeyer eds., 2003), and Stephen D. Krasner, *Sovereignty: An Institutional Perspective*, 21 *COMP. POL. STUD.* 66, 79–80 (1988).

285. *Supra* note 279 and accompanying text.

286. See 9/11 COMMISSION REPORT, *supra* note 11, at xv (describing the Commission's intent to share as much information with the public as possible).

287. VERMEULE, *supra* note 112, at 4–7, and accompanying text.

*a. Impartiality*

In creating the Commission, Congress sought to achieve two types of impartiality: Political impartiality, or the absence of control by a self-interested individual or political party, and institutional impartiality, understood as independence from the Executive Branch and the concomitant ability to review government performance objectively.<sup>288</sup> With respect to its political objectivity, the Commission was bipartisan rather than apolitical or nonpartisan.<sup>289</sup> In its design of the institution, Congress created two decision rules that pulled the Commission in opposite political directions: on the one hand blunting partisan advantage by requiring at least a minimal level of bipartisan agreement among commissioners before document requests and subpoenas to government agencies could be issued, but on the other hand encouraging partisan appointments by vesting Republican and Democratic leaders authority to appoint commissioners in equal number.<sup>290</sup> In its most impartial operations, the Commission appeared to work in a bipartisan fashion—rarely did a partisan faction control the Commission's work—and its *Report* refused to hold officials from both parties accountable.<sup>291</sup> In certain instances, most notably during Richard Clarke's and Condoleezza Rice's contentious public testimony, individual members appeared partisan by posing aggressive questions to the witness who represented the opposing party.<sup>292</sup> Inside reports of the Commission's deliberations also indicate that commissioners sought to protect leaders of their own party from criticism.<sup>293</sup> A recent book reports that Commission executive director Philip Zelikow was viewed as a "mole" for the Bush administration, suggesting that the Commission staff's work was controlled by partisan management.<sup>294</sup> The commissioners have officially denied the allegations, however,<sup>295</sup> and although the book presents evidence

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288. See May, *supra* note 185, at 30–31 (discussing the bipartisanship of the Commission).

289. *Id.*

290. *Supra* notes 159–63, 173–75 and accompanying text.

291. See 9/11 COMMISSION REPORT, *supra* note 11, at xv–xvi (describing the Commission as nonpartisan and aiming not "to assign individual blame").

292. See KEAN & HAMILTON, *supra* note 6, at 179 ("[Ben-Veniste] challenged Rice repeatedly in the style of a cross-examination.").

293. See *supra* note 248 and accompanying text (reporting the failure of commissioners to criticize members of their own party).

294. SHENON, *supra* note 132, at 39.

295. See Statement by the Former 9/11 Commissioners (Feb. 8, 2008), <http://www.fas.org/irp/news/2008/02/911comm.pdf> (last visited Aug. 29, 2008) (asserting that "[n]o staffer did control, or could control, the judgments that Commissioners reached," and that "there is no basis for the allegations of bias [Shenon] asserts") (on file with the Washington and

that Zelikow is a political actor with ties to the Republican party,<sup>296</sup> it fails to present compelling evidence that but for Zelikow's involvement, the final report would have offered a less partisan and more thorough account of the attacks.<sup>297</sup> To the extent that the Commission did not tilt towards one particular party, it was politically impartial and, ultimately, appeared bipartisan; but this lack of clear favoritism was the result of the equal power that representatives of each party possessed rather than a commitment by its members to eschew partisan commitments.<sup>298</sup>

Congress also explicitly designed the Commission so that it would conduct its investigation from outside of the Executive Branch, as a corrective to the frustrations Congress experienced in its Joint Inquiry.<sup>299</sup> In this way, the Commission was charged with maintaining institutional impartiality in evaluating the performance of the Executive Branch. The White House apparently tried to convince Chairman Kean, a former Republican governor, to "stand up for the president, and . . . protect him in the process" from excessive legislative intrusion.<sup>300</sup> There is no indication either in Kean's actions or in the Commission's operations that he did so.<sup>301</sup> The Commission's strategic

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Lee Law Review).

296. Based largely on his interviews with staff members, Shenon either insinuates or explicitly alleges that Zelikow intentionally lied to Kean and Hamilton when he interviewed for the executive director position, SHENON, *supra* note 132, at 169–71; had ongoing discussions with Bush political strategist Karl Rove, probably relating to the Commission's work, *id.* at 107, 173–74; maintained a friendship and personal relationship with Condoleezza Rice, *id.* at 145–46, 149; sought to promote and protect the theory of preemptive war that he developed on behalf of the Bush administration, *id.* at 128, 170; and sought to slip into the Commission's final report trumped-up evidence that Saddam Hussein's Iraq had formal relations with al-Qaeda, *id.* at 321, 323. Commissioners certainly viewed Zelikow as a potentially partisan political actor and decided to appoint as general counsel and deputy executive director individuals who had ties to Democrats. See KEAN & HAMILTON, *supra* note 6, at 35–37 ("[S]ince the executive director was a Republican, other top staff positions had to be reserved for Democrats.").

297. Shenon concedes that Zelikow hired and oversaw an "impressive" staff, SHENON, *supra* note 132, at 86, that Shenon praises throughout his book; pushed hard against White House resistance to declassify documents and strategically drafted the *Report* to limit censorship and redaction by the Bush administration, *id.* at 408–10; got along well with and impressed Democratic commissioner Jamie Gorelick, *id.* at 222; and relented in the wake of staff arguments against including allegations of ties between Iraq and al-Qaeda, *id.* at 380.

298. See 9/11 COMMISSION REPORT, *supra* note 11, at xv ("[F]ive Republicans and five Democrats . . . have come together to present this report without dissent.").

299. See *supra* notes 146–55 and accompanying text.

300. See SHENON, *supra* note 132, at 25, 38 ("Part of Kean's appeal to the White House was the belief that he would be more sensitive than other candidates to the needs of the executive branch.").

301. See *id.* at 38 (describing the fact that the White House "never lost [the] fear" that the

decision to prefer to negotiate with the White House and federal agencies for access to documents rather than automatically issue subpoenas engendered criticism from some of the Democratic commissioners and from victims' families who viewed the approach as excessively deferential.<sup>302</sup> It proved to be a reasonable, successful strategy, however, given the risk of additional delays and costs from seeking to enforce the subpoenas if the White House resisted them and the quantity of information the Commission was able to extract through negotiation and political pressure. Ultimately, the Commission did not appear to be captured by the Bush administration or Congress, and inside accounts suggest that both frequently fought and resented the Commission.<sup>303</sup>

### *b. Accountability*

The Commission was accountable, either directly or indirectly, to numerous institutions. By assigning itself appointment authority over the vast majority of commissioners, Congress gave itself a strong measure of *ex ante* control over the Commission.<sup>304</sup> And by granting the Commission a miniscule budget—less than a quarter of what the Commission would ultimately spend—Congress retained for itself the opportunity to evaluate the progress and tenor of the Commission's investigation when the Commission sought additional funds.<sup>305</sup> Recognizing their accountability to Congress, commissioners sought to maintain good relations with congressional party leaders.<sup>306</sup> Others, too, demanded such accountability. Through its delays in complying with the Commission's requests for certain classified documents and for interviews with White House principals, the White House virtually compelled the Commission to accumulate the public and political credibility that would enable it to pressure the White House into some degree of acquiescence.<sup>307</sup> At the same time, the threat that the press and victims' families would turn against the Commission compelled commissioners to make themselves available through

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Commission would blame Bush and his administration).

302. See *supra* note 202 and accompanying text.

303. See SHENON, *supra* note 132, at 91 ("House Speaker Dennis Hastert of Illinois seemed almost irrationally antagonistic toward the investigation.").

304. See *supra* notes 159–63 and accompanying text.

305. See *supra* note 6 and accompanying text.

306. See FELZENBERG, *supra* note 143, at 414 ("Kean asked each of his colleagues to cultivate whatever ties they had on Capitol Hill . . . to advance the commission's goals.").

307. See SHENON, *supra* note 132, at 74–76 (emphasizing the possible public reaction to the Commission being denied access to classified documents).

open hearings, press conferences, interviews, publicly released draft reports, and private meetings with family members.<sup>308</sup>

As an administrative and legal matter, however, once the Commission issued its final report it quickly began the process of going out of existence, and was soon directly accountable to no one.<sup>309</sup> This lack of accountability is irrelevant for the vast majority of commissions, because a nonexistent commission also has neither legal authority nor direct political influence.<sup>310</sup> Such was not entirely the case with the 9/11 Commission, however. Its political reputation and moral authority outlived its legal existence; moreover, the Public Discourse Project allowed the Commission an unofficial afterlife.<sup>311</sup> Parlaying the Commission's reputation into political influence, former chairman Kean and his fellow former commissioners were able to use persuasion and pressure to get the attention of the public and lawmakers and, ultimately, to lead efforts to reform the structure and performance of the national security state.<sup>312</sup> Because the Commission had ceased to exist, the Public Discourse Project was short-lived,<sup>313</sup> and the commissioners were neither elected officials nor employees or members of a government agency, the ex-commissioners' efforts were made only on behalf of a generalized public interest in national security. Responsibility for any errors in or displeasure with the Commission's final report, legislative proposals, and lobbying efforts now falls on the Commission's principal, Congress—which, of course, is also directly responsible for having enacted many of the Commission's proposals.<sup>314</sup> To the extent that Congress can blame a now-nonexistent Commission for any mistakes the Commission made, commissioners at least face an indirect and thin form of punishment in the harm to the Commission's historical reputation. Reputational harm is not, however, equivalent to the political responsibility that Congress and permanent executive agencies face.

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308. See *id.* at 97 ("Tom Kean . . . had felt strongly that the commission needed an early public hearing, if only to prove to the increasingly anxious 9/11 families that the investigation really was up and running.").

309. See *supra* note 261 and accompanying text.

310. See FELZENBERG, *supra* note 143, at 437 ("Unlike members of past commissions, they would not retreat from public view after they submitted their report.").

311. See *supra* note 262 and accompanying text.

312. See *supra* notes 267–68 and accompanying text.

313. The Project ceased operations on December 31, 2005. 9/11 Public Discourse Project, <http://www.9-11pdp.org/> (last visited Aug. 29, 2008) (on file with the Washington and Lee Law Review).

314. See RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS 55–57 (2005) (discussing politics of enactment of the 9/11 Commission's proposals).

*c. Transparency*

Congress required the Commission to hold an unspecified number of "public hearings and meetings,"<sup>315</sup> and the Commission sought to meet that mandate by holding nineteen days of public hearings.<sup>316</sup> It also frequently made itself available to the press,<sup>317</sup> while its widely available and highly readable final report included hundreds of footnotes, albeit in very small print, that allowed interested readers to assess the empirical support for the Commission's assertions.<sup>318</sup> At the same time, Lee Hamilton held secret, unofficial meetings about IC reform during the investigation with a group of twenty prominent former Secretaries of Defense and State and congressional leaders he termed the "wise men."<sup>319</sup> In addition, numerous aspects of its internal operations remained hidden—at least until the publication of Kean and Hamilton's institutional memoir, *Without Precedent*, and Philip Shenon's book, *The Commission*.<sup>320</sup> In all, the Commission may have been no less transparent than most federal agencies, and in the relatively formal proceedings of its hearings and in the mediated form of press interviews it attempted to hold itself open to the public.<sup>321</sup>

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315. Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, tit. VI, § 606, 116 Stat. 2383, 2412 (2002) (codified at 6 U.S.C. § 101 (Supp. IV 2004)).

316. See 9/11 COMMISSION REPORT, *supra* note 11, at xv (discussing the efforts of the 9/11 Commission to gather input from the public).

317. See *supra* notes 194–95 and accompanying text (discussing the efforts of the 9/11 Commission to make itself available to the press).

318. See 9/11 COMMISSION REPORT, *supra* note 11, at 451–567 (listing the footnotes to the full 9/11 Commission report).

319. See LUNDBERG, *supra* note 185, at 61 (listing some of the "wise men" and others from whom Hamilton sought advice while serving on the commission). Hamilton had also advocated for the equivalent of a DNI "for decades" while in Congress. KEAN & HAMILTON, *supra* note 6, at 286.

320. See generally KEAN & HAMILTON, *supra* note 6 (including numerous inside accounts of the Commission's operations from its co-chairmen); SHENON, *supra* note 132 (purporting to give an uncensored history of the 9/11 Commission). The Commission's records will be available to the public from the National Archives beginning in 2009. The National Archives, 9/11 Commission Records, <http://www.archives.gov/research/9-11-commission/> (last visited Oct. 23, 2008) (on file with the Washington and Lee Law Review).

321. See KEAN & HAMILTON, *supra* note 6, at 142 (asserting that the 9/11 Commission got the media and public better involved as time went on).



*d. Deliberations*

Because the Commission's deliberations were secret, there is no way of evaluating its decisionmaking process except from insider accounts and by reading back from the Commission's unanimity and final report.<sup>322</sup> Insider accounts are largely laudatory of the commissioners' roles in their participation in the *Report's* drafting: Kean and Hamilton suggest that the Commission's deliberations were fulsome, participatory, and well-informed,<sup>323</sup> while Philip Shenon's more critical account generally praises the quality of the commissioners' deliberations but questions Philip Zelikow's filtering of the information on which the commissioners' deliberations were based.<sup>324</sup> Kean and other commissioners were committed to achieving consensus about the Commission's conclusions fairly early in the investigation, and their polite but firm efforts to remove Max Cleland, the commissioner most opposed to the Bush administration, preserved the possibility of unanimity and consensus-based decisionmaking.<sup>325</sup> Unanimous decisions are the norm in advisory commissions, and commissions typically gravitate towards vague and cautious conclusions and recommendations to achieve and preserve consensus.<sup>326</sup> Commitments to unanimity encourage deliberation, agreement, and consensus, and produce more legitimate-seeming decisions; however, they can also repress conflict, promote compromise, and privilege the status quo.<sup>327</sup> Viewed affirmatively, the Commission's unanimity suggests the triumph of expert, bipartisan consensus through an intensive deliberative process encouraged by the commission form;<sup>328</sup> viewed critically, it suggests a "herd mentality" that

322. See generally POSNER, *supra* note 314, at 3–8 (explaining the 9/11 Commission process and enactment of proposals).

323. See KEAN & HAMILTON, *supra* note 6, at 269–95 (describing the chronology of the 9/11 Commission's *Report* and interactions of Commission members).

324. SHENON, *supra* note 132, at 401–02 (describing Zelikow's work in outlining the 9/11 Commission *Report* and criticism of Zelikow for being soft on the Bush White House).

325. See *supra* note 221 and accompanying text.

326. See TUTCHINGS, *supra* note 25, at 31–33, 74 (asserting that unanimous commissions generally make cautious recommendations in order to achieve unanimity).

327. See generally Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141, 152 (2006) (summarizing literature on decision rules that require unanimity).

328. See, e.g., KEAN & HAMILTON, *supra* note 6, at 290–91 (describing "vigorous debates" without acrimony and intense discussions and compromise during final deliberations over the Commission's *Report*); John Updike, *The Great I Am*, NEW YORKER, Nov. 1, 2004, at 100 (describing the *Report* as a "masterpiece written by committee").

preferred to avoid difficult decisions about individual responsibility for governmental failure and that as a result offered poorly considered reforms.<sup>329</sup>

*e. Conclusion*

In the preface to its final report, the Commission claimed to have embodied fundamental administrative values: "We have sought to be independent, impartial, thorough, and nonpartisan."<sup>330</sup> Representing and furthering the public interest, the Commission sought to place itself above the short-sighted, self-interested struggles that define a fallen political world obsessed with partisanship rather than representation and leadership.<sup>331</sup> More extravagantly, Jonathan Simon has characterized the Commission's work as a form of "dangerous speech," one that channeled the powerful testimony of responsible government officials and the anguished, personalized victimhood of the families of 9/11 victims in order to force a powerful and effective democratic accountability on the state.<sup>332</sup>

The bureaucratic and political conditions of the Commission's design, investigation, and final report were more complex and less idealized than either the Commission's or Simon's accounts suggest.<sup>333</sup> The Commission operated somewhat outside the established frameworks of the federal government, but it was nevertheless implicated within and buffeted by the political world it could not transcend.<sup>334</sup> As Congress designed it, the Commission was politically bipartisan rather than impartial.<sup>335</sup> It was not entirely transparent, especially in its deliberations—deliberations that ultimately chose bipartisan consensus over

329. See David M. Mednicoff, *Compromising Toward Confusion: The 9/11 Commission Report and American Policy in the Middle East*, 34 CONTEMP. SOC. 107, 113 (2005) (arguing that consensus in the *Report* meant adhering to mainstream Realist policy solutions and eschewing ideas that fall outside areas of potential agreement).

330. 9/11 COMMISSION REPORT, *supra* note 11, at xv.

331. See KEAN & HAMILTON, *supra* note 6, at 189–211 (discussing the cohesiveness of the 9/11 Commission, particularly after partisan political attacks on some of its members).

332. Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1421–22 (2005) (explaining the Greek concept of *parrhesia* and its application to proceedings of the 9/11 Commission).

333. See KEAN & HAMILTON, *supra* note 6, at 316–34 (giving co-chairmen's account of Commission's history); Simon, *supra* note 133 and accompanying text.

334. See KEAN & HAMILTON, *supra* note 6, at 203 (describing attacks on Commission member Jamie Gorelick).

335. See Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383, 2408 (2002) (codified at 6 U.S.C. § 101 (Supp. IV 2004)) (authorizing the 9/11 Commission).

holding individual elected and high-ranking officials fully accountable for their failures.<sup>336</sup> It achieved a degree of independence from Congress, its principal, but it was hampered by limited resources, struggled with the White House and federal agencies over access to information, and was forced to make continual efforts to appease victims' families and develop its relationship with the general public and the media.<sup>337</sup> It was neither the ideal investigative advisory commission—expert, independent, above politics—nor the captured tool of Congress or the President.

The Commission's instrumental administrative success in achieving its informational mandate was in part the result of its somewhat mixed record as an administrative institution of democratic governance forced to engage in the legal, bureaucratic, and political struggles necessary for engagement in an imperfect political world.<sup>338</sup> Its quite public efforts to present and sell itself to the public provided it legitimacy and a public profile overshadowing that of the WMD Commission, a presidential commission established by President Bush to study the performance of the IC in providing intelligence about Iraq's weapons of mass destruction performance, and to suggest IC reforms.<sup>339</sup> Serving the different role of providing advice solely to the President, composed solely of presidential appointees, and lacking the formal bipartisan structure of the 9/11 Commission,<sup>340</sup> the WMD Commission's report had far less influence

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336. See KEAN & HAMILTON, *supra* note 6, at 274–75 (describing process of editing the report and seeking unanimity).

337. See, e.g., *id.* at 26 (describing efforts of 9/11 families to make sure that the 9/11 Commission would not stay behind closed doors).

338. It is too soon to evaluate the 9/11 Commission's historical position and long-term influence with any confidence, especially as more inside accounts of its operations begin to emerge, and as more primary source documents on which the Commission relied have become available. See, e.g., FELZENBERG, *supra* note 143, at 405–42 (describing proceedings and history of 9/11 Commission). See generally SHENON, *supra* note 132 (providing an "uncensored" account of Commission's operations, published in 2008); Intelfiles.com, <http://intelfiles.egoplex.com/index.html> (providing a repository for primary source documents cited in the Commission's report) (last visited Dec. 9, 2008) (on file with the Washington and Lee Law Review). 9/11-related conspiracy theories that place the Commission at the conspiracy's center continue to circulate and attract believers. MARK FENSTER, CONSPIRACY THEORIES: SECRECY AND POWER IN AMERICAN CULTURE 238–39 (2d rev. ed. 2008). Further revelations may damage the Commission's reputation, but at the time of this writing, it remains the most prominent and influential account of the attacks.

339. Exec. Order No. 13,328, 69 Fed. Reg. 6901, § 2 (Feb. 6, 2004) (establishing the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction); see also Patricia M. Wald, *Analysts & Policymakers: A Confusion of Roles?*, 17 STAN. L. & POL'Y REV. 241, 243 (2006) (describing work of WMD Commission from a member's perspective).

340. See *id.* (describing membership and mission of WMD Commission in Executive Order).

on the public or Congress than the 9/11 Commission's report.<sup>341</sup> This is in part because the 9/11 Commission was established first and issued its report while the WMD Commission was conducting its investigation, and in part because the WMD Commission issued its report after Congress enacted some of the 9/11 Commission's IC reorganization proposals.<sup>342</sup> In addition, the WMD Commission appeared, and in many ways operated, solely as an agent of President Bush,<sup>343</sup> whereas the 9/11 Commission, in its admittedly imperfect but quite public effort to further democratic values, appeared far more independent.<sup>344</sup>

### *B. The 9/11 Commission and the Risk of Overdisclosure and Error*

If the 9/11 Commission represents the rare, highly successful and influential independent commission, one that may be worthy of emulation, it also helps us identify and understand the risks of the advisory commission.<sup>345</sup> In the case of a commission investigating national security issues, these risks seem especially great. A commission could pressure the President or an agency to disclose classified information that should remain secret; similarly, a commission could inadvertently or purposefully disclose information that it was supposed to keep secret. In the former scenario, the disclosure would not be

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341. See POSNER, *supra* note 314, at 4–5 (asserting that it is unfortunate that the 9/11 Commission issued its report before the WMD Commission).

342. See O'Connell, *supra* note 281, at 1669–70 (discussing the relative chronology of the establishment and work of the 9/11 Commission and WMD Commission and the changes resulting from each).

343. See BOB WOODWARD, *STATE OF DENIAL* 284–87 (2006) (describing White House's creation of the WMD Commission, its efforts to control the commission's mission and membership, and the fact that some Democrats believed that the Commission would serve as "political cover" for the White House); Letter from Tom Daschle, U.S. Senator, et al., to George W. Bush, U.S. President (Feb. 2, 2004), [http://fas.org/irp/congress/2004\\_cr/com020204.pdf](http://fas.org/irp/congress/2004_cr/com020204.pdf) (urging President to change the appointment process for the proposed WMD Commission and alleging that it would be "appointed and controlled by the White House [and would] not have the independence or credibility necessary to investigate" pre-war intelligence).

344. See POSNER, *supra* note 314, at 5–8 (discussing public relations efforts of the 9/11 Commission and its bipartisan composition).

345. The fiscal costs of advisory commissions should also be acknowledged. See H.R. REP. NO. 91-1731, at 12 (1970) (including a House hearing airing complaints about advisory commission costs). In the grand scheme of the federal budget, the cost of any individual commission is quite low. Croley & Funk, *supra* note 35, at 526–27. And indeed, the Commission's costs were relatively small, given that it increased the quantity of information available to the public and, more importantly, improved public understanding of the attacks and their causes. See KEAN & HAMILTON, *supra* note 6, at 45–46 (identifying congressional appropriation for the Commission).

the direct fault of the commission; nevertheless, in both cases, the disclosures would not occur but for the existence of the Commission's investigation. Neither of these fears materialized in the 9/11 Commission's operations—indeed, the Commission's *Report* was thoroughly vetted for the disclosure of classified information by the White House before it was released,<sup>346</sup> and the Bush administration has not alleged that these disclosures or the Commission's *Report* as a whole harmed national security. And any risks or costs created by over-disclosure would need to be balanced against the gains that a commission's proper disclosure of information (as well as the gains in public knowledge of even the costliest disclosures) produces.

A greater set of risks attends the potential influence of a commission's final report on historical knowledge and on the legislative and administrative response to the subject of the Commission's investigation. Suppose, for example, that the 9/11 Commission reached mistaken or incomplete conclusions about the attacks or their causes, whether due to insufficient time to conduct its investigation, a mistake or cover-up by an agency or the administration, inadvertent commission error, or a decision by the Commission to ignore or distort a significant piece of evidence. This suggestion is not entirely hypothetical. Commission staff failed to research thoroughly and systematically relevant archives in the National Security Agency,<sup>347</sup> and New York City government agencies failed to release all of their emergency call tapes to the Commission, despite the subpoena that the Commission issued to city agencies.<sup>348</sup> The Commission neither sufficiently acknowledged that its accounts of al-Qaeda's development and of the 9/11 attacks were based in great part on harsh interrogations of "high-value" detainees, nor sufficiently considered the implications of coerced interrogation for the accuracy of its account.<sup>349</sup> A factual conclusion that is mistaken because of unavailable,

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346. See KEAN & HAMILTON, *supra* note 6, at 296 (discussing White House process for declassifying the Commission report).

347. See SHENON, *supra* note 132, at 372–73 (describing the late discovery of NSA material by 9/11 Commission staff and the frenzied process that led to some of this material's inclusion in the final report).

348. See Jim Dwyer, *Scores of 9/11 Tapes Were Held Back by City Despite Court Orders*, N.Y. TIMES, Apr. 14, 2006, at 3 (stating that the city held back tapes from 9/11 that had been the subject of years of litigation).

349. See SHENON, *supra* note 132, at 182–83, 391 (describing the 9/11 Commission's largely fruitless efforts to gain access to detainees and its failure to realize that some evidence obtained from detainees was coerced); Robert Windrem & Victor Limjoc, *9/11 Commission Controversy, Deep Background: MSNBC Investigates*, MSNBC.COM, Jan. 30, 2008, <http://deepbackground.msnbc.msn.com/archive/2008/01/30/624314.aspx> (stating that Commission staffers never sufficiently questioned intelligence officials about the types of interrogation techniques used on detainees). In its defense, the Commission was not provided access to interview these prisoners

ignored, misinterpreted, or inaccurate sources can of course be contested as new information comes to light—such is the nature of historical research and debate—and may not directly cause significant harm to the public or the government. A significant factual error may, however, undercut the legitimacy of both a commission's report and, to the extent that the commission is viewed as an agent of the state, the broader political order.<sup>350</sup> It may also undercut a commission's prescriptive recommendations, to the extent that those recommendations were based on the investigation's now-discredited findings and were adopted because of its investigation's misplaced reputation.

Worse than factual errors, what if the Commission's policy prescriptions proved unfounded, even dangerously misguided? Imagine, for example, that future events reveal that the Commission's advocacy for IC reorganization within a newly created Director of National Intelligence, which played a key role in persuading Congress to enact the Intelligence Reform Act, somehow degraded intelligence collection and analysis, and/or the distribution of intelligence to decision makers—and, as a result, harmed the nation's security. If the 9/11 Commission's institutional success and influence led the political branches to make a terrible mistake—no matter if the mistake was caused by the Commission's institutional design, faulty appointments of an inadequate chairperson and commissioners, or intentional or unintentional errors made during the Commission's operations—then the Commission as an investigatory model may offer no better solution to the need for an inquiry into a catastrophic event than investigations run by a congressional committee or an existing agency. Indeed, it may represent a worse response to that need, given the

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directly, and as a result was forced to rely on transcripts that may not have disclosed the interrogations' conditions. 9/11 COMMISSION REPORT, *supra* note 11, at 146; KEAN & HAMILTON, *supra* note 6, at 120–23. See generally May, *supra* note 185. Commissioners and Commission staff also claim that they were unaware that these interrogations were videotaped in 2002—these videotapes were subsequently destroyed in 2005. Thomas H. Kean & Lee H. Hamilton, *Stonewalled by the C.I.A.*, N.Y. TIMES, Jan. 2, 2008, at A17; Mark Mazzetti, *9/11 Panel Study Finds That C.I.A. Withheld Tapes*, N.Y. TIMES, Dec. 22, 2007, at A1; Joby Warrick & Dan Eggen, *CIA Tapes Were Kept From 9/11 Panel, Report Says*, WASH. POST, Dec. 23, 2007, at A11.

350. This is especially true for those who view the attacks as the result of a conspiracy in which President Bush and others participated; conspiracy theories about the attacks assume that the Commission was merely a tool to cover up a much darker truth, and its "mistakes" are evidence of its complicity. See FENSTER, *supra* note 338, at 238–39 (describing conspiracy theories surrounding the 9/11 attacks and the conspiracy community's view of the 9/11 Commission); Cass Sunstein & Adrian Vermeule, *Conspiracy Theories* 21–22 (Harvard Pub. Law Working Paper No. 08-03, 2008), available at <http://ssrn.com/abstract=1084585> (exploring the political and legal challenges posed by conspiracy theories).

advisory commission's relative lack of political and bureaucratic accountability for its mistakes.<sup>351</sup>

Critics, including, most prominently and prolifically, Judge Richard Posner,<sup>352</sup> have made precisely this argument in their critique of the Commission's proposals to reorganize the IC. Recall that the Commission blamed existing bureaucratic structures for impeding the coordinated and efficient gathering and analysis of intelligence, and concluded that a centralized management structure for the intelligence community, led by a "powerful CEO" in the position of the Director of National Intelligence (DNI), was necessary to manage and unify the IC.<sup>353</sup> Critics disagree with the Commission's factual conclusions—fault for the attacks and the extent of their damage, they argue, lies with management and especially policymakers who failed to heed warnings from intelligence agencies about the terrorist threat.<sup>354</sup> Accordingly, they also disagree with the Commission's proposed solution—the correct response, they argue, would be to replace upper levels of management or perform some less radical and disruptive IC reform than radical reorganization.<sup>355</sup> A reorganized

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351. See *infra* notes 352–56 and accompanying text.

352. See RICHARD A. POSNER, COUNTERING TERRORISM 144–45 (2007) [hereinafter POSNER, COUNTERING TERRORISM] (criticizing some of 9/11 Commission's findings); RICHARD A. POSNER, UNCERTAIN SHIELD 1–4 (2006) [hereinafter POSNER, SHIELD] (describing 9/11 Commission's failures and media's reluctance to criticize the Commission); POSNER, *supra* note 314, at 4–5 (criticizing 9/11 Commission's public relations effort that commenced well before the release of its report).

353. See 9/11 COMMISSION REPORT, *supra* note 11, at 399, 411–14 (stating that the DNI would manage the national intelligence program, oversee contributing agencies, and supervise national intelligence centers).

354. See Paul R. Pillar, *Intelligent Design?*, FOREIGN AFF., Mar.–Apr. 2008, at 138, 142–43 (discussing criticisms of the intelligence community). Many family members of the victims of the 9/11 attacks faulted the Commission's unwillingness to lay blame with individual government officials, and resented the fact that their choice to join the 9/11 Victim Compensation Fund forced them to forego tort litigation that might have identified negligent individuals and institutions. Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645, 674–78 (2008). But see KENNETH FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 165 (2005) (arguing that litigation was unlikely to produce an authoritative account of those culpable for attacks and their damage, and promoting the 9/11 Commission's work as the more appropriate means to pursue nonmonetary goals). Conversely, one of the benefits of the Moussaoui criminal trial was its augmentation of the relatively dry information and presentation in the Commission's *Report* both with information about government performance before the attacks and with emotional statements about the attacks' impacts on victims' families. See Wayne A. Logan, *Confronting Evil: Victims' Rights in an Age of Terror*, 96 GEO. L.J. 721, 758–59 (2008) (noting the significance of victims' impact evidence in the Zacarias Moussaoui trial).

355. See POSNER, *supra* note 314, at 85–86, 103–08 (disagreeing with the 9/11 Commission's proposed reorganization and citing Israel's proposed decentralization of its

IC probably could *not* have successfully stopped the attacks because surprise attacks, especially the rare well-planned and -executed ones, are difficult to prevent, given the enormous costs of sorting the vast quantity of collected intelligence.<sup>356</sup>

To respond to IC agencies' tendencies to hoard information horizontally with each other and vertically up the chain of command, Posner's ideal IC organization would have a thin, decentralized bureaucracy composed of specialized, competitive, enterprising agencies that pursue diverse inquiries into national security threats and are shielded from political power struggles.<sup>357</sup> By contrast, Posner argues, the centralized and hierarchical structure that the Commission proposed and Congress in great part adopted has created a DNI who can limit, channel, and ultimately impede the flow of information to policymakers, and will allow the President to control that flow by controlling the DNI.<sup>358</sup> To Posner, the fact that Congress largely embraced and enacted the Commission's proposals transforms the Commission's misjudgments into a greater threat of terrorist attack.<sup>359</sup>

Posner traces the Commission's mistaken judgment, and Congress's mistaken embrace of it, back to the Commission's status and operation as an advisory commission.<sup>360</sup> He argues that commissions are structurally hampered by the practice of appointing former elected or appointed officials as

intelligence); JEFFREY T. RICHELSON, *THE US INTELLIGENCE COMMUNITY* 527–29 (5th ed. 2008) (describing the failures of 9/11 as individual rather than structural problems); Falkenrath, *supra* note 263, at 187–88 (same); Charles Perrow, *Organizational or Executive Failures?*, 34 *CONTEMP. SOC.* 99, 106 (2005) (same); Joshua Rovner & Austin Long, *The Perils of Shallow Theory: Intelligence Reform and the 9/11 Commission*, 18 *INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE* 609, 620 (2005) (explaining potential shortcomings of the intelligence reform proposed by the 9/11 Commission).

356. See POSNER, *supra* note 314, at 19–20, 85–86, 94–97, 111, 118–22 (discussing difficulties in preventing surprise attacks and criticizing the 9/11 Commission for its failure to acknowledge this); John Hollister Hedley, *Learning from Intelligence Failures*, 18 *INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE* 435, 435–36 (2005) (noting that failures of intelligence are inevitable).

357. See POSNER, SHIELD, *supra* note 352, at 60–62 (discussing benefits of Posner's ideal IC reorganization); POSNER, *supra* note 314, at 85–86, 103–08 (discussing reactions to surprise attacks and resulting flaws in intelligence organizations).

358. See POSNER, *supra* note 314, at 53, 115–16 (discussing reasons that information flow is blocked when there are more bureaucratic layers in the intelligence community); Reuel Marc Gerech, *Not Worth a Blue Ribbon: The Conventional (and Unhelpful) Wisdom of the 9/11 Commission*, *WKLY. STANDARD*, Aug. 16, 2004, at 24 (describing alleged failures of the 9/11 Commission).

359. See POSNER, SHIELD, *supra* note 352, at 1–8 (criticizing the 9/11 Commission Report and the speed with which Congress adopted its recommendations).

360. See *id.* at 7 (discussing how the makeup of the 9/11 Commission preordained its failures).



commissioners rather than experts in the fields relevant to the commission's investigation.<sup>361</sup> Similarly, the need to strike partisan "balance" in appointments makes a commission's recommendations less likely to "reflect fresh, unconventional thinking," and, perversely, much more likely to be adopted by the President or Congress.<sup>362</sup> The need for balance can also lead to the kind of political "horse trading" among commissioners that enabled the 9/11 Commission to draft a unanimous report, a result that bespoke excessive compromise and a "herd mentality."<sup>363</sup> More expert in politics than intelligence, the commissioners acted in a bipartisan rather than expert and nonpartisan manner.<sup>364</sup> And above all, the Commission played a political game in a political world: the Commission "orchestrated an effort" to "win public support," and as such deserves credit for its "public-relations sense, if not its policy sense";<sup>365</sup> its conclusions were hastily adopted by presidential candidates and insufficiently vetted by a compliant press,<sup>366</sup> and it was supported by the influential lobbying group of victims' families, whose singular lack of qualifications in the field of intelligence reform constituted "amateurism run

361. See *id.* (criticizing the lack of academic input on 9/11 Commission). It should be noted, however, that a number of the Commissioners had significant experience overseeing intelligence matters while in Congress (including former Senator Kerrey and former Representatives Hamilton and Roemer) and in Executive Branch agencies (including former Deputy Attorney General Gorelick and former Secretary of the Navy Lehman). National Commission on Terrorist Attacks upon the United States, Biographical Information, <http://govinfo.library.unt.edu/911/about/bios.htm> (last visited Oct. 23, 2008) (on file with the Washington and Lee Law Review).

362. See POSNER, SHIELD, *supra* note 352, at 7–8 (discussing problems with bipartisan commissions).

363. See POSNER, *supra* note 314, at 7 (comparing 9/11 Commission's mentality with the rush to judgment that preceded the war in Iraq). Posner was not the only critic to condemn the Commission's unanimity. Cf. Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 39–40 (2006) (arguing that the presence of experts is crucial to success of deliberative systems). See generally Mednicoff, *supra* note 329, at 113; Richard Clarke, *Honorable Commission, Toothless Report*, N.Y. TIMES, July 23, 2004, § 4, at 11.

364. See POSNER, *supra* note 314, at 8–10 (criticizing the members of the Commission for having little experience in intelligence and suggesting other potential members who would have been more effective).

365. *Id.* at 5, 56.

366. *Id.* at 5–6, 56; see also Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L.J. 184, 192–93 & 192 n.47 (2007) (describing the political use of reforms proposed by independent advisory commissions, including the 9/11 Commission); Ian S. Lustick, *Fractured Fairy Tale: The War on Terror and the Emperor's New Clothes*, 16 MINN. J. INT'L L. 335, 347 (2007) (arguing that "the iconic status of the 9/11 Commission and not the actual importance or appropriateness of its analysis and advice" made its proposals especially attractive to elected officials).

wild" and a "perversion of the democratic process."<sup>367</sup> At the same time, the Commission's seeming nonpartisanship and position outside of the political branches, combined with its savvy public relations campaign, allowed it to outmaneuver political actors.<sup>368</sup> The Commission's success makes failure to respond to its proposals appear to be an under-reaction to terrorism's threat, which in turn creates the inference that this failure unduly risks public safety.<sup>369</sup> In this regard, Posner prefers a "purely presidential" institution like the WMD Commission, whose membership and jurisdiction the President controlled.<sup>370</sup> The 9/11 Commission, on this view, constituted a flawed, unelected, and politically unaccountable entity capable of using its seemingly nonpolitical position outside of the existing bureaucratic, government institutions to trump the normal checks and balances of the political process.

Such criticism is by no means universal, as Amy Zegart's praise for the Commission's efforts to promote intelligence reform makes clear.<sup>371</sup> The Commission's critics and proponents are engaged in a debate that cannot be resolved, based on opposing readings of theories about organizations and intelligence operations that are exceptionally abstract and ultimately indeterminate.<sup>372</sup> They offer equally plausible arguments about whether

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367. POSNER, *supra* note 314, at 6. The arguments of two prominent senators opposed to the IRTPA support Posner's claims. See 150 CONG. REC. S10,512, S10,514 (daily ed. Oct. 6, 2004) (statement of Sen. Byrd) (explaining that the Senate was rushing into passing the reforms); Chuck Hagel, *Intelligence Reform and False Urgency*, WASH. POST, Aug. 3, 2004, at A17 ("We must not allow false urgency dictated by the political calendar to overtake the need for serious reform. ").

368. See POSNER, *supra* note 314, at 5–6 (describing how the 9/11 Commission's public-relations effort forced political actors to ratify its recommendations). The Commission's afterlife as the Public Discourse Project allowed the Commission's political influence to continue. See Robert F. Bloomquist, *American National Security Presiprudence*, 26 QUINNIPIAC L. REV. 439, 486 (2008) (noting that the Public Discourse Project's "grades," which received a great deal of attention from the press and are influential in public and political debates, were based on how government agencies comported with the 9/11 Commission's conclusions).

369. Martha Minow, *Tolerance in an Age of Terror*, 16 S. CAL. INTERDISC. L.J. 453, 485 (2007).

370. See POSNER, SHIELD, *supra* note 352, at 4–5 (discussing the perceived greater effectiveness of WMD Commission); see also *supra* notes 339–43 and accompanying text. Another of the 9/11 Commission's sins, Posner argues, was eclipsing the WMD Commission's possible influence on public and political debate about IC reform. POSNER, *supra* note 314, at 4.

371. See ZEGART, *supra* note 279, at 178–82 (stating that intelligence reform appeared dead until three factors converged); see also *supra* notes 279–82 and accompanying text (discussing unique circumstances that, in author's view, allowed the 9/11 Commission to be unusually, if not entirely, effective).

372. See Hans de Bruijn, *One Fight, One Team: The 9/11 Commission Report on Intelligence, Fragmentation and Information*, 84 PUB. ADMIN. 267, 276–80 (2006) (discussing

centralized control or a decentralized, fragmented, and competitive set of agencies can better enable the intelligence community to develop the capability to "imagine" new security threats.<sup>373</sup> Perhaps structural reforms are unlikely ever to improve the intelligence agencies;<sup>374</sup> moreover, Posner himself concedes that even a reorganized and centralized IC could be functional and well-run.<sup>375</sup> Whether the office of the DNI has proven or will prove to be an improvement over the pre-IRTPA IC organization cannot be known as yet,<sup>376</sup> and may never be known.<sup>377</sup> Even if Judge Posner and others may overstate their critique of the Commission's proposals as reckless, erroneous folly, the debate they have initiated and the indeterminacy they identify suggests, at minimum, that the Commission presented its proposal to reorganize the IC with

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how incentives within intelligence-gathering organizations will vary with preferences of those in charge); Falkenrath, *supra* note 263, at 187 (discussing the confusing nature of the 9/11 Commission's proposals).

373. See Rovner & Long, *supra* note 355, at 619–20 (asserting that the 9/11 Commission's core recommendations may in fact be in conflict and that centralization of intelligence-gathering may lead to failures of imagination); see also De Bruijn, *supra* note 372, at 281–85 (arguing that a mix of centralized and decentralized management of intelligence agencies will result in benefits such as greater information sharing).

374. See RICHARD K. BETTS, SURPRISE ATTACK: LESSONS FOR DEFENSE PLANNING 17 (1982) (asserting that organization of intelligence gathering structures is not the most important national intelligence problem).

375. See POSNER, SHIELD, *supra* note 352, at 56–57 (noting that under the IRTPA, a strong Secretary of Defense can check the authority of the DNI); POSNER, *supra* note 314, at 60–61 (noting that a President or a DNI could work around the reorganization by delegating significant authority to individual intelligence services). Indeed, notwithstanding the IRTPA, Secretary of Defense Donald Rumsfeld resisted any effort by the DNI to direct or influence the operations of any intelligence agency located within the Defense Department. See HULNICK, *supra* note 255, at 188–89 (2004) (discussing weakness of CIA and its director and noting that other agencies had little incentive to cooperate); Eric Schmitt, *Clash Foreseen Between CIA and Pentagon*, N.Y. TIMES, May 10, 2006, at A1 (noting the increased intelligence role of the Defense Department and the resulting conflict with the CIA).

376. Although uncertain as to how precisely to structure the DNI's hierarchical authority over all aspects of domestic and foreign intelligence gathering, Posner is certain that the IC as reorganized is deeply flawed. POSNER, COUNTERING TERRORISM, *supra* note 352, at 35–69.

377. President Bush had difficulty finding a willing candidate for the DNI position, and his ultimate nominee, John Negroponte, resigned after only eighteen months to take the number two position in the State Department. Lawrence Wright, *The Spymaster*, NEW YORKER, Jan. 21, 2008, at 42, 44; *A Bad Job*, ECONOMIST, Jan. 13, 2007, at 40. A former member of the CIA claimed in fall 2006 that the office of the DNI (ODNI) faced significant bureaucratic resistance from within the IC. Meanwhile, the ODNI's quick expansion in personnel, composed mostly of employees who were transferred from other agencies, has caused some consternation among senior intelligence managers. Wright, *supra*, at 42, 44. Nevertheless, at least one commentator has suggested that intelligence analysis has improved under the DNI as a result of the reorganization. See generally Tim Weiner, *Pssst: Some Hope for Spycraft*, N.Y. TIMES, Dec. 9, 2007, § 4, at 1.

more confidence than it may have deserved. Any overconfidence, when combined with the favorable political context for legislative enactment that the Commission helped to create, presents a significant risk that a commission may have excessive and unaccountable influence on political actors.

*C. Designing Transparency and Policy Formation: The 9/11 Commission as a Model of Administrative Success*

Given the 9/11 Commission's successes and risks, how well can the Commission serve as a model for future advisory commissions? This section considers in turn the Commission's two mandates: 1) to provide information and analysis of the attacks; and 2) to make proposals for governmental reform.

*1. Designing Transparency*

By successfully and safely making important historical information relating to intelligence accessible and comprehensible to the public, the Commission achieved an extraordinarily rare accomplishment, especially during a time of extended crisis, war (both in Iraq and against the more nebulous force of "global terror"), partisan rancor, and resistance by the Executive Branch to disclosure.<sup>378</sup> It succeeded in an area where the Judiciary and Congress consistently fall short.<sup>379</sup> Although judicial enforcement of disclosure mandates has produced occasional success, it has also proven exceptionally frustrating—especially to public advocates of transparency, who view the Judiciary as too willing to defer to Executive Branch claims of statutory and constitutional privilege from disclosure.<sup>380</sup> This frustration is endemic to the complex political relationship between the Executive and Legislative Branches, and to the Judiciary's role in either avoiding or striking a balance in politically charged contexts between two seemingly exclusive abstract normative goals: Producing an informed democratic public with access to government information, and protecting a public decisionmaker from disclosing deliberations and privileged, secret information.<sup>381</sup> The Judiciary has

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378. See KEAN & HAMILTON, *supra* note 6, at 57 (stating that the 9/11 Commission chairs knew up front that some information would be particularly difficult to get).

379. See FENSTER, *supra* note 338, at 235–36 (describing the success of the 9/11 Commission's efforts to publicize its findings).

380. See Fenster, *supra* note 10, at 889–91 (discussing the Bush administration's continued unwillingness to increase transparency in the Executive Branch).

381. Cf. *United States v. Nixon*, 418 U.S. 683, 706 (1974) (discussing the appropriate level

on occasion appeared willing to recognize limitations on executive privilege and the need to protect national security secrets;<sup>382</sup> but on many more and more recent occasions, courts have deferred to the Executive's invocation of a privilege, whether in the form of the nebulous common law "state secrets" doctrine,<sup>383</sup> or in the statutory exemptions from disclosure under the Freedom of Information Act when the government invokes the specter of the Global War on Terror.<sup>384</sup> Courts also avoid being drawn into political interbranch disputes when the President resists congressional efforts to seek Executive Branch information.<sup>385</sup> Efforts to tweak the constitutional and statutory standards that courts apply to these disputes will not change these dynamics, given the

of confidentiality for the Executive Branch).

382. See, e.g., *id.* (rejecting a blanket claim of executive privilege by a qualifying confidentiality interest); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 452–54 (1977) (rejecting a blanket claim of executive privilege by balancing confidentiality interest against congressional interest in preserving presidential materials and restoring public confidence following the Watergate scandal); *N.Y. Times Co. v. United States*, 403 U.S. 713, 716–19 (1971) (Black, J., concurring) (rejecting prior restraint on publication despite the government's claim of significant threats to national security).

383. See, e.g., *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007) (dismissing suit on the grounds that its "entire aim" was to "prove the existence of state secrets"); see Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1308–13 (2007) (surveying the history of the doctrine's use, characterizing the privilege as "overinclusive in its results," and proposing congressional and judicial reforms of the doctrine); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939–40 (2007) (arguing that the Bush administration has deployed the doctrine with unprecedented frequency and breadth).

384. See 5 U.S.C. §§ 552(b)–(c) (2000) (exempting from FOIA classified information "kept secret in the interest of national defense or foreign policy"); Center for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 927–28 (D.C. Cir. 2003) (upholding government's refusal to disclose information about detainees held following the September 11 attacks on the grounds that courts have "consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated"); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 156–68 (2006) (discussing secrecy in the context of the FOIA); Christina E. Wells, "National Security" Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1198 (2004) (same). *But see* Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1017 (2008) (defending FOIA's role as part of a broader "ecology" of transparency in federal law).

385. See Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 735 (1993) (asserting that few executive-privilege cases have been litigated since 1983); Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 325–26 (2002) (noting that disputes over information between the legislature and the executive are not usually solved judicially).

inescapable indeterminacy of legal doctrine in this area and the deferential and conflict-averse tendencies of the Judiciary as an institution.<sup>386</sup>

Nor has Congress seemed willing to use its oversight role to provide objective, comprehensible information about national security issues for the public. In his authority as commander in chief and over foreign affairs, the President is naturally prone to concealing information for military and diplomatic advantage; accordingly, using its lawmaking and oversight role, Congress must provide an institutional check against excessive Executive secrecy.<sup>387</sup> And yet, for a variety of institutional reasons—including the tight budgeting for committee staff, busy congressional work schedules, and the relatively small political gains for individual legislators who invest their time in intelligence oversight—congressional oversight of national security affairs, and especially of the IC, has been lax.<sup>388</sup> Single party control over the Presidency and Congress, which occurred for much of President George W. Bush's first and second terms, also lessens the likelihood of effective congressional oversight.<sup>389</sup> The 9/11 Commission excoriated Congress's failure to provide sufficient oversight, characterizing that oversight as "dysfunctional."<sup>390</sup> In the years since the Commission's *Report*, Congress has made only minimal efforts to reform its byzantine intelligence oversight committee structure.<sup>391</sup>

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386. Recent scholarship on the executive privilege doctrine confidently asserts that the correct measure of judicial common law reform can tame the doctrine. See, e.g., Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 530 (2007) (arguing in favor of according statutes affording legislative access to executive branch information "constitutionally final and enforceable status"); Lee, *supra* note 60, at 242 (calling for a "nuanced analysis" of the President's confidentiality interest in executive privilege that would require courts to differentiate among confidentiality claims); cf. David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1077, 1085 (2007) (promoting judicial resolution of executive privilege disputes by challenging the "escalation model" approach to executive privilege that assumes political branches can best resolve informational disputes).

387. See Heidi Kitrosser, *Macro-Transparency as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163, 1167–71 (2007) (arguing that the Legislative Branch is designed to enact broad policy that the executive must execute, and that it is to act as a check on the executive).

388. See ZEGART, *supra* note 278, at 21–27 (discussing recent and historical failures of the U.S. intelligence system); Robert F. Blomquist, *Congressional Oversight of Counterterrorism and Its Reform*, 11 ROGER WILLIAMS U. L. REV. 1, 67–68 (2005) (discussing possible reasons for less effective congressional oversight of the intelligence community).

389. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2345–47 (2006) (discussing historical and recent congressional oversight and the relevance of party control of Congress).

390. See 9/11 COMMISSION REPORT, *supra* note 11, at 420 (giving the Commission's assessment of congressional oversight of intelligence).

391. See RICHARD A. BEST, JR., CONG. RESEARCH SERV., INTELLIGENCE ISSUES FOR

If the Judiciary and Congress are unable to pry information from the Executive, then underdisclosure of Executive Branch information is above all a systemic problem that can best be addressed through innovatively designed institutions that can fill gaps in the existing branches' efforts. Such institutions can develop the necessary expertise and establish the political and moral authority and ongoing relationships with the political branches necessary to enforce political and bureaucratic norms of transparency.<sup>392</sup> In so doing, they may be better able to achieve the larger goal of producing an informed public and accountable government.

Viewed in this context, the 9/11 Commission emerges as an extraordinarily successful example of an institution that could force the disclosure of documents and information that no private or public litigant could have obtained under any constitutional or statutory right. Assuming that the *Report* was largely correct in its account of the attacks—even conceding the criticism that it refused to hold individuals sufficiently accountable for their failures—then it produced a more knowledgeable Congress and public.<sup>393</sup> Balancing the gains of its work as an institutional agent of government transparency against its low risks and costs, the Commission emerges as a model for future transparency-forcing institutions.

It suggests, too, that its design as a bipartisan, relatively independent institution might prove especially effective in future crises, whether, as in the 9/11 Commission, following a catastrophic event, or as a means to enable informed public deliberation prior to a decision to commit the nation to an

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CONGRESS 11 (2008), available at <http://fas.org/sgp/crs/intel/RL33539.pdf> (asserting that Congress has not followed up on initial efforts at reform); FREDERICK M. KAISER, CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: CURRENT STRUCTURE AND ALTERNATIVES 1, <http://www.fas.org/sgp/crs/intel/RL32525.pdf> (discussing failure of Congress to create a joint intelligence committee). For a discussion of current reform proposals, see Ford, *supra* note 257, at 760–76.

392. See Fenster, *supra* note 10, at 945–49 (discussing forms of nonjudicial bodies that might be charged with resolving disputes between the Legislative and Executive Branches). Commentators, including one U.S. Senator, have suggested using the 9/11 Commission as a model to assist in congressional oversight. See PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 113 (2005) (calling for a bipartisan institution modeled in part on the 9/11 Commission that would review national security performance and "be charged with providing information and recommendations to Congress, at least annually, on both the substantive measures that have been taken by the Executive Branch (either pursuant to congressional mandate or without it) and the frequency and utility of such measures"); Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-First Century*, 1 HARV. L. & POL'Y REV. 3, 37 (2007) (asserting that "making it easier to convene independent commissions in the vein of the 9/11 Commission" would enhance congressional oversight).

393. See POSNER, SHIELD, *supra* note 352, at 1–8 (criticizing the 9/11 Commission but describing its public-relations blitz and efforts with Congress).

irreversible course of events, such as the war in Iraq.<sup>394</sup> Transparency can most effectively assist the public in holding political actors accountable when it is imposed in a timely fashion and results in comprehensible, credible information.<sup>395</sup> The post hoc nature of the 9/11 Commission was unavoidable, given the nature of the subject of its investigation. The long delay between the event and its report's release, however, was regrettable, and future post hoc commissions should be established in a more timely fashion. But the WMD Commission, which was established after the irreversible decision to invade Iraq in order to investigate mistakes that formed the basis of that decision, would have been far more effective and credible as a commission if it had performed its investigation *ex ante*.<sup>396</sup>

## 2. Commissioning Policy Formation

Forming and prescribing remedial policies in response to a past event or advocating a particular course of action for a future decision are quite different tasks from those of investigating and reporting on past events. First, the general skills required for an investigation are distinct from those required for policymaking, which requires specialized knowledge in particular subject areas and includes reviewing existing reform proposals, possibly developing new, innovative ones, and then discerning which would be the most feasible and appropriate.<sup>397</sup> Hiring staff with sufficient experience and knowledge could overcome those problems for a commission's generalist members.<sup>398</sup> The preferences of generalist commissioners for particular solutions would not result in any greater insights than those of elected officials, who at least face direct accountability for their mistakes—especially when those mistakes might affect an issue as significant as national security. If an advisory commission merely gives advice that can be reviewed in a deliberate manner and accepted

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394. See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 899 (2007) (discussing options that President Bush could have considered in forming a commission to study the Iraq war before ordering the invasion).

395. See Fenster, *supra* note 10, at 941–45 (discussing the value of comprehensive and timely release of information and asserting the value of information that the public can understand).

396. See generally Posner & Vermeule, *supra* note 394, and accompanying text.

397. See POSNER, *supra* note 314, at 6 (asserting that it was a mistake to combine investigation of the attacks with recommendations for preventing future attacks).

398. See HAMILTON & KEAN, *supra* note 6, at 38–40 (discussing the Commission's determination to hire the best possible staff).



or rejected on its merits, then any commission's proposals should serve only as an additional informational input into the decisionmaking process.

The immediate political reception of the 9/11 Commission's *Report* suggests that under certain conditions, a commission's proposals can assume a much more influential position.<sup>399</sup> Faced with the combination of a national security crisis following the 9/11 attacks and the political maelstrom of a hotly contested presidential election in which national security played a preeminent role, presidential candidates and congressional leaders rushed to embrace and enact the *Report's* proposals.<sup>400</sup> Following a crisis, legislators act more swiftly and un-deliberatively than usual in order both to achieve the goals that the proposed legislation promises and to be seen as responding in a timely fashion to the crisis.<sup>401</sup> In the massive reorganization that created the Department of Homeland Security, for example, the 9/11 attacks led Congress to legislate without fully considering the potentially negative effects caused by cobbling together a huge, wholly new bureaucracy from existing departments.<sup>402</sup> In the midst of a legislative fever, the imprimatur of a successful, high-profile, independent commission can lend significant, perhaps excessive, legitimacy to a policy proposal.<sup>403</sup>

The 9/11 Commission demonstrates why commission design should include mechanisms that force caution upon political actors when reviewing a commission's policy proposals. These mechanisms could take a number of forms. First, a commission's principal can withhold authority for the commission to make prescriptive policy proposals by allowing it merely to perform an investigation and issue an informational report. Second, the principal can require that a commission present multiple proposals and identify the advantages and disadvantages of each option; the principal could even prohibit the commission from rank-ordering the alternatives. Third, the

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399. See POSNER, SHIELD, *supra* note 352, at 1–20 (reviewing the history of how the 9/11 Commission's recommendations led to a significant overhaul of U.S. intelligence).

400. *Id.*

401. See Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 707–10 (2006) (discussing reasons for greater legislative haste in the aftermath of crises and citing examples).

402. See *id.* at 710–12 (acknowledging the efficiency benefits arising from combining existing bureaucracies but warning of unforeseen consequences).

403. Posner and Vermeule's confidence that a President could "wiggle" out of a precommitment to follow a commission's proposals seems fanciful in this regard, and suggests that a President would be quite unlikely to make such a commitment in the first place. See Posner & Vermeule, *supra* note 394, at 899 (positing that although a president might be able to ignore a commission's recommendations that he had promised to follow, he would suffer electoral consequences).

principal can attempt to exercise greater control over the commission and play a more active role in the commission's process of reviewing and proposing new policies. Any interference with the commission's work, however, would make the commission less independent, and might adversely affect the quality and legitimacy of its report. Finally, the principal could precommit to a deliberative process before the commission issues its report, delaying action for a prescribed cooling off period of a particular length lest it find itself swept up in a legislative frenzy to follow the commission's recommendation. Either of these options would at least address the risks attendant to a commission's ability to wield excessive influence over the elected decisionmakers who should take responsibility for their political decisions.

### V. Conclusion

In his recent short story "A Report on Our Recent Troubles,"<sup>404</sup> Steven Millhauser presents an official (albeit fictional) document produced by a group of citizens who have been charged by a "Committee" to investigate an epidemic of suicides that has plagued their unnamed small town.<sup>405</sup> In the typical progression of such an official report, the document offers a chronicle of the recent tragedies, an hypothesis to explain the epidemic's causes, and a series of proposals for the town to consider adopting as a response.<sup>406</sup> As the "Report" elegiacally describes it, until earlier in the present year the town had been an idyllically "pleasant place to live," a community at the very end of a commuter rail line where access to "the larger world" combined with a "communal separation for the sake of our own way of life" to produce an aesthetically and socially utopian suburb.<sup>407</sup> This perfect idyll ends, however, when first a few adults, then dozens of high school and middle school students, and then a seemingly perfect, popular adult couple imagine and then engage in a variety of creative, spectacular means to end their own lives.<sup>408</sup>

"In such a world," the report states, "people seek answers."<sup>409</sup> Reviewing the theories that circulate among the townsfolk—the epidemic is punishment

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404. Steven Millhauser, *A Report on Our Recent Troubles*, HARPER'S MAG., Nov. 2007, at 76.

405. *Id.*

406. *See id.* at 77–80 (giving report for Committee).

407. *Id.*

408. *See id.* at 76–78 (describing various ways in which members of the community committed suicide).

409. *Id.* at 80.

for the town's sins, or a logical end to a materialistic, pleasure-seeking culture, or an effort to bravely face human mortality—the report comes up with its own answer: The town has accomplished perfection, and such perfection requires the banishment of "the unseen," "the forbidden," "disruption," and, ultimately, death. In the town's "recent troubles," the banished have returned and "a counter-town arises" in which innocent citizens have come to embrace the very darkness that the town had thought it had successfully expelled.<sup>410</sup> "Severe illnesses demand severe remedies," the report asserts, and so its prescriptions suggest a legislated savagery: public hangings, gladiatorial contests between men and beasts, a return to public punishment by stoning, flaying, and the stake, and the annual ritual murder of a child on the town green.<sup>411</sup> "Anything less than a violent response to our crisis," the report concludes, "will certainly fail."<sup>412</sup>

Millhauser profoundly represents the promise that the investigatory commission form offers a nation in crisis.<sup>413</sup> The "Report" authoritatively narrates the awful events that have come to define the town, giving them shape and historical meaning.<sup>414</sup> It fulfills a social and cultural need to make sense of the raw materials of the recent past—to provide what the 9/11 Commission characterized as an authoritative narrative<sup>415</sup> that can in turn produce a knowledgeable, thinking public. The "Report" also represents the political desire to find a public means to address these events, to contain and banish them by explaining how they happened and how we can stop them from happening again.<sup>416</sup> Here, Millhauser's story takes the absurd, horrifying qualities of the events he imagines and pairs them with an equally absurd, horrifying response.<sup>417</sup> The analogy between the fictional "Report" and the *9/11 Commission Report* stops there—whether one agrees or not with even its most controversial proposals, the *Report* is surely not absurd. But fiction's ability to offer a critical distance from our historical present allows the

410. *See id.* at 80 (giving report's analysis of the origins of the town's troubles).

411. *See id.* (giving report's recommendations for how to solve the crisis).

412. *Id.*

413. *See generally id.* at 76–80.

414. *See id.* at 76–78 (describing gruesome suicides and possible reasons they occurred).

415. *See 9/11 COMMISSION REPORT, supra* note 11, at xv (describing the 9/11 Commission's sense of its own purpose to educate the American Congress and public on the 9/11 attacks).

416. *See Millhauser, supra* note 404, at 80 (attempting to explain reasons for suicides and suggesting remedies).

417. *See id.* ("We suggest a return to public hangings, on the hill behind the high school; we support gladiatorial contests between men and maddened pit bulls . . .").

recognition that with the authority granted to the government report by the commission of experts comes a naturalizing effect that lends grave legitimacy not only for its recounting of past events, but also for its hypotheses as to cause and its proposed remedy. The investigatory commission provides an exceptionally important, even necessary service in investigating, making public, and narrating the past. It deserves less deference for its more speculative efforts, however. Deciding upon and implementing remedies are ultimately political judgments that require the full deliberation and the decisions of accountable political actors. Whether the Commission's prescriptions ultimately prove helpful or harmful to national security and governance—an issue that likely can never be authoritatively resolved—its remarkable success in prompting broad legislative reform should caution future principals against allowing their informational agent-administrators to set a gravely important political agenda.

