NOTE

SOUND AND FURY,[1] CONFUSED ALARMS,[2] AND OVERSIGHT: CONGRESS, DELEGATION, AND EFFECTIVE RESPONSES TO FINANCIAL CRISES

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I. INTRODUCTION

The current worldwide economic crisis has prompted a diverse set of drastic policy responses, many wholly without precedent, from firms and governments alike. Alongside these emergency policy responses, decision-makers have recognized the need for: (1) vigilant oversight of the expenditure of huge sums of money for economic stabilization; (2) investigation into the causes and origins of the crisis; and (3) regulatory reform to ensure long-term stability. With the crisis far from over and Congress continuing to spend substantial amounts of money, financial, legal, political, and lay observers alike recognize the need to meet these three tasks.

When Congress passed the Emergency Economic Stabilization Act of 2008 ("EESA"), it created up to $700 billion in spending authority for the U.S. Department of the Treasury as part of the Troubled Assets Relief Program ("TARP").[3] However, TARP represents only the most visible appropriation in a government-wide financial stabilization effort to combat the crisis.[4]

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[1] WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5 (John Matthews Manley ed., Longmans, Green, and Co. 1919) (1623) ("Life's but a walking shadow, a poor player / That struts and frets his hour upon the stage / And then is heard no more: it is a tale / Told by an idiot, full of sound and fury, / Signifying nothing.").

[2] MATTHEW ARNOLD, *Dover Beach*, *in* POEMS 211, 211 (1879) ("And we are here as on a darkling plain / Swept with confused alarms of struggle and flight, / Where ignorant armies clash by night.").

[3] Pub. L. No. 110-343, div. A, 122 Stat. 3765, 3765–807 (2008) (to be codified in scattered sections of 12, 15, 26, 31 U.S.C.).

[4] *TARP Oversight: Warrant Repurchases and Protecting Taxpayers: Hearing Before the H. Comm. on Financial Servs., Subcomm. on Oversight and Investigations*, 111th Cong. (2009), *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/orhr_072209.shtml [hereinafter *July TARP Oversight Hearing*] (testimony of Neil Barofsky, Special Inspector General, TARP) (calculating $4.7 trillion already used for financial stabilization and over $23 trillion in potential government exposure). The Special Inspector General for the Troubled

Collectively, these financial stabilization programs have involved a substantial delegation of spending and regulatory authority to the Executive branch. Congress has also delegated some traditional legislative functions—such as oversight, investigation, and reform—between executive and legislative agencies, while choosing to retain others. Although the delegation of spending and regulatory authority to the Executive has received more attention than the delegation of oversight authority,[5] the viability and wisdom of each delegation scheme will play a significant role in the ultimate success or failure of the government's economic stabilization program.

Primary responsibility for oversight, investigation, and reform rests with Congress,[6] both because of their relationship to Congress's ongoing legislative authority over the crisis[7] and their relationship to Congress's power to make and oversee appropriations.[8] Congress has used EESA to delegate most of its TARP oversight responsibilities to four other entities: the Financial Stability Oversight Board ("FinSOB"), the Special Inspector General for the Troubled Assets Relief Program ("SIGTARP"), the Congressional Oversight Panel ("Panel"), and the Government Accountability Office ("GAO").[9] Congress further used the Fraud Enforcement and Recovery Act of 2009 ("FERA") to delegate its investigative functions to the Financial Crisis Inquiry Commission ("FCIC").[10] However, Congress has failed to

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Assets Relief Program ("SIGTARP") includes a huge range of expenditures and potential liabilities, including the entirety of Federal Reserve and Federal Deposit Insurance Corporation initiatives related to the crisis, Treasury action both inside and outside the ambit of TARP, and actions by other regulators like the Federal Housing Administration and the National Credit Union Administration. *Id. See* discussion *infra* Part II.

[5] *See, e.g.*, Archit Shah, Recent Development, *Emergency Economic Stabilization Act of 2008*, 46 HARV. J. ON LEGIS. 569, 583–84 (2009). The merits and constitutionality of this kind of delegation have long been debated. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); William E. Scheuerman, *The Economic State of Emergency*, 21 CARDOZO L. REV. 1869, 1883–84 (2000).

[6] Several committees of Congress have jurisdiction over the mitigation of the financial crisis, chiefly the Senate Committee on Banking, Housing, and Urban Affairs, the Senate Committee on Finance, the Senate Committee on Appropriations, the Senate Committee on the Budget, the House Committee on Financial Services, the House Committee on Ways and Means, the House Committee on Appropriations, the House Committee on the Budget, and the Joint Economic Committee. S. COMM. ON RULES AND ADMIN., 111TH CONG., STANDING RULES OF THE SENATE R. XXV (2009) [hereinafter SENATE RULES], *available at* http://www.rules.senate.gov/public/index.cfm?FuseAction=howCongressWorks.RulesOfSenate (identifying committees and their legislative jurisdictions); CLERK OF THE HOUSE OF REPRESENTATIVES, 111TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES 6–16 R. X [hereinafter HOUSE RULES], *available at* http://www.rules.house.gov/ruleprec/111th.pdf (same); *see also* Employment Act of 1946, ch. 33, 60 Stat. 23 (codified as amended at 15 U.S.C. § 1024 (2006)) (establishing the Joint Economic Committee and its jurisdiction).

[7] *See, e.g.*, Watkins v. United States, 354 U.S. 178, 187 (1957); McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

[8] U.S. CONST. art. I, § 9, cl. 7.

[9] *See* EESA, Pub. L. No. 110-343, div. A, §§ 104, 116, 121, 125, 122 Stat. 3765, 3770–71, 3783–86, 3788–93 (2008) (to be codified at 12 U.S.C. §§ 5214, 5226, 5231, 5233).

[10] Pub. L. No. 111-21, § 5, 123 Stat. 1617, 1625–31.

delegate responsibility in two areas: (1) oversight of economic stabilization efforts outside of TARP; and (2) regulatory reform.[11]

Congress's incomplete delegation may have jeopardized the effectiveness of its oversight, investigation, and reform responsibilities. At present, Congress's decision to retain oversight beyond TARP has not affected the Executive's broader economic stabilization efforts, and has left a great deal of money and power without sufficient scrutiny.[12] The experience of financial crises going back almost a century has shown that delegating investigation and reform to a subset of Congress, or at least integrating delegated investigative tasks within the normal legislative body, is more effective in the long term than using the standard committee-based system.[13] In the context of financial crises and stabilization efforts, Congress's delegation of oversight, investigation, and reform functions correlates strongly with success.

In light of this experience, a more complete oversight scheme would delegate the authority to police the Executive's entire economic stabilization program to the existing TARP oversight bodies. Such a delegation scheme would include delegating oversight authority over the crisis management programs of the Federal Reserve, the Federal Deposit Insurance Corporation ("FDIC"), and other agencies. Similarly, a more effective investigation and reform plan would involve a select committee of Congress investigating the origins and abuses of the crisis and embarking on comprehensive regulatory reform.

But, instead of taking the measures that have been most effective over the last century, Congress has failed to delegate adequately. This decision has left the EESA oversight bodies limited to their mandates to oversee TARP. Although Congress did task a special commission to investigate the breakdowns in the financial markets that led to the current crisis,[14] the commission will only play a consulting role in recommending regulatory solutions;[15] Congress is still retaining the regulatory reform lead. The consequences of the resulting lost opportunities may be extreme.

This Note seeks to analyze the shortcomings of Congress's delegation of its oversight, investigation, and reform responsibilities and to recommend an alternative course of action for Congress to follow in the coming months and years. Part II discusses which areas of authority Congress delegated and

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[11] In the regulatory reform context, "delegation" refers to the appointment of a select committee or other body to recommend reforms or draft legislation, which the whole Congress would then consider. Delegating power to pass legislation or other lawmaking power would present serious nondelegation doctrine problems, *see* Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting), and would violate Article I's bicameralism and presentment requirements. *See* U.S. CONST. art. I, § 7; INS v. Chadha, 462 U.S. 919, 946–51, 956–57 (1983).

[12] *See* discussion *infra* Part III.

[13] *See* discussion *infra* Part IV.

[14] *See generally* FERA § 5.

[15] *Id.*

which it reserved for itself, and offers an explanation for the current delegation scheme. Part III examines the shortcomings of the ongoing economic stabilization oversight and recommends expanding the mandates of the EESA oversight bodies to include all financial stability efforts. Part IV outlines the shortcomings of Congress's present investigative and regulatory reform activities, discusses the types of investigative bodies that Congress has employed to conduct investigations and regulatory reform work in the past, and ultimately recommends employing a select committee of Congress to carry out these functions in responding to the current economic crisis.

II. Congress's Oversight, Investigation, and Reform Scheme

Congress identified and acted upon four specific roles in EESA and FERA. First, EESA delegated many of its TARP oversight responsibilities to four oversight bodies: FinSOB, SIGTARP, GAO, and the Panel.[16] Second, Congress retained supervisory oversight authority over these bodies, and expanded its own oversight authority over financial stabilization efforts outside TARP.[17] Third, Congress recognized the need for an investigation of the causes of the financial crisis, and delegated responsibility for conducting it.[18] Finally, Congress recognized the need for systematic regulatory reform efforts, and kept the authority to pursue reform in the normal legislative channels.[19]

A close analysis of the oversight provisions contained in the legislation[20] indicates that Congress delegated much of its TARP oversight authority to a set of new oversight bodies created in EESA.[21] The same analysis also indicates that Congress recognized its oversight responsibilities over non-TARP economic stabilization efforts, as well as its responsibility to conduct investigative and regulatory reform tasks.[22] While it delegated some of the initial groundwork for fulfilling these latter responsibilities through EESA and FERA, it reserved much of the authority for itself.[23] The panic atmosphere, short timeframes, and contemplation of vast delegation of spending authority to Treasury probably contributed to the desire of members of Congress to retain control over much of the policymaking processes, as well as oversight beyond the strict boundaries of TARP. However, the

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[16] *See* EESA §§ 104, 116, 121, 125.

[17] *See id.* §§ 104(e), 116(a)(3), 121(f)(1), 125(b)(1), 129, 131, 202, 122 Stat. at 3771, 3785, 3790, 3791–92, 3796–98, 3800–01 (to be codified at 12 U.S.C. §§ 5214, 5226, 5231, 5233, 5235, 5236, 5251).

[18] *See* FERA, Pub. L. No. 111-21, § 5, 123 Stat. 1617, 1625–31 (2009); EESA, §§ 117(a), 133(a), 122 Stat. at 3786, 3798 (to be codified at 12 U.S.C. §§ 5227, 5238).

[19] *See* FERA § 5; EESA §§ 105(c), 125(b)(2), 122 Stat. at 3772–73, 3792 (to be codified at 12 U.S.C. §§ 5215, 5233).

[20] *See* EESA §§ 104, 116, 121, 125.

[21] *See id.* §§ 104, 116, 121, 125; *see* discussion *infra* Part II.B.1.

[22] *See id.* §§ 105(c), 117(a), 125(b)(2), 129, 131, 133(a).

[23] *See* discussion *infra* Part II.B.2.

decision to avoid full delegation put a heavy burden on Congress to exercise its reserved control and authority.

A. Background: The Fall 2008 Panic and the Birth of EESA

On September 7, the Federal Housing Finance Agency ("FHFA") placed the Federal National Mortgage Association ("FNMA" or "Fannie Mae") and the Federal Home Loan Mortgage Corporation ("FHLMC" or "Freddie Mac") into conservatorship as a result of billions of dollars in losses on securitized mortgages.[24] The following weekend, the venerable investment banks Lehman Brothers and Merrill Lynch desperately searched for acquirers after the federal government decided not to intervene to save them from similar losses.[25] By Sunday, September 14, Merrill Lynch had agreed to an acquisition by Bank of America,[26] and Lehman Brothers had decided to declare bankruptcy.[27] Further, the investment bank Bear Stearns had been forced by its own mounting losses on toxic assets and inadequate capital reserves to merge with JPMorgan Chase in March of 2008.[28] This meant that three of the nation's five largest investment houses,[29] all with nearly century-long pedigrees,[30] had disappeared within six months of one another.

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[24] Press Release, Henry M. Paulson, Jr., Sec'y of the Treasury, Statement by Secretary Henry M. Paulson, Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers (Sept. 7, 2008), *available at* http://www.treas.gov/press/releases/hp1129.htm.

[25] Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill Is Sold*, N.Y. TIMES, Sept. 14, 2008, at A1.

[26] Press Release, Bank of Am., Bank of America Buys Merrill Lynch Creating Unique Financial Services Firm (Sept. 15, 2008), *available at* http://newsroom.bankofamerica.com/index.php?s=43&item=8255.

[27] Press Release, Lehman Bros., Lehman Brothers Holdings Inc. Announces It Intends to File Chapter 11 Bankruptcy Petition; No Other Lehman Brothers' U.S. Subsidiaries or Affiliates, Including Its Broker-Dealer and Investment Management Subsidiaries, Are Included in the Filing (Sept. 15, 2008), *available at* http://www.lehman.com/press/pdf_2008/091508_lbhi_chapter11_announce.pdf.

[28] Press Release, JPMorgan Chase, JPMorgan Chase to Acquire Bear Stearns (Mar. 16, 2008), *available at* http://www.jpmorgan.com/cm/cs?pagename=JPM_redesign/JPM_Content_C/Generic_Detail_Page_Template&cid=1159338557604&c=JPM_Content_. The Federal Reserve Bank of New York facilitated the merger with a $29 billion loan to a special purpose vehicle, Maiden Lane LLC, designed to purchase and hold the most problematic of Bear Stearns's assets. Press Release, Fed. Reserve Bank of N.Y., Summary of Terms and Conditions Regarding the JPMorgan Chase Facility (Mar. 24, 2008), *available at* http://www.newyorkfed.org/newsevents/news/markets/2008/rp080324b.html; *see also* Maiden Lane, L.L.C., http://www.maidenlanellc.com (last visited Oct. 15, 2009). By the end of September, the remaining two investment houses, Goldman Sachs and Morgan Stanley, would formally convert from investment banks to bank holding companies. Jon Hilsenrath et al., *Goldman, Morgan Scrap Wall Street Model, Become Banks in Bid to Ride Out Crisis*, WALL ST. J., Sept. 22, 2008, at A1.

[29] Shawn Tully, *What's Wrong With Wall Street and How To Fix It*, FORTUNE, Apr. 14, 2008, at 70.

[30] Lehman Brothers was founded in 1850, Merrill Lynch in 1914, and Bear Stearns in 1923. *The Causes and Effects of the Lehman Brothers Bankruptcy: Hearing Before the H.*

Because of its status as a major derivative contract counterparty, the Lehman bankruptcy panicked investors and sent financial markets reeling.[31] Then, when major credit ratings agencies downgraded the debt of American International Group ("AIG"), an equally prominent derivative counterparty, on the afternoon of Monday, September 15, investors raced to collect from AIG and protect themselves from potential losses on their contracts with the company.[32] The downgrades triggered derivative contract provisions that forced AIG to post additional collateral to its counterparties, meaning that the company needed to come up with more cash than it could assemble in time to meet its obligations.[33] Regulators took drastic, unprecedented action to help. The State of New York suspended regulations that prohibited insurance companies from borrowing from subsidiaries, thereby allowing AIG to raise $20 billion overnight.[34] Federal regulators scrambled to help assemble private financing.[35] However, these efforts were not enough, and on Tuesday, September 16, the Federal Reserve announced that it would lend the institution $85 billion under its section 13(3) unusual and exigent circumstances authority.[36] This action allowed AIG to make its collateral calls and avoid bankruptcy.[37]

But the crisis continued. The following day, the Reserve Primary Fund—a prominent, ultra-safe money market mutual fund—"broke the buck," meaning that its shares fell below one dollar for the first time in decades.[38] This fund, and others like it, consumed high volumes of short-term commercial debt, faced investor runs, and, in turn, caused the financial sector to face the possibility that short-term corporate credit would dry up altogether.[39] The Treasury thus began mobilizing the resources of the Ex-

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Comm. on Oversight and Gov't Reform, 110th Cong. (2008) (preliminary transcript), *available at* http://oversight.house.gov/documents/20081010150253.pdf [hereinafter *Lehman Brothers Hearing*] (testimony of Richard S. Fuld, Jr., Chairman & CEO, Lehman Brothers); Evelyn M. Rusli, *Bear Stearns: From Bad to Worse*, FORBES, Dec. 20, 2007, *available at* http://www.forbes.com/2007/12/20/bear-stearns-closer-markets-equity-cx_er_cg_1220markets35.html; Merrill Lynch, Our History, http://www.ml.com/index.asp?id=7695_8134_8296_14044 (last visited Oct. 15, 2009).

[31] *See, e.g.*, *Lehman Brothers Hearing*, *supra* note 30.

[32] Mary Williams Walsh & Michael J. de la Merced, *A Race for Cash at A.I.G.*, N.Y. TIMES, Sept. 16, 2008, at C1.

[33] *Id.*

[34] *Id.*

[35] Edmund L. Andrews et al., *Fed in an $85 Billion Rescue of an Insurer Near Failure*, N.Y. TIMES, Sept. 17, 2008, at A1.

[36] Press Release, Bd. of Governors of the Fed. Reserve Sys. (Sept. 16, 2008), *available at* http://www.federalreserve.gov/newsevents/press/other/20080916a.htm. This power, commonly known as the Federal Reserve's section 13(3) power or lender of last resort power, enables the Board of Governors to authorize any regional Federal Reserve Bank to loan money to a non-bank financial institution. Emergency Relief and Construction Act of 1932, ch. 520, § 210, 47 Stat. 709, 715 (codified as amended at 12 U.S.C. § 343 (2006)) (amending Federal Reserve Act, ch. 6, § 13, 38 Stat. 251, 263–64 (1913)).

[37] *Id.*

[38] Diya Gullapalli et al., *Money Fund, Hurt by Debt Tied to Lehman, Breaks the Buck*, WALL ST. J., Sept. 17, 2008 at C1.

[39] *Id.*

change Stabilization Fund ("ESF")—an entity created to enable the manipulation of currency markets outside of traditional monetary policy mechanisms[40]—to protect money market mutual funds against losses.[41]

Both the Federal Reserve and Treasury were stretching their respective authorities and resources as far as they could, but new, unprecedented crises continued to appear almost daily, and even the most extraordinary uses of money and power could not halt the impending crisis.[42] As a result, on September 19, Secretary Henry M. Paulson, Jr. submitted a three-page draft bill asking Congress for almost unlimited, unreviewable authority to purchase directly up to $700 billion of mortgage-related assets.[43]

Congress immediately began adding to the bill. In addition to inserting a host of oversight, review, and reporting provisions,[44] legislators began adding items as diverse as authority for the Securities and Exchange Commission ("SEC") to suspend mark-to-market accounting[45] and executive compensation restrictions.[46] The much-expanded bill was unveiled by Congressional leadership on Sunday, September 28.[47] After an embarrassing defeat of the new measure in the House of Representatives the next day,[48] Congressional negotiators tacked on an increase in the cap on the maximum value of accounts insured by FDIC,[49] and added to the package two entirely separate pieces of legislation concerning energy[50] and altering the tax code.[51] These new incentives, in addition to an all out effort from both the White House and Congressional leaders,[52] attracted an additional fifty-eight votes

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[40] Gold Reserve Act of 1934, ch. 6, 48 Stat. 337 (codified as amended at 31 U.S.C. §§ 325(a), 5302(c)(1) (2006)).

[41] Press Release, U.S. Dep't of the Treasury, Treasury Announces Guaranty Program for Money Market Funds (Sept. 19, 2008), *available at* http://www.treasury.gov/press/releases/hp1147.htm.

[42] *See* James B. Stewart, *Eight Day: The Battle to Save the American Financial System*, THE NEW YORKER, Sept. 21, 2009, at 59.

[43] *Treasury's 3-page Bailout Proposal*, CNN MONEY, Sept. 20, 2008, http://money.cnn.com/2008/09/20/news/economy/treasury_proposal/index.htm [hereinafter "Paulson Draft Bill"]. The bill famously included only three pages of text, and a Treasury spokesperson described the appropriation it contained as "not based on any particular data point . . . [w]e just wanted to choose a really large number." Brian Wingfield and Josh Zumbrun, *The Paulson Plan: Bad News for the Bailout*, FORBES, Sept. 23, 2008, http://www.forbes.com/2008/09/23/bailout-paulson-congress-biz-beltway-cx_jz_bw_0923bailout.html.

[44] *See* H.R. 3997, 110th Cong. §§ 104, 105, 116, 119, 121, 125, 129 (2008) (as considered in the House pursuant to H.R. 1517, 110th Cong. (2008), Sept. 29, 2008).

[45] *Id.* § 132.

[46] *Id.* § 302.

[47] Lori Montgomery & Paul Kane, *Sweeping Bailout Bill Unveiled; COMPROMISE: Lawmakers work to secure support*, WASH. POST, Sept. 29, 2008, at A1.

[48] 154 CONG. REC. H10,334–35 (daily ed. Sept. 29, 2008).

[49] EESA, Pub. L. No. 110-34, div. A, § 136, 122 Stat. 3765, 3799–3800 (2008) (to be codified at 12 U.S.C. § 5241).

[50] Energy Improvement and Extension Act of 2008, Pub. L. 110-343, div. B, 122 Stat. 3765, 3807–61 (to be codified in scattered sections of 26 U.S.C.).

[51] Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Pub. L. 110-343, div. C, 122 Stat. 3765, 3861–933 (to be codified in scattered sections of 16, 26, 29, 42 U.S.C.).

[52] David M. Herszenhorn, *Bailout Plan Wins Approval; Democrats Vow Tighter Rules*, N.Y. TIMES, Oct. 4, 2008, at A1.

in the House, thus helping the legislation to pass on Friday, October 3.[53] President George W. Bush signed the measure later that same day.[54]

B. EESA Oversight: Delegate TARP, Reserve the Rest

In exactly two weeks, Congress had transformed a three-page draft statute with no provisions for oversight, investigation, or regulatory reform into EESA—an enormous piece of legislation creating three new oversight bodies (FinSOB, SIGTARP, and the Panel), and assigning significant responsibility to one already existing body, GAO.[55] Any authority not explicitly delegated to these four EESA oversight bodies remains with Congress[56]—a scheme that reflects a reluctance to delegate too much oversight authority.

EESA preserves Congress's supervisory authority over TARP and expands its oversight prerogatives into other economic stabilization areas that were previously the sole province of the Executive. Further, even where EESA delegates oversight authority, it gives preference to agencies within the legislative branch.[57]

1. Delegated Oversight Authority

Congress delegated TARP oversight to four bodies: two residing in the Executive branch (FinSOB and SIGTARP)[58] and two residing in the legislative branch (the Panel and GAO).[59] Thus, each branch contains one body designed to oversee policy decisions and one to monitor implementation.[60] Yet, despite the apparent parity between branches, members of Congress delegated greater oversight responsibilities and more extensive powers to the two legislative bodies than the two Executive entities. This arrangement means that greater authority to change the course of TARP policy lies with Congress and its subordinates.

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[53] *Compare* 154 CONG. REC. H10,805–06 (daily ed. Oct. 8, 2008) (passing EESA, then H.R. 1424, 110th Cong. (2008), with 263 yea votes against 171 nay votes), *with* 154 CONG. REC. H10,334–35 (daily ed. Sept. 29, 2008) (rejecting EESA as H.R. 3997, 110th Cong. (2008), with only 205 yea votes against 228 nay votes).

[54] Press Release, The White House, Office of the Press Sec'y, President Bush Signs H.R. 1424 Into Law (Oct. 3, 2008), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081003-17.html.

[55] *See* EESA, Pub. L. No. 110-343, div. A, §§ 104, 116, 121, 125, 122 Stat. 3765, 3770–71, 3783–86, 3788–93 (2008) (to be codified at 12 U.S.C. §§ 5214, 5226, 5231, 5233).

[56] *See* U.S. CONST. art. I, § 9, cl. 7; Watkins v. United States, 354 U.S. 178, 187 (1957); McGrain v. Daugherty, 273 U.S. 135, 181–82 (1927).

[57] *See* discussion *infra* Part II.B.1.

[58] *See* EESA §§ 104, 121.

[59] *See id.* §§ 116, 125.

[60] Executive policy oversight lies with FinSOB, *see id.* §§ 104, 121, while implementation oversight lies with SIGTARP, *see id.* § 121. Legislative policy oversight lies with the Panel, *see id.* § 125, while implementation oversight is GAO's responsibility, *see id.* § 116.

FinSOB serves as the policy oversight arm of the Executive branch.[61] EESA charges FinSOB with reporting quarterly on the effectiveness of Treasury's program, recommending new or different courses of action to Treasury, ensuring that Treasury's policies accord with the purposes of the Act by serving the economic interests of the United States, and protecting taxpayers.[62] FinSOB also may appoint an independent credit review committee to evaluate Treasury's TARP activities.[63]

Next, SIGTARP functions as the Executive branch's implementation overseer.[64] SIGTARP has primary responsibility for policing fraud and abuse in TARP under the same standards that govern the standing inspectors general for policing cabinet departments and other agencies, including Treasury.[65] As a result, SIGTARP has the responsibility to promote efficiency in TARP's administration, audit and investigate the program's implementation, and supervise and coordinate the identification and prosecution of perpetrators of fraud and abuse.[66] In addition, SIGTARP must engage in ongoing audits of Treasury's TARP exercises, but in more detail than a standard inspector general audit.[67] SIGTARP is also required to report to Congress quarterly.[68]

The Congressional Oversight Panel ("Panel") represents the legislative branch's policy oversight body. EESA directs the Panel to fulfill its oversight responsibilities through monthly oversight reports, which review the effectiveness of Treasury's attempts to stabilize the economy and the financial

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[61] *See* EESA, Pub. L. No. 110-343, div. A, § 104(6), 122 Stat. 3765, 3771 (2008) § 104(b), 122 Stat. at 3771 (to be codified at 12 U.S.C. § 5214). FinSOB's membership consists of five executive branch appointees: the Secretaries of Treasury and Housing and Urban Development, the Chairmen of the Federal Reserve and the SEC, and the Director of the Federal Housing Finance Agency ("FHFA"). *Id.*

[62] *Id.* § 104(a)(1)–(2), (e), (g), 122 Stat. at 3770–71 (to be codified at 12 U.S.C. § 5214).

[63] *Id.* § 104(f), 122 Stat. at 3771 (to be codified at 12 U.S.C. § 5214). FinSOB has not yet created such a committee; even if it did, the statute leaves unclear the influence that such a committee would have over Treasury's acquisitions, such as whether Treasury would require its approval before going ahead with a transaction.

[64] *See id.* § 121(c), 122 Stat. at 3788–89 (to be codified at 12 U.S.C. § 5231) (enumerating SIGTARP's duties as conducting audits and investigations of Treasury's program and establishing controls and systems that facilitate such audits and investigations).

[65] *Id.* § 121(c)(3) (incorporating the provisions of the Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. app. II §§ 1–13 (2006 & Supp. II 2008))).

[66] 5 U.S.C. app. II § 4(a). Also, like other inspectors general, SIGTARP is responsible for ensuring that TARP abides by the accounting standards set out by GAO. § 4(b)(1), (c) (ordering inspectors general to comply with GAO-established auditing standards and to avoid duplicating GAO efforts).

[67] In this area, Congress gave SIGTARP highly specific direction about the content of its audits by mandating that they include comprehensive lists and descriptions of assets purchased and insurance contracts entered into, a listing of the financial institutions involved in the transactions, and any personnel hired or contracted to manage Treasury's acquisitions. EESA, Pub. L. No. 110-343, div. A., § 121(c)(1)(A)–(G), 122 Stat. 3765, 3788–89 (2008) (to be codified at 12 U.S.C. § 5231). The audits must also include the rationale behind Treasury's actions, and a detailed accounting of assets purchased, sold, and held. *Id.*

[68] *Id.* § 121(f)(1), 122 Stat. at 3790 (to be codified at 12 U.S.C. § 5231).

sector, mitigate the foreclosure crisis, and make markets more transparent.[69] In addition, Congress granted the Panel the power to hold hearings and administer oaths to witnesses.[70] These powers are not granted to any of the other oversight bodies mentioned in EESA.[71]

Finally, GAO serves as implementation oversight arm of the legislative branch.[72] In addition, GAO also holds some policy responsibility.[73] In its reports, which are due every sixty days, GAO must review the financial implications of TARP, the nature and value of acquisitions made and assets held, operational efficiency, legal compliance, and success at mitigating conflicts of interest.[74] GAO must also assess the performance of TARP vis-à-vis its statutory purposes[75] and prepare an annual audit of TARP or other EESA activities.[76] The statute further mandates that Treasury remedy any problems GAO discovers or certify to Treasury's Congressional overseers that the problem does not require further action.[77]

This delegation scheme indicates some degree of Congressional favoritism toward legislative entities in assignment of TARP oversight responsibilities. For example, FinSOB exists as a forum for the heads of other relevant agencies, which lack TARP spending power,[78] to affect Treasury's policy choices.[79] Further, SIGTARP only has the statutory authority to influence the operation of Treasury's program, not its policy direction.[80]

In contrast, the Panel's combination of broad oversight scope[81] and power to conduct public consultations[82] establishes it as better able to steer Treasury's policies. Further, GAO's authority to mandate operational changes in Treasury's program comes with the policy responsibility to assess TARP's performance in relation to the goals laid out in EESA.[83] Moreover, Congress required that the Panel and GAO issue more frequent reports on a wider

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[69] *Id.* § 125(b)(1), 122 Stat. at 3791–92 (to be codified at 12 U.S.C. § 5233).

[70] *Id.* § 125(e)(1), 122 Stat. at 3793 (to be codified at 12 U.S.C. § 5233).

[71] *Id.* §§ 104, 116, 121, 122 Stat. at 3770–71, 3783–86, 3788–90 (to be codified at 12 U.S.C. §§ 5214, 5226, 5231).

[72] *See id.* § 116(a)(1)(B)–(H), (a)(3), (b)(1).

[73] *See* EESA, Pub. L. No. 110-343, div. A, § 116(a)(1)(A), 122 Stat. 3765, 3783 (2008) (to be codified at 12 U.S.C. § 5226).

[74] *Id.* § 116(a)(1)(B)–(H), (a)(3).

[75] *Id.* § 116(a)(1)(A).

[76] *Id.* § 116(b)(1).

[77] *Id.* § 116(b)(1)–(3).

[78] *See id.* § 104(b). The Secretary of the Treasury is the lone FinSOB member with TARP spending authority. *See id.* §§ 101(a)(1), 102(a)(1), 122 Stat. at 3767–69 (to be codified at 12 U.S.C. §§ 5211–12).

[79] *See* EESA, Pub. L. No. 110-343, div. A, § 116(a)(1)(A), 122 Stat. 3765, 3783 (to be codified at 12 U.S.C. § 5226) (expressly charging FinSOB with reviewing Treasury's actions, recommending alternative courses of action, and reporting fraud to SIGTARP).

[80] *See id.* § 121(c).

[81] *Id.* § 125(b), 122 Stat. at 3791–92 (to be codified at 12 U.S.C. § 5233) (giving the Panel authority to review the state of financial markets and the regulatory system).

[82] *See id.* § 125(e)(1) (granting the Panel authority to hold hearings, take testimony, receive evidence, and administer oaths to witnesses).

[83] *See id.* § 116(a)(1)(A)–(H).

number of issues than the Executive oversight bodies, making the work of the legislative bodies both more public and more influential.[84] As a result, even where it delegated its oversight functions, Congress granted more authority to the bodies it controls directly than to those housed in the Executive branch.

2. Reserved Oversight Authority

In addition to delegating TARP oversight responsibility, Congress carved out its own oversight role in EESA by reserving certain authority. First, Congress reserved for itself the ability to make ultimate judgments about TARP based on government-wide reporting about the program. For example, Treasury must report to the appropriate committees of Congress both monthly and when it meets certain spending thresholds.[85] EESA also directs the four oversight bodies to submit periodic reports detailing their work.[86] Congress further placed budgetary reporting requirements on both the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO").[87] These reporting standards provide an additional and independent source of budgetary and expense data apart from SIGTARP and GAO, the two oversight bodies with auditing functions.[88] These extensive reporting requirements provide a wealth of information on which Congress may base statutory alterations to TARP policy. They also provide public exposure, which affects TARP operations.[89]

Second, Congress inserted specific oversight provisions into the EESA, which are designed to expand its ability to oversee broader economic stabilization efforts beyond TARP. In particular, Congress used EESA to order the Federal Reserve to report on each exercise of its section 13(3) emergency authority.[90] Thus, even though EESA does not substantively alter the use of

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[84] *See id.* §§ 116(a)(3), 125(b)(1).

[85] Treasury must report every thirty days about its exercises under TARP and submit a detailed financial accounting of its actions. EESA, Pub. L. No. 110-343, div. A, § 105(a)(1)–(3), 122 Stat. 3765, 3771–72 (2008) (to be codified at 12 U.S.C. § 5215). Further, every time it uses an additional fifty billion dollars of its spending authority, Treasury must issue a report in which it describes not only the transactions made, but also the pricing mechanism used, the effect on the financial system, and the remaining problems in the financial system. *Id.* § 105(b)(1)–(2), 122 Stat. at 3772 (to be codified at 12 U.S.C. § 5215). This report must also include how much more TARP activity it will require to fix the problems. *Id.*

[86] *Id.* §§ 104(g), 116(a)(3), 121(f)(1), 125(b)(1). FinSOB, GAO, and SIGTARP each report to the relevant Congressional committees. *Id.* §§ 104(g), 116(a)(3), 121(f)(1). However, the Panel reports to Congress as a whole. *Id.* § 125(b)(1).

[87] *Id.* § 202, 122 Stat. at 3800–01 (to be codified at 12 U.S.C. § 5252).

[88] *See id.* §§ 116(b), 121(c)(1).

[89] *See generally* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984). Legislative surveillance through devices like reports and hearings constitutes active "police-patrol" oversight that not only remedies, but also deters, executive deviation from legislative preferences and goals. *See id.* at 166.

[90] EESA, Pub. L. No. 110-343, div. A, § 129, 122 Stat. 3765, 3796–97 (2008) (to be codified at 12 U.S.C. § 5235). Between 1958 and the beginning of 2008, the Federal Reserve

the section 13(3) power, the Federal Reserve must now disclose each exercise of its section 13(3) authority, including the specific terms and justification of its emergency use.[91] In addition, Congress imposed new restrictions on Treasury's ability to use the ESF in exigent circumstances by requiring Treasury to reimburse the ESF in full for any use of the fund to guarantee money market mutual funds[92] and by prohibiting Treasury from using the ESF for any future money market mutual fund stabilization efforts.[93] Other than these changes, the bill did not impose greater restrictions on ESF use, and it still leaves open the possibility that Treasury could use the ESF for purposes outside of money market mutual fund guarantees that are not otherwise prohibited by law. However, these new extensions of oversight authority over Treasury and the Federal Reserve permit Congress to affect the Executive branch's implementation of other economic stabilization programs without further statutory changes.

Congress's use of EESA to affirm its own supervisory role over TARP and to expand its direct oversight responsibilities to the broader economic stabilization program grants it substantial flexibility to review and steer the Executive's overall economic stabilization program. Congress can mobilize both indirect oversight mechanisms and direct statutory revisions in order to either press for, or force, policy changes it deems necessary. As a result, to the extent that oversight authority can affect the use of spending and regulatory authority, Congress kept most of the power to do so.

C. Investigation and Reform: Partially Delegated, Congress in Control

In addition to its extensive oversight provisions, EESA also directs certain entities to lay the groundwork for Congress's eventual investigation into the financial crisis and resulting reform of the regulatory system.[94] In May 2009, Congress established its plan for pursuing investigation and reform in FERA, which delegated investigative functions to the Financial Crisis Inquiry Commission ("FCIC"). Further, Congress kept ultimate reform responsibility for itself with bodies like Treasury, the Panel, and FCIC serving effectively only as consultants.[95] Thus, just as in the oversight context, Con-

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used its section 13(3) power only once, in 1991. David Fettig, *The History of a Powerful Paragraph: Section 13(3) Enacted Fed Business Loans 76 Years Ago*, THE REGION (Fed. Reserve Bank of Minneapolis), June 2008, at 33, 34, *available at* http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3485. However, the Federal Reserve authorized six separate exercises of this power during 2008. BD. OF GOVERNORS OF THE FED. RESERVE SYS., FEDERAL RESERVE STATISTICAL RELEASE H.4.1: OF DEPOSITORY INSTITUTIONS AND CONDITION STATEMENT OF FEDERAL RESERVE BANKS (2009), *available at* http://www.federalreserve.gov/releases/h41/20090813/h41.pdf.

[91] EESA § 129(a).

[92] *Id.* § 131(a), 122 Stat. at 3797 (to be codified at 12 U.S.C. § 5236).

[93] *Id.* § 131(b), 122 Stat. 3797–98 (to be codified at 12 U.S.C. § 5236).

[94] *See, e.g.*, *id.* §§ 125(b)(2), 133(a), 122 Stat. at 3792, 3798 (to be codified at 12 U.S.C. §§ 5233, 5238).

[95] *See, e.g.*, FERA, Pub. L. No. 111-21, § 5(h), 123 Stat. 1617, 1630 (2009).

gress delegated subordinate authority and preserved ultimate policy and reform power for itself.

1. Investigation

Members of Congress recognized the need for investigations into the causes of the financial crisis as a component of successful reform.[96] But Congress, in EESA, limited the delegation of its investigative responsibility by assigning discrete tasks regarding specific subjects. It also assigned subject matter to different agencies. For example, EESA directs the SEC to conduct an investigation into the role that mark-to-market accounting played in the crisis.[97] Similarly, GAO was directed to conduct an investigation into the role excessive leverage and sudden deleveraging played in the financial crisis.[98]

These investigative directives indicate legislators' understanding that a diverse set of causes underlay the financial crisis, and that each of these causes merits careful scrutiny in order to avoid recurring. However, EESA itself did not delegate a more generalized inquiry into the financial crisis.

However, FERA subsequently delegated the authority to conduct this broader investigation to FCIC.[99] FCIC is a ten-member special commission with a mandate to investigate the causes of the financial crisis generally, including a list of twenty-two specific topics, as well as to investigate the causes of every major failed financial institution or recipient of "exceptional government assistance."[100] The FCIC must report its findings by December of 2010, and it must consult with Congress in the interim in order to "inform[ ] the Congress on the work of the commission."[101] As such, Congress has effected an almost complete delegation of the power to investigate the causes of the financial crisis.

2. Regulatory Reform

Finally, members of Congress also recognized the need for an overhaul of the financial regulatory system following the systemic crisis of the fall of

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[96] *See, e.g.*, EESA, Pub. L. No. 110-343, div. A, §§ 117(a), 133(a), 122 Stat. 3765, 3786, 3798 (2008) (to be codified at 12 U.S.C. §§ 5227, 5238).

[97] *Id.* § 133(a). *See generally* OFFICE OF THE CHIEF ACCOUNTANT, DIV. OF CORP. FIN., SEC, REPORT AND RECOMMENDATIONS PURSUANT TO SECTION 133 OF THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008: STUDY ON MARK-TO-MARKET ACCOUNTING (2008), *available at* http://www.sec.gov/news/studies/2008/marktomarket123008.pdf.

[98] EESA § 117(a), 122 Stat. at 3786 (to be codified at 12 U.S.C. § 5227). *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES GAO-09-739, FINANCIAL MARKETS REGULATION: FINANCIAL CRISIS HIGHLIGHTS NEED TO IMPROVE OVERSIGHT OF LEVERAGE AT FINANCIAL INSTITUTIONS AND ACROSS SYSTEM (2009), *available at* http://www.gao.gov/new.items/d09739.pdf.

[99] FERA § 5, 123 Stat. at 1625–31.

[100] *Id.* § 5(c)(1)–(2).

[101] *Id.* § 5(h)(1), (4).

2008. However, in the regulatory area, Congress kept all meaningful authority in the standing committee system and the normal channels of the legislative process. Further, even where Congress did delegate select reform functions, it asserted the primacy of its own regulatory reform prerogatives and the standard legislative process.

EESA delegated responsibility to both Treasury and the Panel to produce comprehensive regulatory reform reports, including recommendations for legislative changes.[102] However, Congress retained the discretion to accept, reject, or modify the various recommendations it receives.[103] In addition, the statutory mandates identified the topics that members of Congress wanted covered, and the mandates further indicated the types of recommendations that legislators would prefer to see.[104] Therefore, even with EESA's delegation of recommendation power, functionally all of the regulatory reform power remains in Congress.

Similarly, FERA delegated investigative responsibilities to FCIC, but designed the commission to have little to no role in actually developing reform proposals. FCIC's mandate does not include recommending reforms arising out of its findings.[105] Further, the statute directs FCIC to "consult" with the Congressional committees responsible for financial regulation and, where reform proposals will likely originate, inform the committees about the FCIC's investigation.[106] Finally, Congress excluded its members from sitting on the FCIC, thereby effectively walling off its own members from

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[102] EESA, Pub. L. No. 110-343, div. A, §§ 105(c), 125(b)(2), 122 Stat. 3765, 3772–73, 3792 (2008) (to be codified at 12 U.S.C. §§ 5215, 5233). *See generally* CONG. OVERSIGHT PANEL, SPECIAL REPORT ON REGULATORY REFORM (2009), *available at* http://cop.senate.gov/documents/cop-012909-report-regulatoryreform.pdf [hereinafter PANEL REGULATORY REFORM REPORT]; U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM (2009), *available at* http://www.financialstability.gov/docs/regs/FinalReport_web.pdf [hereinafter TREASURY REGULATORY REFORM REPORT].

[103] Article I's bicameralism and presentment requirements demand this discretion. *See* U.S. CONST. art. I, § 7; INS v. Chadha, 462 U.S. 919, 946–51, 956–57 (1983).

[104] EESA § 105(c)(1)(A)–(B) ("The Secretary shall . . . [include] (1) recommendations regarding (A) whether any participants in the financial markets that are currently outside the regulatory system should become subject to the regulatory system; and (B) enhancement of the clearing and settlement of over-the-counter swaps."); *id.* § 125(b)(2) ("The Oversight Panel shall . . . [include] recommendations regarding whether any participants in the financial markets that are currently outside the regulatory system should become subject to the regulatory system, the rationale underlying such recommendation, and whether there are any gaps in existing consumer protections."). Unsurprisingly, Treasury's report made greater OTC regulation a centerpiece of its recommendations. TREASURY REGULATORY REFORM REPORT, *supra* note 102, at 3, 6–7, 46–49. Similarly, the Panel recommended much tougher consumer protection measures in its report. PANEL REGULATORY REFORM REPORT, *supra* note 102, at 2–4, 30–37.

[105] FERA, Pub. L. No. 111-21, § 5(h)(1), 123 Stat. 1617, 1630 (2009) (limiting the commission's report to "findings and conclusions . . . on the causes of the current financial and economic crisis.").

[106] *Id.* § 5(h)(4), 123 Stat. at 1630 (ordering FCIC to consult with the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs, in addition to other potentially relevant committees).

exposure to unfiltered information obtained during the Commission's investigation.[107]

These decisions prevent the blending of investigative and reform functions. Congress barred its own members—who are tasked with reforming the system—from sitting on FCIC and thus absorbing the results of the investigation first hand.[108] Similarly, the FCIC is not tasked with translating the results of its investigation into new regulatory policy.[109] As a result, Congress receives only information filtered through FCIC, and simultaneously holds the exclusive power to use that information in reform efforts.

D. Capture, Control, and Politics: Congress's Incomplete Delegation Explained

An inquiry into Congress's incomplete delegation reveals four principal influences on its decision to limit the delegation of oversight, investigation, and reform authority: (1) a need for dedicated oversight to make EESA more palatable; (2) a wariness of the involvement of captured regulators; (3) a desire to commit responsibility to political constants in periods of political uncertainty; and (4) a desire to retain control and predictability in the more politically charged areas of investigation and reform. These competing influences may have led to a preference for new institutions with carefully circumscribed, diffused power, so as to avoid capture and ensure meaningful oversight and investigation. Furthermore, these influences may have led to a preference for large-scale reservation of supervisory oversight and reform authority, so as to keep control within Congress until at least the end of the election season.

First, Congress needed to include real oversight provisions in the financial rescue legislation. A political firestorm followed the introduction of Secretary Paulson's three-page proposal because it lacked administrative, Congressional, or judicial review.[110] Thus, in order to win over hesitant legislators, the new bill had to offset the grant of enormous spending authority with strong oversight provisions.[111]

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[107] *Id.* § 5(b)(2)(B), 123 Stat. at 1626.

[108] *Id.*

[109] *See id.* § 5(h)(1).

[110] *The Future of Financial Services: Exploring Solutions for the Market Crisis: Hearing Before the H. Comm. on Financial Servs.*, 110th Cong. 10 (2008) (statement of Rep. Al Green (D-Tex.)) ("I think it bears reading the actual language of what came to us initially, because this will give people who have not had the opportunity to peruse this a better understanding of why so many Members have great consternation about what is being done.").

[111] *See, e.g.*, 154 CONG. REC. S9469 (daily ed. Sept. 25, 2008) (statement of Sen. Herb Kohl (D-Wis.)) ("We have yet to see the details of this final bailout package. I am reserving judgment. . . . Any bailout needs rigorous oversight.").

Second, members of Congress exhibited strong suspicion of existing regulatory institutions, indicating a fear of involving captured regulators[112] in overseeing the administration of financial stabilization efforts.[113] Given the acknowledged failure of federal banking regulators to anticipate or mitigate the crisis, legislators displayed understandable mistrust of existing institutions.[114] As a result, Congress decided to create new, unhindered oversight and investigative bodies,[115] in contrast to other rescues in which existing institutions assumed most of the implementation and oversight responsibilities.[116] These new institutions, given their outsider status, enjoy unique credibility that distinguishes them from the previously familiar players on the financial regulatory scene.[117]

Third, during an uncertain campaign season, a rational Congress would want to avoid the risks of future adverse political consequences, regardless of who won in the upcoming elections.[118] Mitigating these risks meant shifting the oversight authority to entities that were nonpartisan or controllable by Congress, which was accomplished in EESA by giving as little oversight power as possible to the Executive branch and by retaining supervisory power.[119] Congress assigned extensive responsibility to explicitly nonparti-

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[112] *See generally* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). Stigler argues that industries seek regulation for their own purposes, and regulators often oblige because the regulated are their real constituents. *Id.* at 3–8, 17–18.

[113] *See, e.g.*, FERA, Pub. L. No. 111-21, § 5(c)(1)(B), (S), 123 Stat. 1617, 1626–27 (2009) (directing FCIC to examine role of regulators' failure to enforce rules and regulatory arbitrage in the crisis).

[114] *Modernizing America's Financial Regulatory Structure: Hearing Before the Cong. Oversight Panel*, 111th Cong. 5–7 (2009) (statement of Sen. John Sununu (R-N.H.), Cong. Oversight Panel Member) (discussing failure of regulators to identify weaknesses in the financial system); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF THE TREASURY, AUDIT REPORT OIG-09-037, SAFETY AND SOUNDNESS: OTS INVOLVEMENT WITH BACKDATED CAPITAL CONTRIBUTIONS BY THRIFTS 1–4 (2009) (finding Office of Thrift Supervision complicit in backdating capital contributions at supervised institutions).

[115] *See* FERA § 5, 123 Stat. at 1625–31; EESA, Pub. L. No. 110-343, div. A, §§ 104, 121, 125, 122 Stat. 3765, 3770–71, 3788–93 (2008) (to be codified at 12 U.S.C. §§ 5214, 5231, 5233).

[116] *See, e.g.*, Chrysler Corporation Loan Guarantee Act of 1979, Pub. L. No. 96-185, § 3, 93 Stat. 1324, 1325 (1980) (establishing the Chrysler Corporation Loan Guarantee Board composed solely of existing regulators: the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, and the Comptroller General).

[117] *See, e.g.*, 155 CONG. REC. H3850 (daily ed. Mar. 25, 2009) (statement of Rep. Ed Towns (D-N.Y.)) ("[E]ven with its current modest staff, the SIGTARP has demonstrated its effectiveness in overseeing the TARP program."); 155 CONG. REC. H1088 (daily ed. Feb. 10, 2009) (statement of Rep. Clifford Stearns (R-Fla.)) ("What we really need is oversight by only those who are independent of the administration and that do not have ties to the Wall Street banking community. So . . . I echo the sentiments of the Congressional Oversight Panel.").

[118] *See* DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5–6 (1974) (proposing a theory of legislators as rational actors seeking to maximize their chances of re-election).

[119] *See, e.g.*, McCubbins & Schwartz, *supra* note 89, at 167–69 (describing the phenomenon of "credit-claiming" and "blame-shifting" by legislators and noting that a legislator may accomplish both when he or she has supervisory control over an entity exercising regulatory authority).

san entities, GAO, and SIGTARP,[120] and it gave primacy to legislative oversight rather than Executive.[121] Congress also preserved its role to supervise overall TARP policy.[122] In these ways, the TARP oversight scheme prevents those seeking partisan or electoral gain from using the new institutions as political weapons, and channels any political wrangling into the more predictable, familiar environment of Congress.

Finally, Congress kept, or at least politically neutralized, the sensitive authority to investigate and reform. Blame and accusation about the financial crisis began long before the September 2008 crisis and the consideration of EESA.[123] As the financial crisis continued, its origin became a partisan battlefront, with blame falling both on a deregulatory, laissez-faire philosophy[124] and on misguided attempts to make credit available to those too poor to afford it.[125] In this hostile environment, legislators' attempts to keep control over these politically charged arenas explain the lack of a delegation of investigative functions until well after the outcome of the 2008 elections. The desire to avoid politically damaging revelations during the 2010 midterm election cycle also helps to explain the December 2010 due date for FCIC's report.[126]

Simultaneously, financial regulatory reform loomed during consideration of EESA as a difficult and sensitive undertaking. Some in Congress had already begun looking forward to reforming the regulatory system and to

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[120] 5 U.S.C. app. II § 3(a) (2006) ("There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation."); U.S. Gov't Accountability Office, About GAO, http://www.gao.gov/about/index.html (last visited Oct. 27, 2009) ("The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress.").

[121] *Compare* EESA, Pub. L. No. 110-343, div. A, §§ 104, 121, 125, 122 Stat. 3765, 3770–71, 3783–86, 3788–93 (2008) (to be codified at 12 U.S.C. §§ 5214, 5231, 5233), *with id.* §§ 116, 125 (to be codified at 12 U.S.C. §§ 5226, 5233). *See also* discussion *supra* Part II.B.1.

[122] *See* EESA §§ 104(g), 105, 116(a)(3), 121(f)(1), 125(b)(1), 129, 131, 202, 122 Stat. at 3771–73, 3785, 3790–92, 3796–98, 3800–01 (to be codified at 12 U.S.C. §§ 5214–15, 5226, 5231, 5233, 5235–36, 5252).

[123] *See, e.g.*, 153 CONG. REC. H12,211 (daily ed. Oct. 30, 2007) (statement of Rep. Marcy Kaptur (D-Ohio)) ("Global credit markets are now facing unprecedented disruptions due to the mortgage-derivatives fraud which originated here in this country before spreading across the world . . . . [L]eadership is critical in times of economic crisis. Yet this Congress seems to be tiptoeing around the magnitude of what is facing the people of this country. This isn't time for prevarication, obfuscation, or public relations gimmicks by the Secretary of Treasury or the Fed.").

[124] Lou Dobbs Tonight: Senator McCain Suspends His Campaign Temporarily; Obama Rejects McCain's Challenge; FBI's Criminal Probe; Is E-Verify Dead? (CNN television broadcast Sept. 24, 2008) (featuring Rep. Barney Frank (D-Mass.) stating, "[h]ere is the problem, a lack of regulation going back to Ronald Reagan allowed the private sector to make the mistakes that put us in this situation.").

[125] *See Oversight Hearing to Examine Recent Treasury and FHFA Actions Regarding the Housing GSEs: Hearing Before the H. Comm. on Financial Servs.*, 110th Cong. 10 (2008) (statement of Rep. Michele Bachmann (R-Minn.)).

[126] FERA, Pub. L. No. 111-21, § 5(h)(1), 123 Stat. 1617, 1630 (2009). At least one opponent of FERA noted this due date as a means of "congressional cover." 155 CONG. REC. H5687 (daily ed. May 18, 2009) (statement of Rep. Michael Burgess (R-Tex.)).

acknowledging that Congress and other government officials had enhanced the already great complexity and political risk.[127] At the same time, powerful interest groups also began trying to shape the coming deliberations.[128] In such an environment, it made sense for Congress to want to keep control of reform in the normal channel of legislative action, the committee system, rather than using a new entity, such as a select committee or commission made up of its own members.

III. Oversight in Practice: Limited Success and a Need for More Authority

Congress faced an enormous task when it drafted and deliberated EESA and FERA. It not only had to create a successful policy initiative, but also had to: (1) design an oversight scheme that could oversee the policy initiative, both inside and outside of the primary subjects of the legislation (Treasury and TARP); (2) investigate the origins of the crisis; and (3) plan for long-term regulatory overhaul. So far, the success of the oversight scheme in achieving these goals has been mixed. On the one hand, the delegated oversight has been effective; it has changed the ways in which Treasury implements its program and has ensured some measure of transparency and accountability from TARP. On the other hand, non-TARP economic stabilization activities have gone almost completely without adequate oversight from Congress, resulting in worrisome implications. As a result of this discrepancy, this Note recommends delegating additional oversight to the bodies that have already had oversight success—the Panel, GAO, and SIGTARP—to cover the non-TARP economic measures where Congress has so far conducted only limited oversight.

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[127] *See, e.g.*, 154 Cong. Rec. S9225 (daily ed. Sept. 23, 2008) (statement of Sen. Kit Bond (R-Mo.)) ("[W]e need to change the other aspects of the regulatory system that allowed this blaze to get out of control. Now, some of that was mandated by Congress; some of it was a failure to exercise oversight; some of it was judgments made a long time ago which turned out not to work in these critical times. But it is absolutely essential we come together on this measure and work with bipartisan cooperation and understanding and communicating with our constituents.").

[128] *See, e.g.*, *Regulatory Restructuring and Reform of the Financial System: Hearing Before the H. Comm. on Financial Servs.*, 110th Cong. 138–39 (2008) (testimony of Tim Ryan, President and Chief Executive Officer, Securities Industry and Financial Markets Association ("SIFMA")) ("Recent challenges have strained the notion that U.S. markets are the most efficient, liquid and well-regulated markets in the world. They have highlighted the necessity of a fundamental review of our regulatory system in order to identify and correct its weaknesses. SIFMA strongly supports these efforts and commits to be a constructive participant in the process. . . . SIFMA stands ready to assist the Committee as it considers these and other important issues.").

A. TARP Oversight: A Qualified Success

The bodies with delegated EESA mandates within TARP—the Panel, GAO, SIGTARP, and FinSOB—combine to provide a robust oversight network. The independence of each organization, coupled with the expertise each one brings to the oversight realm, produces a combined mechanism capable of challenging any assertions made by the Treasury, and ensures accountability and transparency. In fact, this challenging of the Treasury has already taken place during the admittedly brief run of TARP oversight. Although not without fault, the mixture of skills, focus, and outsider credibility that the Panel, GAO, and SIGTARP bring to TARP oversight has at least partially succeeded in keeping pressure on Treasury.[129]

For example, during the initial Capital Purchase Program ("CPP"), Secretary Paulson indicated that the value of the investments that Treasury made during late 2008 was "at or near par" at the time of purchase.[130] The Panel subsequently engaged in a valuation analysis of the transactions and found that when Treasury purchased preferred stock and warrants as part of the CPP, the market value of the securities when Treasury bought them was significantly lower than the par value Treasury paid.[131] Similarly, Treasury made a public statement that it had almost $135 billion remaining in uncommitted TARP spending authority.[132] GAO and SIGTARP, in independent publications that same week, agreed on a figure lower by about $25 billion.[133] Although Treasury has not officially revised its estimate, the presence of alternative competing accounts has altered the public's perception about the program, and raised the possibility of new appropriations required for

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[129] FinSOB has not undertaken the same type of aggressive oversight efforts that the other three bodies have and has yet to exercise much of its oversight authority. *See* discussion *infra* Part III.A.

[130] *See, e.g.*, U.S. DEP'T OF THE TREASURY, RESPONSES TO QUESTIONS OF THE FIRST REPORT OF THE CONGRESSIONAL OVERSIGHT PANEL FOR ECONOMIC STABILIZATION 8 (2008), *available at* http://www.treas.gov/press/releases/reports/123108%20cop%20response.pdf ("When measured on an accrual basis, the value of the preferred stock is at or near par . . . . On a mark-to-market basis, the value of some preferred stock may be judged lower when compared to the date of purchase as equity markets have experienced pressure since the program began.").

[131] CONG. OVERSIGHT PANEL, FEBRUARY OVERSIGHT REPORT: VALUING TREASURY'S ACQUISITIONS 2 (2009), *available at* http://cop.senate.gov/documents/cop-020609-report.pdf. The Panel's report also examined contemporaneous private purchases of similar securities issued by CPP participants; the private investors all received closer to, or more than, fair value. *Id.* at 8.

[132] Maya Jackson Randall, *Treasury Has $134.5 Billion Left in TARP*, WALL ST. J., Mar. 30, 2009, at A3.

[133] *See TARP Oversight: A Six Month Update: Hearing Before the S. Comm. on Finance*, 111th Cong. (2009), *available at* http://finance.senate.gov/sitepages/hearing033109.htm [hereinafter *March TARP Oversight Hearing*] (testimony of Neil Barofsky, Special Inspector General, TARP); U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, GAO-09-504, TROUBLED ASSET RELIEF PROGRAM: MARCH 2009 STATUS OF EFFORTS TO ADDRESS TRANSPARENCY AND ACCOUNTABILITY ISSUES 9 (2009), *available at* http://www.gao.gov/new.items/d09504.pdf. The discrepancy arises from Treasury's expectation of $25 billion in redemptions by financial institutions in which Treasury invested as part of the Capital Purchase Program.

TARP.[134] Finally, in July 2009, the Panel and SIGTARP combined to conduct a robust review of Treasury's decision to sell warrants it received as part of its TARP capital infusions.[135] The review sought to examine whether Treasury received fair market value for its warrants and subsequently questioned Treasury's valuation methodology.[136]

Of course, oversight of TARP has run into some roadblocks. FinSOB, designed to serve as one of the four oversight bodies, has not used the full extent of its oversight authority and has largely withdrawn from TARP oversight.[137] Further, and arguably most importantly, it is not immediately clear the extent to which the oversight and public presence of these bodies has affected Treasury's conduct on TARP; Treasury's programs do not appear to have changed substantially due to attention from the variety of oversight bodies.[138]

However, on balance, the bodies exercising delegated oversight responsibility, in conjunction with the supervisory oversight authority and public exposure of Congress, have the authority to police the Treasury program and fulfill the statutory mandates of EESA and TARP. Moreover, the Panel, GAO, and SIGTARP each have reputations as credible outside observers.[139]

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[134] *See, e.g.*, Peter Barnes, *Treasury Has About $100B Left to Spend From TARP,* Fox Business, Apr. 9, 2009, http://www.foxbusiness.com/story/markets/industries/government/treasury-b-left-spend-tarp/.

[135] *See July TARP Oversight Hearing*, *supra* note 4 (testimony of Neil Barofsky, Special Inspector General, TARP, and Elizabeth Warren, Chair, Cong. Oversight Panel); Cong. Oversight Panel, July Oversight Report: TARP Repayments, Including the Repurchase of Stock Warrants 3–5, 90 (2009), *available at* http://cop.senate.gov/documents/cop-071009-report.pdf [hereinafter TARP Repayments Report].

[136] TARP Repayments Report, *supra* note 135, at 3–5, 90.

[137] *See supra* Part II.B.1. FinSOB has the power to appoint a credit review committee to evaluate prospective Treasury transactions, but it has not yet done so. *See* Fin. Stability Oversight Bd., Quarterly Report to Congress for the Quarter Ending June 30, 2009 (2009), *available at* http://www.financialstability.gov/docs/FSOB/FINSOB-Qrtly-Rpt-063009.pdf (not mentioning a credit review committee appointment in the report or in the attached FinSOB meeting minutes); Fin. Stability Oversight Bd., Quarterly Report to Congress Pursuant to Section 104(g) of the Emergency Economic Stabilization Act of 2008 for the Quarter Ending March 31, 2009 (2009), *available at* http://www.financialstability.gov/docs/FSOB/FINSOB-Qrtly-Rpt-033109.pdf (same); Fin. Stability Oversight Bd., First Quarterly Report to Congress Pursuant to Section 104(g) of the Emergency Economic Stabilization Act of 2008 for the Quarter Ending December 31, 2008 (2009), *available at* http://www.financialstability.gov/docs/FSOB/FINSOB-Qrtly-Rpt-123108.pdf (same).

[138] *See, e.g.*, Cong. Oversight Panel, April Oversight Report: Assessing Treasury's Strategy: Six Months of TARP 27–35 (2009) [hereinafter Panel April Oversight Report], *available at* http://cop.senate.gov/documents/cop-040709-report.pdf (discussing repeated calls from the Panel for Treasury to identify and carefully monitor metrics, expand its focus beyond few narrow financial metrics, and conduct a more thorough review of a broader set of measures).

[139] *See, e.g.*, 155 Cong. Rec. H3850 (daily ed. Mar. 25, 2009) (statement of Rep. Towns) ("[E]ven with its current modest staff, the SIGTARP has demonstrated its effectiveness in overseeing the TARP program."); 155 Cong. Rec. H1088 (daily ed. Feb. 10, 2009) (statement of Rep. Stearns) ("What we really need is oversight by only those who are independent of the administration and that do not have ties to the Wall Street banking community. So . . . I echo the sentiments of the Congressional Oversight Panel.").

As such, although they may have only a limited ability to alter Treasury's policy course directly, they do have the ability to offer independent financial and economic analysis, which will likely lead to greater transparency of Treasury's programs and closer scrutiny of its policy decisions. In this way, this Note argues that Congress's TARP oversight scheme represents, at least at the moment, a qualified success.

B. Confused Alarms: Non-TARP Stabilization Efforts Almost Free of Oversight

In contrast to TARP oversight, the oversight of economic stabilization programs beyond TARP, an area of supervision that Congress reserved for itself, has lagged far behind. Financial stabilization efforts taking place outside the boundaries of TARP, many of which involve the commitment of sums equal to or greater than Treasury's TARP spending authority with equal or greater risk of taxpayer exposure, have not received the same scrutiny as TARP spending and proposals. Oversight has fallen behind in this manner because the EESA-mandated oversight bodies have little or no delegated authority to conduct oversight beyond TARP and because Congress has not stepped in to fulfill its own oversight responsibility. As a result, the protections of public scrutiny and outside verification do not yet apply to much of the federal government's program for financial stabilization.[140]

In particular, Treasury programs that make use of debt financing loaned or guaranteed by the Federal Reserve and the FDIC have been the subject of comparatively little oversight. For example, GAO has expressed concern about its ability to carry out its EESA mandate with regard to the Term Asset-Backed Securities Loan Facility ("TALF") because of limitations on its authority.[141] A number of bills are pending in Congress to grant GAO broader authority to audit certain Federal Reserve facilities such as TALF,[142] but the prohibition against full audits still remains in force as TALF goes forward.[143]

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[140] The amount of TARP spending authority represents a minority of the total government funds at risk as part of financial stabilization. SIGTARP has estimated that the total could be as high as $23 trillion. *July TARP Oversight Hearing*, *supra* note 4. The Panel calculated this total at over $3.1 trillion in September 2009. CONG. OVERSIGHT PANEL, SEPTEMBER OVERSIGHT REPORT: THE USE OF TARP FUNDS IN THE SUPPORT AND REORGANIZATION OF THE DOMESTIC AUTOMOTIVE INDUSTRY 206 (2009), *available at* http://cop.senate.gov/documents/cop-090909-report.pdf.

[141] *Emergency Economic Stabilization Act: One Year Later: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 111th Cong. (2009) (testimony of Gene Dodaro, Acting U.S. Comptroller General) (stating that GAO still has insufficient audit authority over TALF). *See also March TARP Oversight Hearing*, *supra* note 133 (testimony of Gene Dodaro, Acting U.S. Comptroller General) (stating that the Banking Agency Audit Act prohibits GAO from auditing the Federal Reserve's monetary policy and discount window operations).

[142] *See, e.g.*, Federal Reserve Credit Facility Review Act of 2009, H.R. 2424, 111th Cong. (2009); Federal Reserve Transparency Act of 2009, H.R. 1207, 111th Cong. (2009).

[143] *See* 31 U.S.C. § 714(b)(2), (e) (2006 and Supp. II 2008) (prohibiting GAO from auditing general section 13(3)). Congress amended this section with the Helping Families Save

Furthermore, in areas where the EESA oversight bodies do not have jurisdiction, Congress has, with few exceptions, been largely absent from the oversight scene. The Federal Reserve, although required to disclose its first order exercises of section 13(3) authority, need not disclose additional information.[144] Tellingly, when the public finally learned the identities of the counterparties to AIG's derivative transactions, it received the information from AIG rather than from the Federal Reserve.[145] In addition, information has not been forthcoming from the Federal Reserve about participants in arrangements like the Primary Dealer Credit Facility and the Commercial Paper Funding Facility or regarding the exact nature of the assets held in the Maiden Lane special purpose vehicles.[146] Congress has not compelled the Federal Reserve to reveal this information, and, lacking an EESA oversight body with the authority to demand it, the information remains hidden.

In situations where an oversight body has only questionable authority because Congress reserved all or some oversight authority for itself, Congress can fill in the gaps by conducting its own oversight. But so far, it has not acted to do so.[147] Further, even when it does address oversight, Congress tends to call the heads of the EESA-mandated oversight bodies before it for updates.[148] This path, although important to Congress's supervisory authority over these oversight bodies, does not remedy the problems caused by gaps in the overall financial stability oversight scheme that Congress itself created. So, while Congress preserved its own prerogative to conduct oversight in this area, it has yet to actually step in and meet the resulting need for oversight and control.

Their Homes Act of 2009, Pub. L. No. 111-22, § 801, 123 Stat. 1632, 1663. The statute granted GAO authority to audit Federal Reserve section 13(3) facilities actions "with respect to a single and specific partnership or corporation." *Id.* § 801(d). The statute also granted GAO access to records of TALF and other Federal Reserve programs established in conjunction with TARP, but it did not grant full audit authority. *Id.* § 601.

[144] *See* 31 U.S.C. § 714(b)(2).

[145] Press Release, Am. Int'l Group, Inc., AIG Discloses Counterparties to CDS, GIA and Securities Lending Transactions (Mar. 15, 2009), *available at* http://www.aig.com/aigweb/internet/en/files/Counterparties150309RELonly_tcm385-155648.pdf.

[146] *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., STATISTICAL RELEASE H.4.1: FACTORS AFFECTING RESERVE BALANCES OF DEPOSITORY INSTITUTIONS AND CONDITION STATEMENT OF FEDERAL RESERVE BANKS (2009), *available at* http://www.federalreserve.gov/releases/h41/20090514/h41.pdf.

[147] *See supra* notes 145–46 and accompanying text.

[148] *See, e.g.*, *March TARP Oversight Hearing*, *supra* note 133; *Pulling Back the TARP: Oversight of the Financial Rescue Program: Hearing Before S. Comm. on Banking, Housing and Urban Affairs*, 111th Cong. (2009), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=hearings.Hearing&Hearing_ID=28f2539e-817d-43f1-b5f7-e4d8777914c7 (testimony of Neil Barofsky, Special Inspector General, TARP, Gene Dodaro, Acting U.S. Comptroller General, and Elizabeth Warren, Chair, Cong. Oversight Panel); *A Review of TARP Oversight, Accountability, and Transparency for U.S. Taxpayers: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Servs.*, 111th Cong. 4–10 (2009) (testimony of Neil Barofsky, Special Inspector General, TARP, Gene Dodaro, Acting U.S. Comptroller General, and Elizabeth Warren, Chair, Cong. Oversight Panel).

C. Solution: Expand Existing Oversight Bodies' Mandate to Cover Non-TARP Stabilization Efforts

Regardless of its reasons for failing to oversee non-TARP funding, Congress does a disservice to the American public by retaining oversight authority over enormous sums of money outside the ambit of TARP and then not exercising it. Failing to exercise its oversight powers increases the likelihood that Treasury, the Federal Reserve, or the FDIC will lose funds to waste, fraud, or abuse; makes the Executive generally less accountable because fewer authorities are examining policy implementation and alternatives; and denies the public an opportunity to evaluate the operation and the success of economic stabilization measures outside of TARP. Accordingly, Congress should find some means of ensuring that some entity monitors these policies and expenditures.

Fortunately, the problem of Congress failing to fulfill the role that it reserved for itself has a simple solution: delegate the role to the bodies that are already well versed in the financial crisis and its oversight. The Panel, GAO, and SIGTARP have each demonstrated independence, credibility, and expertise in exercising their duties over TARP's first half year. Moreover, each has begun recognizing and bumping up against the limits of its own authority.[149] As a result, each body has demonstrated that it could transition easily from a TARP focus to a broader economic stabilization focus. Given the success of these bodies within the TARP context, it makes sense, in the absence of Congressional attention, to extend the bodies' respective mandates to include all extraordinary programs and initiatives started by the Executive in the name of solving the financial crisis.

IV. Investigations and Reform: Lagging Behind

Given that Congress reserved significant authority for itself with regard to investigations and regulatory reform and that it has not fully exercised this retained authority to fill out the overall oversight scheme, the question emerges of how to investigate properly the stabilization of the financial sector and to reform it long-term. Congress has exercised or delegated its investigative and reform responsibilities for centuries by using its normal standing committee structure, special commissions, and select committees to do so. The historical record regarding the use of these entities indicates that delegating the authority to undertake investigation and reform to a select committee of Congress represents the most effective means of pursuing these

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[149] *See, e.g.*, Panel April Oversight Report, *supra* note 138, at 88–93 (alternative views of Panel Members Richard Neiman and John Sununu discussing proper scope of Panel activities); *March TARP Oversight Hearing*, *supra* note 133, at 5 (testimony of Gene Dodaro, U.S. Acting Comptroller General) (endorsing increased audit authority over the Federal Reserve, especially over programs implemented jointly between the Federal Reserve and Treasury).

goals. Therefore, this Note recommends that Congress create and implement a select committee to investigate the causes of the financial crisis. It further recommends that Congress use the committees' findings and expertise to develop regulatory reform proposals.

Through FERA, Congress created the FCIC, a special commission tasked with the job of conducting a systematic investigation and reporting back to Congress at the end of 2010.[150] Tellingly, the legislation only encompasses an investigative component; the report and other obligations of the commission do not address regulatory reform at all.[151] Congress expressly relegated the FCIC to the role of advisor, by including provisions requiring the Commission to serve as a source of information for the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs.[152] It further required that no sitting officeholder or policymaker sit on the Commission.[153] Congress thereby divorced the investigative element from the regulatory reform task. Time will tell if the decision to reserve power and authority will again result in lackluster performance or if, this time, Congress will take on the challenge; but the historical evidence indicates that Congress will not perform as well as if it had delegated all of these responsibilities to a select committee.

A. Sound and Fury: Unsystematic Congressional Investigation and Reform

So far, Congress has not systematically investigated the origins of the financial crisis or embarked on comprehensive regulatory reform. Instead, members of Congress have either focused on discrete issues, or addressed investigations and regulatory reform in a duplicative, unfocused manner. This lack of complete oversight over financial stabilization efforts places government funds at risk, and undermines confidence in these programs. Further, the failure to conduct adequate investigation or plan sufficiently for regulatory reform legislation runs the risk of missing the opportunity to change the financial system so that the present crisis does not repeat itself.

First, the relevant congressional committees have not embarked on a systematic investigation into the on-the-ground causes of the financial crisis. Some committees have examined several important issues in isolation, such as the role of credit rating agencies[154] and executive compensation.[155] Others have held hearings that attempt to investigate the origins of the crisis by

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[150] FERA, Pub. L. No. 111-21, § 5, 123 Stat. 1617, 1625–31 (2009).

[151] *Id.* § 5(h).

[152] *Id.* § 5(h)(3)–(4).

[153] *Id.* § 5(b)(2)(B) ("No person who is a member of Congress or an officer or employee of the Federal Government or any State or local government may serve as a member of the Commission.").

[154] *See, e.g.*, *Credit Rating Agencies and the Financial Crisis: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. (2008) (preliminary transcript), *available at* http://oversight.house.gov/documents/20081023162631.pdf.

calling in academics or selected market participants to testify.[156] However, while these committees have held informative hearings and identified many important issues, none has yet launched a full-scale, widespread investigation into the financial crisis, complete with document requests and thorough scrutiny. These committees have, instead, relied solely upon the investigative skills of the witnesses and organizations from which they hear testimony. Although capable, these people and organizations do not possess the same powers that Congress does in pursuit of its oversight and investigative functions.[157] As a result, Congress is not currently pursuing information to its fullest capacity.

The House Committee on Oversight and Government Reform has been a notable exception. During the latter half of 2008, the Committee began investigations into the collapses of Fannie Mae, Freddie Mac,[158] and AIG.[159] However, although the committee has done admirable work on the crisis as manifested in these specific institutions, the committee focused on them to the exclusion of a more systematic inquiry about the financial crisis. Furthermore, this committee is not one of the committees of relevant jurisdiction listed in EESA and does not traditionally conduct financial regulation and oversight.[160] These limitations mean that its findings, though important, will not be able to achieve the comprehensive answers that a more systematic investigation would.

Second, Congress has not yet embarked on comprehensive regulatory reform. Although the provisions of EESA indicate an awareness that reform is required,[161] and several Congressional committees have taken up the task,[162] Congress has not looked at the issue in a systematic or consistent

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[155] *See, e.g.*, *Oversight of the Federal Government's Intervention at American International Group: Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. (2009) [hereinafter *Oversight of AIG Intervention Hearing*].

[156] *See, e.g.*, *Turmoil in the U.S. Credit Markets: The Genesis of the Current Economic Crisis: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 110th Cong. (2008) (hearing testimony from representatives of two investment firms, one major municipality, and two fair lending advocacy groups).

[157] Most notably, Congress, unlike private citizens and advocacy groups, can compel production of documents and appearance for testimony. 2 U.S.C. §§ 190m, 192 (2006).

[158] *The Role of Fannie Mae and Freddie Mac in the Financial Crisis: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. (2008) (preliminary transcript), *available at* http://oversight.house.gov/documents/20090209155117.pdf.

[159] *The Collapse and Federal Rescue of AIG and What it Means for the U.S. Economy: Hearing Before the H. Comm. on Oversight & Government Reform*, 111th Cong. (2009); *Hearing on the Causes and Effects of the AIG Bailout: Hearing Before the H. Comm. on Oversight & Government Reform*, 110th Cong. (2008) (preliminary transcript), *available at* http://oversight.house.gov/documents/20081010162126.pdf; *see also, e.g.*, Press Release, H. Comm. on Oversight and Gov't Reform, Towns, Issa Request AIG Independent Monitor Reports from the Department of Justice and Securities and Exchange Commission (Mar. 31, 2009), *available at* http://oversight.house.gov/story.asp?ID=2373.

[160] EESA, Pub. L. No. 110-343, div. A, § 3(1), 122 Stat. 3765, 3766 (2008) (to be codified at 12 U.S.C. § 5202); HOUSE RULES, *supra* note 6.

[161] *See, e.g.*, EESA §§ 105(c), 125(b)(2).

[162] *See infra* notes 163–74 and accompanying text.

way. Without coordination among the committees of relevant jurisdiction, the volume and scope of potential regulatory changes can overwhelm and paralyze the legislative process. As a result, regulatory reform efforts currently suffer from a lack of focus and duplicative efforts.

For example, no fewer than five committees have held hearings purporting to address, in whole or in part, reform of the financial regulatory system.[163] Topics of focus have ranged from investor protection[164] and consumer protection[165] to mitigating systemic risk.[166] Committees have, thus far, pursued these topics on their own agendas and timetables, seemingly without any prioritization.

Furthermore, although any given regulatory policy issue may implicate any number of committees' jurisdiction, unnecessary duplication of efforts hinders Congress's effectiveness in carrying out its reform responsibilities. Indeed, two separate committees conducted two separate hearings to address the regulatory implications of the criminal conduct of Bernard Madoff and his investment firm.[167] On a much smaller scale, two separate committees held hearings into the application of antitrust principles to systemically risky firms.[168] In neither situation does it appear that the two hearings coordinated with each other in any capacity.

The House Committee on Financial Services has also stood out among the relevant committees on the regulatory reform issue. Whether because of its large membership,[169] the limitations of its jurisdiction more strictly to

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[163] *See Where Were the Watchdogs? Systemic Risk and the Breakdown of Financial Governance: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (2009) [hereinafter *Where Were the Watchdogs? Hearing*]; *Too Big to Fail or Too Big to Save? Examining the Systemic Threats of Large Financial Institutions: Hearing Before the Joint Economic Comm.,* 111th Cong. (2009) [hereinafter *Too Big to Save Hearing*]; *Federal and State Enforcement of Financial Consumer and Investor Protection Laws: Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. (2009) [hereinafter *Investor Protection Laws Hearing*]; *'Too Big To Fail?': The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Too Big to Fail Hearing*]; *The Madoff Investment Securities Fraud: Regulatory and Oversight Concerns and the Need for Reform: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 111th Cong. (2009) [hereinafter *Madoff Investment Securities Hearing*].

[164] *Investor Protection Laws Hearing*, *supra* note 163.

[165] *H.R. 627, the Credit Cardholders' Bill of Rights Act of 2009; and H.R. 1456, the Consumer Overdraft Protection Fair Practices Act of 2009: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Servs.*, 111th Cong. (2009).

[166] *Where Were the Watchdogs? Hearing*, *supra* note 163.

[167] *See Madoff Investment Securities Hearing*, *supra* note 163; *Assessing the Madoff Ponzi and the Need for Regulatory Reform: Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. (2009) [hereinafter *Madoff Regulatory Reform Hearing*].

[168] *See Too Big to Save Hearing, supra* note 163; *Too Big To Fail Hearing*, *supra* note 163.

[169] The House Committee on Financial Services has 71 members. House Committee on Financial Services, Committee Members, http://financialservices.house.gov/members.html (last visited Oct. 29, 2009). In comparison, the House Committee on the Budget has only 39 members, and the House Judiciary Committee has only 38. House Committee on the Budget, Members, http://budget.house.gov/members.shtml (last visited Oct. 29, 2009); House Commit-

financial issues,[170] or the prominence of the committee's chairman on issues of regulatory reform,[171] the committee has held considerably more hearings to address regulatory reform, and examined more facets of the issue, than other committees of relevant jurisdiction.[172] That is not to say that there are not problems with the committee's regulatory reform initiatives. For example, its oversight plan merely lists topics, rather than presenting an approach or framework through which to address the various problems.[173] Furthermore, the committee remains susceptible to spending time on issues that are the focus of temporary bursts of great public and media interest, rather than focusing on systematic investigation and reform.[174] On the whole, however, the House Financial Services Committee has been a leader on the regulatory reform issue.

While Congress has made attempts to fulfill the regulatory reform function that it reserved for itself in EESA and FERA, it largely has not succeeded in doing so. This failure to exercise reserved authority leaves another hole in the overall oversight and reform scheme that Congress designed for itself in EESA.

Therefore, although Congress reserved most investigative and regulatory reform authority for itself, it has not exercised that authority to the fullest extent or in the most effective manner. As a result, Congress has not brought to bear the full economic stabilization oversight scheme that it outlined in EESA. This shortcoming imperils the stabilization of the financial

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tee on the Judiciary, Committee Members, http://judiciary.house.gov/about/members.html (last visited Oct. 29, 2009).

[170] HOUSE RULES, *supra* note 6.

[171] *See* Jeffrey Toobin, *Barney's Great Adventure: The Most Outspoken Man in the House Gets Some Real Power*, NEW YORKER, Jan. 12, 2009, at 37, *available at* http://www.newyorker.com/reporting/2009/01/12/090112fa_fact_toobin?currentPage=all.

[172] The House Committee on Financial Services and its subcommittees have held almost ninety hearings since January 2009, about one-third of which dealt with regulatory reform. *See* House Committee on Financial Services, Hearings, http://financialservices.house.gov/hearings_all.shtml (last visited Oct. 29, 2009). In contrast, the Senate Committee on Banking, Housing, and Urban Affairs has held about half as many hearings with, again, only about one-third devoted to regulatory reform. *See* Senate Committee on Banking, Housing, and Urban Affairs, Hearings, http://banking.senate.gov/public/index.cfm?FuseAction=hearings.Home (last visited Oct. 29, 2009).

[173] H. COMM. ON FINANCIAL SERVS., 111TH CONG., REPORT: OVERSIGHT PLAN OF THE COMMITTEE ON FINANCIAL SERVICES FOR THE ONE HUNDRED ELEVENTH CONGRESS (Comm. Print 2009), *available at* http://financialservices.house.gov/111th%20FSC%20Oversight%20Plan-final.pdf.

[174] *See Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the H. Comm. on Financial Servs., 111th Cong.* (2009); *Madoff Regulatory Reform Hearing*, *supra* note 167 (discussing the Bernard Madoff scandal); *see also American International Group's Impact on the Global Economy: Before, During, and After Federal Intervention: Hearing Before the Subcomm. on Insurance, Capital Markets, & Government Sponsored Enterprises of the H. Comm. on Financial Servs.*, 111th Cong. 3 (2009) (addressing, in part, public outcry when "the taxpayers also learned that their money helped cover the million dollar plus retention bonuses of [AIG] executives."); *Oversight of AIG Intervention Hearing*, *supra* note 155.

sector, the recovery of the broader economy, and the prospect of meaningful reform to prevent future crises.

B. Congress's Investigative and Reform Options

Where Congress has investigative and reform functions to perform, it can carry them out in various ways. First, it can direct a standing committee of relevant jurisdiction to look into the issue. Second, it can delegate authority to a special commission. Third, it can delegate responsibility to a select committee to investigate specific matters and propose solutions. Ultimately, this Note concludes that select committees would have the greatest success in addressing new, unfamiliar economic and financial problems.

1. Standing Committees of Congress

Standing committees of Congress have a long tradition of conducting oversight, investigation, and reform. Originally the means for the English Parliament to conduct its own "grand inquests,"[175] standing committees have conducted high-profile oversight and investigations throughout Congress's existence.[176] For example, standing committees have conducted long and thorough investigations into congressional ethics violations during the savings and loan ("S&L") crisis of the 1980s, into the conduct of the Vietnam War, and into the loyalties of citizens and public servants during the height of the Cold War.[177]

Standing committees enjoy liberal access to information.[178] They employ policy experts and enjoy substantial institutional memory surrounding policy debates and decisions.[179] Finally, any statutory alteration to any regulatory scheme must ultimately pass through the appropriate committees on its way to enactment. Having members and staff participate in the oversight, investigative, and reform functions through their committees promotes greater expertise and efficiency, because the relevant members and staff would be able to draw directly on the information gathered during an investigation in drafting and passing reform measures.

Unfortunately, standing committees suffer from the drawback of having a full legislative agenda to attend to, in addition to any investigations that

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[175] JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 5 (1976).

[176] James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1118 (2007).

[177] *Id.*

[178] 2 U.S.C. §§ 190m, 192 (2006); McGrain v. Daugherty, 273 U.S. 135, 174–81 (1927) ("[T]he power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative function."); Exxon Corp. v. FTC, 589 F.2d 582, 585–86 (D.C. Cir. 1978) (holding that the FTC may disclose trade secrets to a valid congressional request or subpoena despite FOIA exemption and criminal prohibition on unauthorized trade secret disclosure).

[179] *See* H.R. REP. NO. 103-413, vol. 1, at 9–18 (1993).

they may be conducting. Many committees must oversee a wide variety of complex policy areas. The Senate Committee on Banking, Housing, and Urban Affairs, for example, exercises jurisdiction over policy areas as diverse as financial services, public housing, mortgage lending, and mass transportation.[180] Independent of additional investigative or oversight responsibilities, each of these policy arenas demands extensive attention just to maintain the federal government's current level of functionality. Further, as with any institution that is a creature of Congress and headed by politicians, standing committees are often highly political bodies.[181] This could make conducting investigations or oversight contentious, may dilute the effectiveness of oversight and investigation, and could result in weaker reform recommendations.[182]

Historically, standing committees have a questionable record of responding to investigative and reform needs following financial and business crises. Both the Continental Illinois National Bank and Trust Company ("Continental Illinois") and the S&L (or "thrift") crises of the 1980s led to an enormous public outcry.[183] As a result, several landmark pieces of legislation were produced by standing committees and placed on the normal Congressional calendar without any dedicated investigative or reform efforts.[184] However, the legislative and regulatory response failed to remedy serious problems.

First, the inadequate capitalization of the deposit insurance funds for both commercial banks and thrifts made Congressional intervention in the Continental Illinois and S&L situations difficult, delayed such intervention, and ultimately compounded the expenses required.[185] Second, although bank

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[180] SENATE RULES, *supra* note 6.

[181] *See, e.g.*, Hamilton et al., *supra* note 176, at 1116 (introducing the topic of congressional investigations in the context of the then-recent change in party control of Congress and its implications for a renewed spirit of executive oversight and investigation into allies of the then-sitting administration).

[182] *See, e.g.*, *id.*

[183] Joseph A. Grundfest, Comm'r, SEC, Address to the U.S. League of Savings Institutions: Responsibility and Regulation in the Savings and Loan Industry 14 (June 26, 1989), *available at* http://www.sec.gov/news/speech/1989/062689grundfest.pdf ("The public outcry against the S&L debacle, and against the aggressive self-interested lobbying conducted by this organization, is growing rapidly.").

[184] *See, e.g.*, Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, 105 Stat. 2236 (codified as amended in scattered sections of 12 U.S.C.); Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIREA"), Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.).

[185] Comptroller of the Currency Todd Conover told Congress that the FDIC did not have the funds to conduct a deposit payoff for any one of the nation's eleven largest banks should any of them fail. FDIC, HISTORY OF THE EIGHTIES – LESSONS FOR THE FUTURE: VOLUME I: AN EXAMINATION OF THE BANKING CRISES OF THE 1980S AND EARLY 1990S 241 (1997) [hereinafter FDIC HISTORY: VOLUME I]. Continental Illinois was the nation's seventh largest bank in 1984. *Id.* at 236. Similarly, the S&L crisis evaded solution for so long and cost so much in part due to the failure to resolve underwater thrifts. JAMES R. BARTH ET AL., THE SAVINGS AND LOAN CRISIS: LESSONS FROM A REGULATORY FAILURE 117–18 (2004).

and thrift evasion of capital requirements played a substantial role in the S&L crisis, Congress ordered regulators to continue examining simple, easy-to-manipulate capital ratios.[186] As such, although Congress ultimately recapitalized the funds and instituted new regulatory frameworks around capital requirements, the lack of a systematic review and dedicated reform effort meant that the shortcomings of these approaches did not come to the fore.[187] Both problems faded during the boom years of the 1990s and mid-2000s, but have now returned in the current financial crisis.[188]

Similarly, following the accounting scandals of the early 2000s, Congress passed the Sarbanes-Oxley Act to combat corporate malfeasance surrounding financial statements.[189] Unfortunately, the committees of relevant jurisdiction simply did not have the resources or the time to conduct meaningful investigations and deliberate over the reform implications.[190] Enacted hurriedly, without systematic investigation, and in the wake of a series of scandals, the legislation imposed sweeping changes on accounting practices, white-collar crime statutes, and a bewildering array of other statutory schemes.[191] As a result, many commentators have criticized the legislation,[192] and some posit that the problems with accounting standards and disclosure of material information played prominent roles in the current crisis.[193]

Although there have been successful standing committee investigations, cases like the S&L legislation and Sarbanes-Oxley represent the benchmarks in the financial and business sector. Standing committees generally face problems where there is no clear consensus and no pre-existing investigative record on which to build. The presence of an already existing legislative agenda makes it difficult to devote sufficient time and resources to establish an investigative record from scratch. The existing political agenda on related subject matter also makes it difficult to further consensus; points of contention are more likely to divide along the pre-existing divisions of the commit-

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[186] PANEL APRIL OVERSIGHT REPORT, *supra* note 138, at 45–51.

[187] Timothy Curry & Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, FDIC BANKING R., Dec. 2000, at 26, 27–28.

[188] PANEL, APRIL OVERSIGHT REPORT, *supra* note 138, at 8–15, 83–85 (addressing undercapitalized financial institutions and the inapplicability of traditional liquidation or receiver methods of resolving insolvent financial institutions).

[189] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.); *see, e.g.*, Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance* (Yale Law Sch., Ctr. for Law, Econ., and Pub. Pol'y, Research Paper No. 297, 2004).

[190] *See, e.g.*, Romano, *supra* note 189, at 8–9.

[191] *See, e.g.*, *id.*

[192] *See, e.g.*, *id.*

[193] This argument manifests itself in two ways. First, some claim that Sarbanes-Oxley magnified the effects of already pro-cyclical mark-to-market accounting by threatening stiff penalties for accountants who failed to keep up with the falling prices of their firms' assets. *See, e.g.*, Zachary Karabell, *Bad Accounting Rules Helped Sink AIG*, WALL ST. J., Sept. 18, 2008, at A25. On the other side, some argue that Sarbanes-Oxley failed to remedy the problem of unreliable and fraudulent accounting. *See, e.g.*, Posting of Michael Corkery to Deal Journal, WSJ Blog, http://blogs.wsj.com/deals/2009/09/11/the-criminal-case-against-aig/ (Sept. 11, 2009, 15:00 EST).

tee and its staff. As such, standing committees, although they have a valuable role to play in oversight and in ultimately enacting regulatory reform, are not ideal for investigating and systematically developing reform recommendations.

2. Special Commissions

Special commissions have a history of conducting oversight and investigation at least as long as that of Congress itself.[194] Special outside commissions, regardless of their legal form, power, or mandate, have generally fallen into two categories: investigative commissions[195] and advisory commissions.[196] Although each type of commission has a different administrative and policy role to play and is usually tailored to that role, both types of commissions share many of the same shortcomings.

Investigative commissions usually arise in response to specific, traumatic events.[197] They have highly specific mandates to probe causes of acute events that unfolded over an extremely short period of time and to propose specific reforms.[198] By contrast, advisory commissions usually exist to advise a specific agency about a specific topic. By the early 1990s, these types of commissions had proliferated to such a high number that the President started an initiative to eliminate unnecessary commissions and discourage the creation of new commissions.[199] Such Executive Branch commissions even have their own statutory scheme: the Federal Advisory Committee Act.[200]

For most of their history, special commissions have been primarily the province of the Executive Branch.[201] However, in recent years, Congress has

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[194] Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239, 1246 n.20 (2008) (citing precedent for outside commissions during the Washington administration and their expanded use throughout the twentieth century).

[195] *See, e.g.*, Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (Aug. 1, 1967) (establishing the National Advisory Commission on Civil Disorders).

[196] *See, e.g.*, Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 1238, 114 Stat. 1654, 1654A-334 to -38 (2000) (codified as amended at 22 U.S.C. § 7002 (2006 & Supp. I 2007)) (establishing U.S.-China Economic and Security Review Commission).

[197] *See, e.g.*, Exec. Order No. 11,365, 32 Fed. Reg. 11,111. (establishing the Kerner Commission in the wake of the 1967 race riots in the United States).

[198] *Id.* § 2 (limiting the Kerner Commission to consideration of causes of recent riots and proposals for preventing and mitigating riots in the future).

[199] Exec. Order No. 12,838, 58 Fed. Reg. 8,207 (Feb. 10, 1993).

[200] Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. I §§ 1–16 (2006)).

[201] *See, e.g.*, Exec. Order No. 11,365, 32 Fed. Reg. 11,111; *see also* 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. 11,130, 28 Fed. Reg. 12,789 (Nov. 29, 1963) (establishing the President's Commission on the Assassination of President Kennedy (Warren Commission)); Exec. Order No. 8,983, 6 Fed. Reg. 6,569 (Dec. 18, 1941) (establishing the Commission to Investigate the Pearl Harbor Attack).

begun delegating its own power to advisory commissions to oversee and advise policymaking on a number of important, complex issues.[202] It has also shown a willingness to empower a legislative investigative commission outside the aegis of the Executive Branch, as shown most notably through the National Commission on Terrorist Attacks upon the United States ("9/11 Commission").[203]

Congress delegated more power to oversee, investigate, and propose reforms to the 9/11 Commission than to any previous outside commission not necessarily composed of legislators.[204] In addition to the power to hold hearings, Congress specifically empowered the 9/11 Commission to subpoena witnesses and compel production of documents, powers it had traditionally reserved for itself.[205] The Commission used these powers to great effect, holding nineteen days of hearings and taking testimony from 160 people, including some of the most powerful officials in the foreign policy, military, and intelligence communities.[206] It also reviewed millions of pages of documents.[207] Ultimately, the Commission released a comprehensive report detailing the background and sequence of the attacks and proposing significant changes to the American system of gathering and processing intelligence.[208]

When the 9/11 Commission released its report, it quickly became a commercial success, selling millions of copies.[209] But when Congress failed to act in the wake of the report's release, the Commissioners formed a separate organization to lobby Congress in favor of the reforms they proposed.[210] This organization, called the 9/11 Public Discourse Project ("PDP"), assigned letter grades to Congress's action or inaction on the Commission's proposals; the highest grade was an A-, and the plurality were Ds and Fs.[211] At least in part because of the PDP's advocacy, most of the Commission's recommendations eventually passed into law, primarily as part of the Intelli-

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[202] *See, e.g.*, Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 1238, 114 Stat. 1654, 1654A-334 to -38 (2000) (codified as amended at 22 U.S.C. § 7002 (2006 & Supp. I 2007)); Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4022, 111 Stat. 251, 350–55 (codified as amended at 42 U.S.C. § 1395b-6 (2006 & Supp. I 2007)) (establishing Medicare Payment Advisory Commission).

[203] Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 605, 116 Stat. 2279, 2410–11 (2002) (codified as amended at 6 U.S.C. § 101 (2006 & Supp. I 2007)).

[204] Although many of the 9/11 Commission's members were former legislators, none were sitting legislators during the Commission's tenure.

[205] Intelligence Authorization Act § 605(a) (granting 9/11 Commission subpoena power).

[206] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 431–33 (2004).

[207] *Id.* at 449.

[208] *See generally id.*

[209] Edward Wyatt, *For Publisher of 9/11 Report, a Royalty-Free Windfall*, N.Y. TIMES, July 28, 2004, at C11.

[210] 9/11 Public Discourse Project, http://www.9-11pdp.org/about/index.htm (last visited Oct. 18, 2009).

[211] 9/11 PUB. DISCOURSE PROJECT, FINAL REPORT ON 9/11 COMMISSION RECOMMENDATIONS (2005), *available at* http://www.9-11pdp.org/press/2005-12-05_report.pdf.

gence Reform and Terrorism Prevention Act of 2004 ("IRTPA").[212] At least one commentator has observed that the IRTPA is "the most significant reorganization of the intelligence community since the National Security Act of 1947."[213] However, the unique nature of the Commission's political surroundings and the trauma surrounding the underlying event, probably made it easier for the commission to convince hesitant legislators to institute their recommendations.[214]

Special commissions are likely better suited for avoiding the excessively political character of a congressional standing or select committee. The involvement of non-legislators, many of whom are new to one another, makes it likely that the commissioners will develop a more cooperative working relationship than the one that usually characterizes relationships between legislators. However, this more apolitical nature comes at the expense of having a legislator's capability to directly influence pending legislation or other reform. Therefore, the special commission form works best to address situations where removing political considerations is more important than tying reform efforts to findings and ensuring their passage; in short, they are better at pure fact-finding than at a blend of oversight, investigation, and reform.

3. Select or Special Committees of Congress

Select or special committees of Congress have a long history; the first recorded Congressional investigation took place via special committee in 1792.[215] Since then, Congress has tasked select committees with investigating matters as broad as wartime contracting[216] or intelligence practices,[217] and as narrow as a review of the questionable actions of one specific presidential campaign.[218]

Just like standing committees, select committees can conduct their inquiries using the full range of tools available to Congress.[219] However, on select committees, members and staff can focus more on the target of their oversight and investigation. Although they may not have the same long-standing policy expertise or institutional knowledge as standing committees, select committees generally make provisions for securing outside expertise, whether from intergovernmental sources or other outside sources.[220] Finally,

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[212] Pub. L. No. 108-458, 118 Stat. 3638 (codified in scattered sections of 5, 6, 8, 18, 22, 42, 49, 50 U.S.C.).

[213] Fenster, *supra* note 194, at 1291.

[214] *See generally id.*

[215] HAMILTON, *supra* note 175, at 172.

[216] S. Res. 71, 77th Cong., 87 CONG. REC. 1615 (1941) (enacted).

[217] S. Res. 21, 94th Cong., 100 CONG. REC. 1431–33 (1975) (enacted).

[218] S. Res. 60, 93d Cong., 119 CONG. REC. 3849–51 (1973) (enacted).

[219] *See, e.g.*, 119 CONG. REC. 5783–85 (1973) (discussing congressional subpoena power and ability to administer oaths during proceedings).

[220] *See, e.g.*, *id.* (discussing the committee's ability to utilize at will the resources and staff of the rest of the government and to hire experts or consultants as necessary).

because select committees are composed of members of the legislature, a committee's findings and proposals tend to advance farther than outside proposals when formally introduced in Congress.[221] Thus, because of their proximity to the oversight and investigative mechanisms, legislators on a select committee can better enact reform and policymaking initiatives that result from their oversight and investigation.

However, select committees have some significant drawbacks. Their lack of familiarity with policies and relevant background can prevent such a committee from reaching a full understanding of an issue or, even worse, can contribute to framing an inquiry incorrectly from the beginning.[222] Furthermore, like standing committees, select committees can fall victim to political pressures. If anything, select committees are more vulnerable to this problem because of their role in tackling more specific, contentious issues.

Congress notably used a select committee to oversee, investigate, and propose reform when it created the National Monetary Commission in 1908.[223] Although calling the new body a commission instead of a select committee, Congress restricted its membership to sitting members of the House and Senate,[224] so it is best understood as a joint select committee. Congress created this Commission, composed of nine senators and nine representatives,[225] and charged it with an enormous task: "inquire into and report to Congress . . . what changes are necessary or desirable in the monetary system of the United States or in the laws relating to banking and currency."[226]

The Commission took four years to carry out its mission, holding hearings across the country and undertaking an investigation of banking practices throughout the United States and Europe.[227] It reviewed crises from around the world, and studied what went wrong, and how, if at all, bankers could prevent these problems.[228] Furthermore, it conducted field hearings around the United States to determine the unique problems of local banking systems, and to determine in what ways they were, and were not, integrated

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[221] *See, e.g.*, Interview by James R. Fuchs, Harry S. Truman Library & Museum, with John H. Tolan, Jr., in San Francisco, Cal. 37 (Mar. 5, 10, and 17, 1970 and Feb. 8, 1974) [hereinafter Tolan Interview], *available at* http://www.trumanlibrary.org/oralhist/tolanj.htm.

[222] *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1259–75 (1988) (arguing that lack of historical understanding undercut Iran-Contra Committee's ability to conduct a full investigation).

[223] Act of May 30, 1908, ch. 229, § 17, 35 Stat. 546, 552.

[224] *Id.*

[225] *Id.* Notably, Congressman Arsène Pujo (D-La.) himself served on the National Monetary Commission at the same time that he chaired the House Banking Subcommittee conducting the Money Trust Investigation. H.R. REP. NO. 62-1593, at 173 (1913); S. DOC. NO. 62-243, at 72 (1912).

[226] Act of May 30, 1908, ch. 229, § 18, 35 Stat. at 552–53. Congress gave the Commission a full six years to accomplish this task. *Id.* § 20, 35 Stat. at 553.

[227] S. DOC. NO. 62-243, at 4–5.

[228] S. DOC. NO. 61-406, at 6–10 (1910) (discussing the resolution of financial crises in Britain, France, and Germany).

into the broader financial fabric of the United States.[229] The Commission's exhaustive study and virtually unlimited budget ultimately produced a proposal to overhaul the American financial system.[230]

However, the National Monetary Commission did not operate in a vacuum. During the course of the Commission's work, concern mounted in both Washington and around the country that Wall Street bankers had accumulated excessive control over the institutions of the broader economy, particularly industrial conglomerates and railroads.[231] That financial panic only subsided after financier J.P. Morgan personally intervened by providing liquidity to the rapidly deteriorating financial situation.[232] Morgan's ability to pull together the funds necessary to restore liquidity fostered two interrelated inquiries: first, what permitted Morgan to access such funds and persuade his ostensible competitors to comply,[233] and, second, whether the United States should have such a capacity for itself.[234]

Largely at the insistence of Congressman Pujo, also a member of the National Monetary Commission, the House Banking Committee convened a subcommittee to answer the first question of Morgan's access to money.[235] The investigation later became known as the Money Trust Investigation.[236]

In an extensive set of hearings, the subcommittee attempted to "[ascertain] whether, in current phrase, there is a 'money trust.'"[237] The investigation uncovered substantial, and not necessarily beneficial, connections between investment houses of all sizes, and other "real economy" enterprises of all sizes.[238] The subcommittee found that, through seats on boards of directors of other banks and industrial firms, one bank could exercise control over a surprisingly large number of enterprises, and influence over dozens more.[239] This control, coupled with the implicit power to exclude banks from assistance during times of crisis, had helped fuel the Panic of 1907.[240]

However, even with the full investigative weight of Congress behind it, the Pujo Investigation stalled because of cooperation problems.[241] The Office of the Comptroller of the Currency refused to cooperate and share informa-

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[229] ROGER T. JOHNSON, FED. RESERVE BANK OF BOSTON, HISTORICAL BEGINNINGS. . . THE FEDERAL RESERVE 19 (1999).

[230] *See generally* S. DOC. NO. 62-243.

[231] *See* 48 CONG. REC. 2382–419 (1912).

[232] SUBCOMM. OF THE COMM. ON BANKING & FIN., 62D CONG., MONEY TRUST INVESTIGATION: INVESTIGATION OF FINANCIAL AND MONETARY CONDITIONS IN THE UNITED STATES 354-60 (Comm. Print 1913) [hereinafter MONEY TRUST INVESTIGATION] (Testimony of Ransom H. Thomas, former president of the New York Stock Exchange).

[233] H.R. REP. NO. 62-1593, at 129–35 (1913).

[234] S. DOC. NO. 61-406, at 3 (1910).

[235] H.R. REP. NO. 62-1593, at 129–33.

[236] MONEY TRUST INVESTIGATION, *supra* note 232.

[237] H.R. REP. NO. 62-1593, at 129.

[238] *See, e.g.*, MONEY TRUST INVESTIGATION, *supra* note 232.

[239] *Id.*

[240] H.R. REP. NO. 62-1593, at 22–27.

[241] *Id.* at 15–17.

tion because it viewed the subcommittee's authorization as insufficient to justify providing what the Comptroller considered to be confidential information.[242] Only after returning to Congress to get a stronger statute permitting disclosure could the subcommittee obtain access to some of the information it sought.[243] The subcommittee thus did not initially have access to critical information, leading it to characterize its findings as "intermediate."[244]

Along with its final report, the National Monetary Commission also submitted a draft bill to create an American central bank.[245] The Commission explicitly modeled the draft bill on the successful institutions it had observed in Europe, and it intended the legislation to remedy the shortcomings that the Commission had observed in the unique American banking system.[246] Working alongside the new President, Congress ultimately passed the Federal Reserve Act the following year.[247] Although the new legislation allayed some of the public outrage at the control of Wall Street bankers over the economy, it also garnered some support from the bankers' community by separating the central banking system from Wall Street in certain respects.[248] As a result, the Federal Reserve Act can be thought of as the product of, among other influences, the combined efforts of the Money Trust Investigation and the National Monetary Commission.[249]

The Money Trust Investigation also made a lengthy and detailed set of recommendations.[250] Congress ultimately responded piecemeal; the Clayton Antitrust Act followed just a year after the subcommittee presented its findings[251] and made it much more difficult to exercise the kind of control over the broader economy that the financial sector had previously enjoyed.[252]

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[242] *Id.*

[243] *Id.* at 14–15.

[244] *Id.* at 17.

[245] S. DOC. NO. 62-243, at 43–72 (1912).

[246] *Id.* at 41 ("[T]he task of the commission was rendered more difficult from the fact there were no precedents that we could follow, and no system in existence that to any considerable extent could be made applicable to existing or prospective conditions in the United States. We were therefore obliged to originate a plan which would answer the exacting requirements of American conditions . . . . The plan we propose is essentially an American system, scientific in its methods, and democratic in its control.").

[247] Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended in scattered sections of 12 U.S.C.). The Federal Reserve Act bears some noted similarities to the National Monetary Commission's proposal. For example, the Commission proposed a system of fifteen regional banking associations, each run by a "governor," responsible for ensuring smooth operation of the national banking system and for providing liquidity in the event of a financial crisis. S. DOC. NO. 62-243, at 72 (1912) at 11–12. In broad outlines, the twelve presidents of the regional Federal Reserve Banks have similar responsibilities today.

[248] JOHNSON, *supra* note 229, at 33.

[249] For a thorough review of the myriad of other influences on the Federal Reserve Act, including the role of William Jennings Bryan as President Wilson's Secretary of State, *see id.*

[250] H.R. REP. NO. 62-1593, at 162–65 (1913).

[251] *See* Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

[252] *See id.*

However, the subcommittee also proposed another critical reform: preventing commercial banks from underwriting investment securities.[253] Congress did not act upon this recommendation, and its failure to do so would ultimately play a role in the onset of the Great Depression.[254] The Glass-Steagall Act would ultimately impose this restriction on commercial banks in 1933.[255]

Another example of select committee investigation occurred in the aftermath of the 1929 market crash and in the throes of the Great Depression. After this crisis, the Senate focused on the prominent role of market participants and the possibility that market abuses may have contributed to the crisis.[256] It thus authorized the Senate Committee on Banking and Currency to investigate stock exchange practices, the impact of stock exchange practices on the national banking system, and the possibility of using the taxing power to alter such practices.[257] The Senate subsequently expanded the Committee's mandate to include an investigation of specific traders of securities and members of stock exchanges,[258] as well as the authority to investigate specific transactions and the subsidiaries of traders and members of stock exchanges.[259] The Committee chose to undertake this investigation using a subcommittee, which became known as the Pecora Committee after its longest-serving chief counsel, Ferdinand Pecora.[260]

The Pecora Committee took its mandate and conducted a thorough, two-year investigation. It most memorably called a series of Wall Street executives to testify before it as part of its investigations into the practices of their firms.[261] Conducting hearings around the country,[262] generating thousands of pages of testimony and records,[263] and expending enormous sums of money,[264] the Committee exposed widespread fraud and other distasteful practices.[265]

While still ongoing, the Committee's investigation provided much of the legislative record to support the banking reforms of the 1930s, including

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[253] H.R. REP. NO. 62-1593, at 164.

[254] The Pecora Commission, discussed *infra* Part IV.B.3, detailed extensive abuses by financial institutions which participated in both commercial and investment banking and attributed much of the Depression's financial instability to such abuses.

[255] *See* Banking Act of 1933 (Glass-Steagall Act), ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.).

[256] S. Res. 84, 72d Cong. (1932) (enacted).

[257] *See id.*

[258] S. Res. 56, 73d Cong. (1933) (enacted).

[259] S. Res. 97, 73d Cong. (1933) (enacted).

[260] Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 37–38 (1991).

[261] *Damnation of Mitchell*, TIME, Mar. 6, 1933, at 47–48.

[262] *Id.*

[263] STOCK EXCHANGE PRACTICES: HEARINGS BEFORE THE COMM. ON BANKING AND CURRENCY PURSUANT TO S. RES. 84 (72ND CONG.) AND S. RES. 56 AND S. RES. 97 (73D CONG.), 72D AND 73D CONG. (listing the full complement of the committee's documents). It amounts to over 9000 pages of investigative record and a report of nearly 400 pages to the full Congress.

[264] *See* S. REP. NO. 73-1455, at 4 (1934) (detailing expenses of $250,000).

[265] *Id.* (detailing $2,000,000 in unpaid taxes "uncovered" during the investigation).

the creation of deposit insurance, the separation of commercial and investment banking, and the regulation of securities and exchange practices.[266] The Committee also called for reforms that subsequent Congresses would act upon, including penalties for inaccurate financial statements,[267] capital requirements,[268] and more thorough bank examinations.[269] In this instance, the Committee benefited substantially from the presence of influential senators among its ranks. For example, Senator Carter Glass (D-Va.) took many of the findings of the Committee and used them as the basis for the reforms contained in the Glass-Steagall Act.[270]

In addition, perhaps the most prominent example of a select committee conducting oversight and investigation into the financial and business sphere is the special Senate Committee to Investigate the National Defense Program. Better known as the Truman Committee after its first chairman, then-Senator Harry Truman (D-Mo.),[271] the Committee began its work in a context with virtually no investigative or oversight precedent to guide it. As the United States filled its "arsenal of democracy" role, it expanded weapons procurement to levels unimaginable just a few years earlier.[272]

In order to combat the potential for waste, fraud, abuse, and corruption as part of these tremendous procurement efforts, the Senate granted the Committee an incredibly broad mandate encompassing substantial oversight responsibilities, as well as investigative and reform tasks.[273] The Senate authorized the Committee to consider subjects as diverse as contracting practices, effects on small businesses, management and labor practices, and "such other matters as the committee deem[ed] appropriate."[274] In fulfilling this mandate, the Committee could call on the full range of Congressional powers, but had a budget of only $25,000 to start.[275]

Despite its limited funds,[276] the Committee used its sweeping mandate to great effect. The Committee held hundreds of hearings, generated

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[266] *Id.* at 393.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Compare* S. Rep. No. 73–1455, at 113–14, 156–84 (detailing abuses of commercial banks engaged in underwriting activities or having investment arms or affiliates) *with* Banking Act of 1933, ch. 89, §§ 16, 20, 48 Stat. 162, 184, 188 (codified at 12 U.S.C. §§ 24, 377) (prohibiting national banks from underwriting securities and requiring them to divest themselves of their underwriting).

[271] *See* Tolan Interview, *supra* note 221.

[272] *See generally* DONALD M. NELSON, ARSENAL OF DEMOCRACY: THE STORY OF AMERICAN WAR PRODUCTION (1946).

[273] S. Res. 71, 77th Cong., 87 CONG. REC. 947 (1941) (enacted).

[274] *Id.* at 948.

[275] *Id.*

[276] Truman successfully operated the committee on this budget by making liberal use of detailees from other committees and branches of the government. Once the United States formally entered the Second World War and spending on military contracting increased commensurately, Truman had little trouble getting the funds he needed. *See generally* Interview by Jerry N. Hess, Harry S. Truman Library & Museum, with Wilbur D. Sparks, Staff Member,

thousands of pages of investigative records, and published upwards of fifty reports.[277] More importantly, it recommended dozens of reforms of the military contracting process which ultimately passed as legislation.[278] This legislation moved smoothly through Congress in large part because of the other committee affiliations of Truman Committee members; Senators Truman, James Mead (D-N.Y.), and Harold Burton (R-Ohio) sat on the Senate Committee on Appropriations, and Senators Truman, Harley Kilgore (D-W. Va.), and Mon Wallgren (D-Wash.) sat on the Senate Committee on Military Affairs.[279]

The legacy of the Truman Committee lives on in modern congressional activities. After the Senate disbanded the Committee in 1948, it granted its oversight and investigative responsibilities to the Permanent Subcommittee on Investigations, now a subcommittee of the Senate Committee on Homeland Security and Government Affairs.[280] As news of contractor scandals came out during the wars in Iraq and Afghanistan, commentators calling for greater oversight and investigative capacity often harkened back to the Truman Committee's success.[281] When Congress established the Commission on Wartime Contracting in Iraq and Afghanistan, both Congress[282] and the Commission[283] explicitly looked to the Truman Committee for inspiration and background.

Select committees of Congress have, therefore, played an important role in investigating the causes and remedies of financial and economic instability and in proposing reforms designed to adapt to new economic and regulatory realities, and to mitigate the effect of economic instability in the future. The combination of their ability to focus exclusively on a particular topic, muster the collective resources and authority of Congress, and translate their diagnoses into meaningful reforms makes them a successful vehicle for conducting oversight and investigation, and for proposing such reforms. History suggests that they are more effective in the business context than any of the alternative options.

Truman Comm., in Wash., D.C. 6–12 (Sept. 5 and 19, 1968), *available at* http://www.trumanlibrary.org/oralhist/sparkswd.htm#transcript.

[277] H. REP. NO. 109-16 at 105 (2005) (Additional Views of the Hon. David R. Obey).

[278] *See* Tolan Interview, *supra* note 221, at 37 (citing as examples the National Defense Appropriation Act of 1942, the Contract Settlement Act of 1944, and the War Mobilization Act of 1944).

[279] *Id.*

[280] Senate Governmental Affairs, PSI Subcommittee History, http://hsgac.senate.gov/public/_files/psihistory.htm (last visited Oct. 27, 2009).

[281] *See, e.g.*, Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-first Century*, 1 HARV. L. & POL'Y REV. 3, 7 (2007).

[282] *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 828, 122 Stat. 3, 230 (codified at 10 U.S.C. § 2410q).

[283] Commission on Wartime Contracting in Iraq and Afghanistan, Background, http://www.wartimecontracting.gov/index.php/about (last visited Oct. 29, 2009) ("The bill was inspired by the work of the 'Truman Committee,' which conducted hundreds of hearings and investigations into government waste during and after World War II that resulted in an estimated savings of more than $178 billion in today's dollars.").

C. Solution: Create a Select Committee of Congress to Investigate and Propose Reforms

This historical analysis indicates that Congress's best option for fulfilling its investigative and regulatory reform responsibilities lies in appointing a select committee of Congress, one imbued with all of Congress's authority and with a robust investigative and reform mandate. Such committees successfully addressed many of the financial crises and intractable business problems of the first half of the twentieth century, and they did so because they possessed: (1) focus; (2) power; and (3) influence.

First, the select committee has focus. Unlike a committee of standing jurisdiction with an ongoing, sweeping policy mandate to fulfill, a select committee has a specific, temporary assignment to finish. It can therefore attract staffers who have expertise in, and who wish to focus on, the subject of the committee's investigation and reform efforts.[284] In contrast, the inability to focus on the issue at hand leads to standing committees repeatedly coming up short in their attempts to investigate and fix regulatory flaws.

Second, both the power granted to the body, and the power exercised by its members, matter. Having only the authority to reform the regulatory system, or to investigate failures, makes for half-measures and vague recommendations. As one can see from the oversight context, having a mandate that prevents a body from fulfilling its broader mission hampers the effectiveness of the overall system.[285] In the select committee context, members negotiate and vote on their own authority, ensuring that they have what they need to go forward; Truman, for example, secured detailees from across the government, and did not need to rely solely on a budget granted to him by the leadership.[286]

Furthermore, in contrast to delegated oversight bodies, each of which must petition and wait for the right authority, a select committee operates from a more privileged position when seeking greater authority because it can simply request it directly from the source. In nearly all of the examples of successful investigation and reform, the institution's mandate, authority, or budget changed from its original form. In order to ensure that an investigative and reform-minded body does not wait for Congress's largesse, it helps to have members of Congress arguing on its behalf.

Finally, influence matters. Having sitting legislators present on the investigative and reform body increases its influence immensely. The experience of the bodies that Aldrich, Pujo, Pecora, and Truman led indicates that sitting legislators have the unique ability to take what they hear in the committee room, or learn from an unearthed document, and use it to revamp future policy. Truman and his colleagues moved seamlessly between their

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[284] *See supra* notes 250–70 and accompanying text (discussion of Pecora Committee).
[285] *See supra* Parts II and III.
[286] *See supra* notes 271–79 and accompanying text (discussion of Truman Committee).

committee work and introducing reform-minded legislation.[287] Glass took the lessons he learned in the committee room with Pecora and put them to use in writing the landmark legislation that would bear his name.[288] Where a body investigating a crisis has the influence to take what it learns about the crisis and turn it into preventive policy, it significantly strengthens the regulatory system and accomplishes the entity's, and therefore the country's, goal.

In addition to power and influence, there is also the issue of political palatability. In this sense, special commissions do have an advantage over select committees because of their apolitical nature. Having non-legislators working on a problem inherently defuses the potential for ugly, contentious policymaking. In this setting, the politicized nature of the financial crisis, and the combat that has already taken place over TARP and EESA, would favor the apolitical special commission solution. But, the need for power and influence for an investigative and reform body continues. Here, regulatory reform is of the utmost importance given the current depth of the financial crisis and the role that the existing regulatory system played in permitting the conditions that fostered it. Congress can scarcely afford to risk a delay between proposal and implementation commensurate with the experience of the 9/11 Commission.

Admittedly, this analysis suffers from one critical flaw: the special commission model pioneered by the 9/11 Commission may well turn out to succeed, given the opportunity to work out its difficulties. Yet, given the complexities of the issue and the political pressures the investigative and reform body would confront when tackling financial reform, this Note suggests that it would be wiser to use the select committee, which is the mechanism that successfully investigated financial crises in the past. The United States emerged from those crises and enjoyed a fifty-year financial quiet spell.[289] Although complexities lie ahead, a return to our traditional financial investigative and reform models may be the best option.

V. Conclusion: A New Wave? Or More *Sturm und Drang*?

Congress delegated and created a robust oversight scheme to police Treasury's enactment of its EESA mandate. However, as befits the crisis atmosphere under which it passed the bill, Congress failed to account for the need to extend oversight to other economic stabilization activities. This shortcoming leaves the broader economic stabilization efforts outside the

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[287] *See supra* notes 272–79 and accompanying text (discussion of Truman Committee and its influence on wartime procurement legislation).

[288] *See supra* notes 250–253 and accompanying text (discussion of the Money Trust Investigation's focus on the separation of underwriting and commercial banking).

[289] *See generally* Panel Regulatory Reform Report, *supra* note 102; David Moss, *An Ounce of Prevention: The Power of Sound Risk Management in Stabilizing the American Financial System* (Harvard Bus. Sch. Working Paper No. 09-087, 2009).

scope of TARP vulnerable to waste, fraud, and abuse. Congress also delegated the task of conducting a comprehensive investigation of the financial crisis to FCIC in order to support and inform proposals to reform the regulatory scheme. However, it divorced the investigative component from the reform component. This shortcoming jeopardizes Congress's ability to create an effective reform scheme.

A. Expanding the Mandate and Powers of EESA Oversight Bodies

Congress's first task should be to ensure that it expands the mandates of the existing EESA oversight bodies to encompass all economic stabilization efforts. Congress has already shown signs of progress in this area. First, Congress has already passed legislation strengthening SIGTARP's oversight capacity.[290] Other legislation, which would grant SIGTARP authority to audit recipients of public money under the anticipated Public-Private Investment Program ("PPIP"), or Term Asset-Backed Securities Loan Facility ("TALF"), has also passed.[291] Additional proposed legislation would require that Treasury keep a running, "close-to-real-time" database of the distribution of TARP funds for the benefit of SIGTARP, GAO, and the Panel.[292] Still other proposals would mandate that Treasury consult the Panel before issuing new executive compensation regulations.[293]

Although many of these proposals, if enacted, would provide important benefits to the TARP oversight scheme, they would not constitute a comprehensive scheme to police the implementation of the government's entire economic stabilization program. Although the question of whether to grant GAO permanent authority to audit the Federal Reserve is beyond the scope of this analysis,[294] at a minimum, GAO and SIGTARP should have the authority to audit the facilities established under the Federal Reserve's emergency section 13(3) power, such as the Maiden Lane special purpose vehicles. The FDIC's and Federal Reserve's involvement in other economic stabilization efforts outside TARP should also fall under the auspices of the TARP oversight scheme. More importantly, future extraordinary exercises of authority should fall under the oversight authority of these bodies. Failure to

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[290] Special Inspector General for the Troubled Asset Relief Program Act of 2009, Pub. L. No. 111-41, 123 Stat. 1603 (to be codified at 12 U.S.C. §§ 5201, 5231). The Act (1) releases funds to SIGTARP; (2) requires that Treasury comply with recommendations arising from SIGTARP audits or certify that not action is needed; (3) requires that Treasury, FDIC, SEC, the Federal Reserve, FHFA, and any other body SIGTARP deems appropriate cooperate with SIGTARP investigations. *Id.*

[291] Public-Private Investment Program Improvement and Oversight Act of 2009, Pub. L. No. 111-22, § 402, 123 Stat. 1656, 1656–58 (to be codified in scattered sections of 12, 15, 31, 38, 42 U.S.C.).

[292] H.R. 1242, 111th Cong. (2009).

[293] H.R. 1664, 111th Cong. (2009).

[294] *See, e.g.*, Letter from Milton J. Socolar, Acting Comptroller Gen. of the U.S., to Sen. Ted Stevens (R-Alaska) (Aug. 10, 1981), *available at* http://www.scribd.com/doc/6320565/Federal-Reserve-Audit.

do so will result in additional Treasury activity being carried out without accountability or transparency.

B. Undertaking a Thorough, Comprehensive Congressional Investigation

Compared to Congress's investigation and regulatory reform efforts, oversight is simple. Congress already created an oversight scheme under EESA, and, by all accounts, it is functional and improving. In contrast, deciding whether, and how, to investigate the causes of the financial crisis and reform the regulatory system proves much more difficult. However, Congress settled this matter when it created the FCIC.

When considering FERA and the FCIC, some prominent members of Congress argued for pushing ahead with regulatory reform without conducting an investigation at all.[295] Under the plans proposed by these legislators, the standing committees of relevant jurisdiction would conduct oversight, investigation, and reform as part of their standard legislative tasks.[296] The assumption behind such a proposal is that the committees are prepared to tackle regulatory reform in addition to their oversight responsibilities and absent formal investigation. The historical record demonstrates the inadequacy of that position, especially with regard to the efforts to combat recent financial crises like the S&L crisis and the accounting scandals of 2002.

The Senate passed a version of FERA proposing a Senate select committee on the financial crisis.[297] This select committee would have consisted of seven senators and, like all committees of Congress, have the same powers to compel witnesses to appear and production of documents.[298] However, despite the advantages of this system, the Senate simply agreed to the House's version of FERA, which created a special commission, the FCIC.[299]

FCIC has only investigatory authority.[300] Its primary responsibilities consist of writing a report, due at the end of 2010, about the causes of the financial crisis and consulting with the leading regulatory reform committees, the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs.[301] Even more problematic, it was required to be composed only of non-policymakers. Although it remains an open question how effective or meaningful the consultation provisions will turn out to be, the Commission otherwise has little or no ability to influence

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[295] *Frank Says Panel Shouldn't Interfere With Legislating*, NATIONAL JOURNAL'S CONGRESSDAILY, Apr. 21, 2009. *See also* John Shaw, *US Hill Probe of Financial Crisis Could Complicate Reg Reform*, MARKET NEWS INTERNATIONAL, Apr. 24, 2009.

[296] Shaw, *supra* note 295.

[297] FERA, S. 386, 111th Cong. §§ 201–09 (as passed by Senate, Apr. 28, 2009).

[298] *See id.*

[299] *Compare id. with* FERA, Pub. L. No. 111-21, § 5, 123 Stat. 1617, 1625–31 (2009).

[300] FERA, § 5(h)(1) (limiting FCIC's report to findings and conclusions about the causes of the financial crisis).

[301] *Id.* § 5(h).

the direction of policy. As a result, Congress has largely tasked it with investigating for investigation's sake. That ignores the lessons of history that one must link the investigative and the reform efforts so as to ensure a connection between failure, change, and remedy.

In constructing a commission without reform authority, Congress seems to have again made the decision to reserve authority for itself, even though it lacks the time, political will, and expertise to exercise it properly. The opportunity existed for Congress to return to an investigative and reform scheme that had proven effective in correcting for, and moving on from, previous crises. It has chosen not to exercise that opportunity. Time will tell whether this new Commission will take its place among the successful exercises of investigative and reform authority, or whether Congress will regret its choice.