

Symposium

Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror

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INTRODUCTION: WAR, RESPONSIBILITY, AND TRUTH TELLING

John Hart Ely's classic book *War and Responsibility* chronicles and critiques the behavior of American constitutional actors in the conduct of the Vietnam War.¹ At its core, *War and Responsibility* is concerned with the problem of checking executive power in the area of national security. Ely's solution rests heavily on his strong belief in legal process, the underlying presumptions of which have been subjected to much criticism.² It seems clear that in light of the expansive assertions of executive power recently made by the Bush Administration in its prosecution of the War on Terror, there is an urgent need for new mechanisms to ensure executive accountability in the national security context.

This article suggests that investigatory commissions may represent an effective supplemental check on the power of the Executive. The experiences of the 9/11 Commission—on which this article draws—demonstrate that an actor outside of the three branches of government may, in certain contexts, play an important role in influencing the behavior of these branches. This article argues that the reason for this newfound power stems from a transformation in our understandings of truth—and of truth telling.

Investigatory commissions have long been associated with expert technical knowledge that is gathered scientifically and applied dispassionately. Like investigatory commissions of the past, the 9/11 Commission mobilized these so-called “analytics of truth”³ in the course of its detailed investigation of government decisionmaking on and before September 11, 2001. Unlike its many predecessors, however, the 9/11 Commission also engaged in a different mode of truth telling, one associated not with technical experts but with ordinary individuals transformed by the violence of September 11. This mode—which I call “parrhesiastic” truth telling—emerged alongside the analytics of truth in ancient Greece and has been translated by Michel Foucault to mean “fearless speech.”⁴ In his words,

1. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

2. For two prominent critics of legal process, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980); and Jules Lobel, *The Relationship Between the Process and Substance of the National Security Constitution*, 15 *YALE J. INT'L L.* 360 (1990) (book review).

3. MICHEL FOUCAULT, *FEARLESS SPEECH* 170 (Joseph Pearson ed., 2001). The concern “with determining how to ensure that a statement is true,” something that Foucault called an “analytics of truth,” *id.*, is valued as essential to the political process, not only in commissions but also in the routine operation of executive agencies, congressional committees, and courts.

4. Though Foucault titles his book *Fearless Speech*, the term *parrhesia* is more commonly translated as “free speech.” *Id.* at 11. *Parrhesia*, along with such rights as *isegoria* (equal right of

[*P*]arrhesia is a verbal activity in which a speaker expresses his personal relationship to truth, and risks his life because he recognizes truth-telling as a duty to improve or help other people (as well as himself). In *parrhesia*, the speaker uses his freedom and chooses frankness instead of persuasion, truth instead of falsehood or silence, the risk of death instead of life and security, criticism instead of flattery, and moral duty instead of self-interest and moral apathy.⁵

Parrhesia does not function by leading listeners to a truth through the performance of reasoned argument or the manipulation of less reflective instincts (as philosophy or rhetoric might). A parrhesiastic speaker produces a truth that comes uniquely from her self and her experience and is directed critically at a listener whose power places the speaker in potential danger. In the classic Athenian mode, a parrhesiastic speaker confronted a god, a sovereign, or the assembled citizenry through a direct revelation of experienced truth. As such, *parrhesia* is dangerous speech, raising the possibility that those with power will retaliate against the speaker as much as the possibility that the holder of power will be shamed or otherwise moved to redress the wrong. Because of its risk, *parrhesia* was not a form of self-interest or therapy. Rather, it was a recognition of a duty to another or to society as a whole.

The right of *parrhesia* meant that speakers with a personal knowledge of the folly of choices made by the sovereign (whether democratic public or king) could confront leaders with their failures. The Athenian tradition demanded that sincere *parrhesiastes* be heeded and left unharmed, but the risk of a less worthy response (i.e., retaliatory violence) also guaranteed the reliability of the critique. *Parrhesia* went into decline in Greece during the fourth century B.C. and has largely been ignored by modern theories of government.

Today, victims have emerged as perhaps the most important source of *parrhesia*.⁶ By reproducing the violent emotions they have experienced, victims who choose to speak parrhesiastically can destabilize political and legal authority. For much of the past two decades, this practice has been directed at the criminal justice system, as violent-crime victims have spoken out against the courts, parole boards, and other decisionmakers whose management of dangerous criminals has failed them. With the 9/11

speech) and *isonomia* (equal participation in governance), was a political right guaranteed by the Athenian constitution. *Id.* at 22.

5. *Id.* at 19-20.

6. See Jonathan Simon, *Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech*, 82 N.C. L. REV. 1377, 1402 (2004).

families and their alliance with the 9/11 Commission, *parrhesia* has moved out into a far more general critical engagement with government.

To a degree unprecedented in the history of federal commissions, I contend, the 9/11 Commission relied on the power of parrhesiastic truth telling by its own members (and leaders), by some of its witnesses, and most importantly by the victims of violence to impose a measure of accountability upon the executive branch. The Commission's relationship with the victims transformed it from an institution anchored completely in the analytics of truth into one infused with parrhesiastic truth. The victims operated almost as a chorus in Greek drama, providing an onstage audience for the central public hearings of the Commission. This chorus gave voice to public criticism of the Commission, the President, and other political actors who stood in the way of discovering the truth behind the events of September 11. The *parrhesia* of the victims (both actual and threatened) helped shape the decisions made by the political actors. This dynamic was best exemplified by the testimony of Richard Clarke, a counterterrorism official in several administrations, whose words unquestionably belong to the parrhesiastic tradition.

Parrhesia, even amplified by a national commission, is no substitute for the congressional responsibility that Ely envisioned. Commissions may, however, offer a crucial mechanism for bolstering the constitutional scheme in national security. Congress's willingness to participate forcefully and coequally in deciding how far to extend the War on Terror may depend on the degree of parrhesiastic accountability imposed on it by the 9/11 Commission. In short, the success of the 9/11 Commission suggests a way to supplement Ely's goal of promoting congressional responsibility by undertaking inquiries into executive action or inaction in matters of national security as well as into the assertion of congressional policymaking power over those matters.

In the remainder of this article, I develop this vision of investigatory commissions as sources of parrhesiastic accountability. In Part I, I sketch out the reasons why Ely's legal process solution to the accretion of executive discretion over war powers may fail, especially in the conditions of the War on Terror. Part II explores the history of investigatory commissions. Part III examines the experience of several commissions in the context of parrhesiastic truth telling.

I. WAR AND RESPONSIBILITY

War and Responsibility takes the reader on a long and detailed tour through the formal acts undertaken by Congress, the President, and the courts relating to the war in Southeast Asia between 1953 and 1975. Most

of the book's constitutional theorizing consists of a largely originalist argument for why there is no serious doubt that Congress was meant to be a politically accountable check on the ability of the Executive to go to war.⁷ The book depicts and critiques the rise of presidential power to initiate and continue war without meaningful approval by Congress.⁸

War and Responsibility grew out of a series of law review articles at a time of great public debate about the war powers, occasioned by the recent history of small-scale and proxy wars conducted by the administrations of Ronald Reagan and George H.W. Bush in places such as Lebanon, Grenada, Panama, Iraq, El Salvador, Nicaragua, and Guatemala. The book makes a focused case for a new and improved War Powers Resolution—which Ely calls the Combat Authorization Act—based closely on the existing War Powers Resolution of 1973.⁹ For a variety of reasons, these legal process solutions to the dominance of executive power over national security have not proven successful at shoring up congressional authority. Ely notes that President Reagan and the first President Bush largely ignored the strictures of the War Powers Resolution.¹⁰ Both the terror attacks of September 11 and the Iraq War have raised further doubts about the efficacy of relying solely on legal process to create the political conditions under which Congress will exercise its constitutional responsibilities.¹¹

7. ELY, *supra* note 1, at 3-5.

8. The concern that parliaments and legislatures can no longer effectively control government has been recognized as a problem in liberal democracies since the end of the nineteenth century. See, e.g., CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., MIT Press 1985) (1923); Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 *YALE L.J.* 1341 (2004). Interestingly, most of the scholarship has focused on the power of the Executive over domestic policy rather than the equally striking rise of executive power over foreign affairs and national security.

9. The provisions of Ely's proposed Combat Authorization Act are set forth in an appendix to *War and Responsibility*. ELY, *supra* note 1, app. at 132-38. As I discuss below, the War Powers Resolution belongs to a family of quasi-constitutional innovations designed to confront the dangers of executive supremacy over national security, as that threat was perceived in the post-Vietnam era. Another innovation was the regulation of the intelligence field Congress undertook following the inquiry conducted by the Church Committee. Perhaps the most significant innovation, spurred by Watergate, was the Independent Counsel Act. Ely's proposed improvements to the War Powers Resolution fit squarely into the logic of these innovations, which mostly track what Harold Koh has described as a legal process approach. See Harold Hongju Koh, *War and Responsibility in the Dole-Gingrich Congress*, 50 *U. MIAMI L. REV.* 1, 5 (1995).

10. ELY, *supra* note 1, at 49-52.

11. Even before these events, the war powers issues of the 1990s seemed to slip beyond the frame of the earlier debate. Was the problem in Bosnia that President Clinton relied on NATO authorization for his actions rather than putting the matter to a vote before the U.S. Congress? Or was it that he failed to make a case to the nation and its representatives in Congress? Is Clinton to be faulted for launching cruise missiles against properties linked to al Qaeda in Sudan without congressional approval? Or did Clinton fail to make an effective case for military action against al Qaeda notwithstanding clear evidence of its involvement in the bombings of U.S. embassies in Kenya and Tanzania?

The wars since September 11—Afghanistan and Iraq—have both been approved by Congress.¹² In the case of the March 2003 invasion of Iraq, the major basis on which the authorization to go to war was granted—Saddam Hussein’s alleged development and deployment of weapons of mass destruction—has collapsed.¹³ It is clear that Congress by and large failed to challenge the President’s aggressive interpretation of existing intelligence. Because that interpretation was endorsed by top U.S. intelligence officials, both Congress and President Bush have sought to deflect blame onto the actions of the intelligence community.

In my view, few, if any, of these questions would be meaningfully dealt with by Ely’s proposed Combat Authorization Act. The narrative of *War and Responsibility* deals almost entirely with the conduct of the traditional three branches of government: executive, legislative, and judicial.¹⁴ It lacks any sustained theoretical attention to the special roles of the CIA, the NSA, the RAND Corporation, and purely private contractors.

Ely’s constitutional strategy for restoring a meaningful congressional check on executive power in warmaking was based on reforming the War Powers Resolution to compel members of Congress to vote on the authority of the President to continue a military engagement.¹⁵ The War Powers Resolution sought to force the President to request Congress’s approval for war by requiring him to report the entry of U.S. forces into areas where combat was a real possibility and to withdraw troops if Congress did not authorize their presence within sixty days.¹⁶ Ely hoped to remedy the major design flaws of the Resolution by clarifying the conditions under which courts would be expected to trigger the need for congressional authorization. He also urged Congress to make remedial measures available to courts in order to encourage reluctant judges to play the role of interbranch referee.

Ely saw the overall enterprise of compelling congressional authorization as one of accountability, making the President accountable to

12. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 2002 U.S.C.C.A.N. (116 Stat.) 1498; Authorization for Use of Military Force, Pub. L. No. 107-40, 2001 U.S.C.C.A.N. (115 Stat.) 224 (2001). Lori Damrosch notes that the resolution concerning action in response to September 11 did not name al Qaeda, Osama bin Laden, or Afghanistan, which suggests that as a declaration of war it would have failed to satisfy Ely. Lori Fislser Damrosch, *War and Uncertainty*, 114 YALE L.J. 1415 (2005).

13. See, e.g., *U.S. Ends Search in Iraq for WMD*, CHI. TRIB., Jan. 13, 2005, at C4. For an analysis of this and similar instances of dubious factual assertions by warmaking executives, see Damrosch, *supra* note 12.

14. Edward Rubin has argued that American administrative law, particularly the Administrative Procedure Act, “fails to recognize the new modes of governance that characterize the administrative state.” Edward Rubin, *It’s Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 97 (2003).

15. ELY, *supra* note 1, app. at 115-31.

16. *Id.* at 48.

Congress and members of Congress accountable to voters. He fashioned his proposal as a response to the “the disappearance of the separation of powers,” particularly as related “to decisions to go to war.”¹⁷ The Cold War had introduced a new political tradition of the Executive making the decision to go to war and Congress avoiding its own constitutional role. As the end of the Cold War has transitioned into a global War on Terror, there is less reason than ever to be optimistic that some form of back-bracing legislation can hold either Congress or the President accountable in the national security domain. In October 2002, President Bush went to Congress to seek authorization to launch a war against Iraqi dictator Saddam Hussein, and he received it. Yet Congress’s authorization of Bush’s Iraq War has all the markings of a Gulf of Tonkin Resolution, which provided neither oversight nor meaningful goals for American forces.

What has remained a real part of American life from the Cold War to the present War on Terror is a “sense of permanent emergency; a consequent condition of continuous large-scale military preparation; covert military operations of a sort we never ran or sponsored before; the infectious attitude of secrecy, even dishonesty, toward the American people that such operations necessarily involve us in.”¹⁸ Those of us who share Ely’s conviction that American democracy requires mechanisms to deter executive abuses, especially in the projection of military power, and to compel the political processes of representative democracy to hold the Executive responsible, need to look beyond the War Powers Resolution.

For all Ely’s insight into how the Cold War had reshaped the practical reality of American war power, his solutions remain within the canonical constitutional picture of American government as a state of executive, legislative, and judicial functions. I suggest that if we relax the impulse to force our discussion of war powers to conform to the three canonical functions, we may find that institutional solutions emerge from current practice. One such solution is the investigatory commission, an institution that can arise from but does not neatly fit into executive, legislative, or judicial archetypes of governmental power. The investigatory commission is an institution that has long played an important but largely untheorized role in the operation of American governance at all levels, but especially in the federal system.

17. *Id.* at ix.

18. *Id.*

II. TRUTH TELLING AND GOVERNING: THE INVESTIGATORY COMMISSION AS A PARRHESIASTIC AGENCY

Commissions are a ubiquitous and curious form of governance. In some respects we might analogize them to a kind of political stem cell: They can emerge from almost any form of government and develop into a wide variety of actual institutions. The most basic relevant meaning of the word “commission” is “[a]uthority committed or entrusted to any one; *esp.* delegated authority to act in some specified capacity, to carry out an investigation.”¹⁹ There are references in English sources as far back as 1494 to governmental bodies designated “commissions,” such as, for example, a “Commyssyon of Sewers” that appears in a 1576 work on the government of Oxford.²⁰

In the United States, commissions can be generated by any kind of governmental entity so long as it exercises a power that is within its own jurisdiction. The term “commission” is also used to describe a wide variety of governmental methods. The Progressive Era saw a proliferation of commissions, many of them quasi-legislative or quasi-judicial bodies. In many states, railroad commissions set rates and established a variety of rules. Workers’ compensation commissions have regulated or even operated workers’ compensation systems. Parole boards (“boards” and “panels” are often used as synonyms for “commissions”) determine the length of time individual prisoners are imprisoned before the possibility of conditional release. The modern administrative agency has also frequently been termed a “commission”—e.g., the Federal Communications Commission, the Federal Trade Commission, and the Securities and Exchange Commission. In other countries, independent commissions have authority to set rules for and oversee elections that would be handled in the United States by partisan local elected officials.²¹

These so-called regulatory commissions often combine fact-finding and rulemaking functions but do so as a matter of regular operation and based on a general continuing jurisdiction. Their members may or may not enjoy relative autonomy from the cycle of election politics, but the commissions themselves are more or less permanent fixtures of government. Commissions tend to be somewhat independent from more political institutions, which makes them deviant and interesting institutions. Insofar as regulatory commissions form part of the regular apparatus of

19. 3 THE OXFORD ENGLISH DICTIONARY 556 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

20. 3 *id.* at 557 (sixth entry).

21. See Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 78 (2004).

government, however, they rarely confront the political branches. Regulatory commissions may add to the stability and legitimacy of political government, but they are unlikely to address a sudden loss of either.

A. *The History of the Investigatory Commission*

Our interest here is with the “investigatory commission,” so labeled to distinguish it from the other forms that also proliferated during the twentieth century. Investigatory commissions may be constituted by virtually every department of Anglo-American government. The commission form has even been borrowed on occasion by publicly minded groups of purely private citizens who have called themselves into being and laid claim to the same virtues as public investigatory commissions.²² From the very earliest days of practice under the Constitution, investigatory commissions were used to assist the established branches in managing problems of accountability. After leading a successful military operation to suppress the Whiskey Rebellion in 1794, President Washington appointed a special commission to investigate the causes of the rebellion and to negotiate appropriate sanctions with rebel leaders.²³ The use of commissions, however, seems to have increased markedly in the latter part of the nineteenth century, reflecting the demand felt by all levels of government to respond to catastrophes and worrying social problems resulting from the growing pressure of mass industrialization.

The late nineteenth century also saw the emergence of the commission form in public international law. Many international lawyers and diplomats of the period viewed war as the result of flawed information or miscalculation of risk by political leaders. Commissions of international specialists were appointed to look into the grievances behind wars, both recent and ongoing, with the belief that establishing facts might change the political decisionmaking calculus that led a country into war.²⁴

The rise of the investigatory commission in this period also parallels the emergence of parliamentary or congressional committees, which can likewise conduct hearings, compel testimony, and issue findings as reports (or even charges of impeachment for federal officers subject to removal by that mechanism). In many parliamentary democracies at the beginning of

22. See, e.g., NAT'L CRIMINAL JUSTICE COMM'N, THE REAL WAR ON CRIME (Steven R. Donziger ed., 1996).

23. See THOMAS R. WOLANIN, PRESIDENTIAL ADVISORY COMMISSIONS: TRUMAN TO NIXON 5 (1975) (describing the Whiskey Rebellion commission as an “operational group” of conciliators and negotiators dealing directly with a crisis, as distinguished from later presidential advisory commissions).

24. See J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 34-42 (1984) (describing the commission of inquiry introduced by the 1899 Hague Convention).

the twentieth century such committees were seen as a key way for legislative bodies to exercise oversight of the burgeoning power of the executive branch, especially in the context of war powers.²⁵ France was one of the first countries to recognize that legislative investigatory bodies could serve as essential checks on domestic political actors.²⁶ In the United States, Woodrow Wilson likewise argued that congressional investigations were critical to keeping administrative power accountable.²⁷ It was not until 1927, however, that the U.S. Supreme Court upheld the constitutionality of Congress's power to investigate.²⁸

On the commission's willingness to confront the power of the administrative state, no less astute an observer than Max Weber has noted the proclivity of bureaucracies to produce secrecy, especially around instances of failure:

In facing a parliament, the bureaucracy, out of a sure power instinct, fights every attempt of the parliament to gain knowledge by means of its own experts or from interest groups. The so-called right of parliamentary investigation is one of the means by which parliament seeks such knowledge. Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament—at least in so far as ignorance somehow agrees with the bureaucracy's interests.²⁹

For reasons that neither Wilson nor Weber anticipated, legislative bodies have not, in fact, been reliable in the persistence or efficacy of their investigatory function.³⁰ The increasing prevalence throughout the twentieth century,³¹ and now into the twenty-first century, of the investigatory commission, notwithstanding full powers within Congress and other legislative bodies to investigate, reflects the need to reach beyond the traditional branches of government in order to counterbalance the increasing depth and breadth of executive administrative power. While a

25. See Lindsay Rogers, *Parliamentary Commissions in France* (pt. 1), 38 POL. SCI. Q. 413, 417 (1923) (discussing France and England).

26. The commissions of the French Chamber of Deputies and of the Senate garnered much attention precisely because they were understood to serve as checks on executive power, particularly during World War I when "war conditions tended to make executives uncontrolled dictators." *Id.*

27. See WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 297-317 (n.p. 1885).

28. See *McGrain v. Daugherty*, 273 U.S. 135 (1927).

29. MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 233-34 (H.H. Gerth & C. Wright Mills eds. & trans., Galaxy 1958) (1946).

30. See Damrosch, *supra* note 12.

31. See Daniel Bell, *Government by Commission*, PUB. INT., Spring 1966, at 3, 6; Elizabeth B. Drew, *On Giving Oneself a Hotfoot: Government by Commission*, ATLANTIC MONTHLY, May 1968, at 45, 45.

precise enumeration is beyond the scope of this article, it seems clear that the trend has been toward increasing use of investigatory commissions.

Recently, in addition to the 9/11 Commission, a host of investigatory commissions have been appointed. We have already heard from a commission appointed by Secretary of Defense Donald Rumsfeld to look into the abuses of Iraqi prisoners at Abu Ghraib prison in Iraq.³² Another commission, this one appointed by President Bush and congressional leaders, is looking into intelligence failures in Iraq, which, as noted above, led top intelligence officials to assure both Congress and the President that weapons of mass destruction existed in Iraq in violation of United Nations resolutions.³³ Indeed, well before the terror attacks of September 11, Congress created three commissions specifically to consider challenges to the national security of the United States.³⁴ Investigatory commissions, in short, are a common feature of American government at all levels.

B. *The Structure of the Investigatory Commission*

The investigatory commission exhibits several notable qualities. Perhaps the most important is its highly contingent nature. Investigatory commissions frequently arise in a context of catastrophic events. For the national government, this has generally meant a massive military setback, security failure, or patterned collapse of civil order. For a city, a single riot may be enough. Investigatory commissions belong to an “emergency apparatus of government, hastily assembled in times of public crisis and charged with completing their investigation within a short period of time.”³⁵

32. This commission is headed by former Secretary of Defense James Schlesinger and includes another former secretary of defense, Harold Brown. Michael Hirsh & John Barry, *Battle over Blame*, NEWSWEEK, Aug. 9, 2004, at 36.

33. See Exec. Order No. 13,328, 69 Fed. Reg. 6901 (Feb. 6, 2004) (creating the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction).

34. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 107, 479 n.114 (authorized ed. 2004) [hereinafter 9/11 COMMISSION REPORT]. The first of these commissions was headed by former Senators Gary Hart and Warren Rudman. Charged with examining twenty-first-century threats to the United States, it concluded that domestic terrorist attacks were among the most compelling. The second commission, headed by former Virginia Governor James Gilmore, examined domestic vulnerabilities to weapons of mass destruction. A third commission, headed by L. Paul Bremer (later head of the Coalition Provisional Authority in Iraq), looked into ways to prepare for a domestic terrorist strike. *Id.* The 9/11 Commission itself comments on the recent proliferation of commissions as evidence of the congressional failure to develop oversight practices. *Id.*

35. Anthony Platt, *The Politics of Riot Commissions, 1917-1970: An Overview*, in THE POLITICS OF RIOT COMMISSIONS, 1917-1970: A COLLECTION OF OFFICIAL REPORTS AND CRITICAL ESSAYS 3, 4-5 (Anthony Platt ed., 1971). Riot commissions were the paradigmatic example of the investigatory commission in the United States in the twentieth century. Indeed, there are distant echoes of the work of the riot commissions in the work of the 9/11 Commission. Both were created in response to widespread death and destruction in the centers of large U.S.

In this respect, they all involve a public mobilized by highly alarming images of emergency conditions and emergency rule. Even after the passage of time suppresses the most destabilizing fears (e.g., that the assassination of President Kennedy was only the start of a foreign invasion or a military coup, or that the attacks on the World Trade Center and the Pentagon signaled the beginning of an even more dispersed plot against American aviation and landmarks), these events produce enduring sources of anxiety about both the legitimacy and competence of government. Moreover, commissions operate at the behest of elite political forces that have considerable investment in the status quo. Finally, while each comprises a range of potentially adversarial actors, each also faces similar institutional pressures to unify in a good faith effort to reassure a stricken political community.

One important consequence of the investigatory commission's temporary status is how that status shapes the incentives of commission members. Appointment to a commission, either to membership or staff, may bring prestige that will add social capital to a person's career, but it typically creates neither long-term obligations nor enduring opportunities for profit.³⁶ Thus, in contrast to normal permanent institutions of government, commissions can exercise judgment from a position of relative independence.

Commission members are generally people with notable careers in governance, often lawyers and elected officials, but also leaders of organizations such as unions, universities, and corporations. While commission members are often former government officials, typically they are retired or have moved on to positions at some remove from government. The staffs of commissions are generally composed of technically skilled lawyers, investigators, and experts whose expertise varies with the nature of the catastrophe. Usually the top staff people are lawyers with considerable experience in high-level corporate and governmental affairs.³⁷

This combination of independence and knowledge may help ensure the "objectivity" relevant to the analytics of truth, i.e., the capacity of the commission to fairly assess the validity of the testimony and other evidence placed before it. But it also hints at the possibility of parrhesiastic truth, which involves the capacity to speak critically to those with greater power, at some risk to oneself and out of a sense of duty.³⁸ This risk is not

cities, and both went about their work in the wake of events viewed as having posed an extraordinary threat to political normalcy.

36. *Id.* at 5.

37. *Id.* at 12.

38. In its appearances in Greek dramas and philosophical writings, *parrhesia* is always spoken upwardly across a power asymmetry (a more powerful person can, of course, speak

ephemeral. After all, the chance that parrhesiastic speech may give rise to great personal cost stands as a warranty of the truthfulness of a parrhesiastic statement. As Foucault notes, "If there is a kind of 'proof' of the sincerity of the *parrhesiastes*, it is his *courage*."³⁹ Indeed, from this perspective, the fact that typical commission members have already given distinguished government service of some sort is less a guarantee of independence (which undercuts courage from a parrhesiastic perspective) than an assurance that the speaker is the sort of person whose criticism is to be taken seriously. A statement that the Bush Administration failed to prevent a terrorist attack when a more vigilant administration might have succeeded has a wholly different meaning coming from someone with distinguished former public service than it would from an ordinary opinionated citizen who might stand in Lafayette Park with a sign.

For the Greeks, eligibility to engage in *parrhesia* required being not only a citizen of Athens but also among the best of citizens, an ill-defined but nonetheless nonuniversal category.⁴⁰ Statements that a leader made a mistake in starting a difficult and unresolved war (like the Peloponnesian War between Athens and Sparta in the fifth century B.C.) had more significance for both speaker and audience if the speaker was a small landowner or a distinguished warrior whose life and fortune were directly wagered in wars rather than a merchant who stood to get rich.⁴¹

The final products of commissions are almost always reports written for the public with the expectation that they will be read and considered by lawmakers and policymakers. In some cases, and the 9/11 Commission is a spectacular case, these reports have become popular with the public at large. Along the way, commissions often hold public hearings. In the case of the 9/11 Commission, media interest was exceptionally high, including some network television and radio broadcasts of live testimony. In some instances, the hearings are trial-like, with a staff attorney questioning a witness under oath for the benefit of the commissioners. The relationship between hearings and the final report, however, is ambiguous. In the case of riot commissions, for example, hearings have been seen by scholars as serving more to allow the venting of strong community feelings than to gather evidence. In Anthony Platt's words,

Although such hearings are quasi-legal (proceedings are recorded, witnesses are cross-examined, etc.) in the style of a legislative

critically to a less powerful one, but this is not *parrhesia*). FOUCAULT, *supra* note 3, at 18. This asymmetry always comes with a risk that the more powerful will retaliate. *Id.* at 16.

39. *Id.* at 15. This contrasts with an analytics of truth in which validity is assured by procedures.

40. *Id.* at 18.

41. *Id.* at 68-70.

investigation, their purpose is largely ceremonial and symbolic. Public hearings communicate an appearance of impartiality and authority; they serve to dramatize the legitimacy of the commission and its inquiry. But they are rarely taken seriously by persons responsible for a commission's final report.⁴²

These reports are generally unanimous, despite the fact that members are often drawn from groups that are at least potentially in conflict: unions, businesses, minority groups. In part, this unity reflects the profound events that have called the commission into being. When substantial dissent becomes public, the basic claim that the commission's authority comes from its disinterested and expert examination of the issues is undermined. Dissent may seem especially inappropriate in the face of the catastrophe that brought the commission into existence. Faced with the prospect of a nonunanimous report, commissions may work hard to compromise on issues even at the cost of major objectives.⁴³ As President Johnson stated in his charge to the Kerner Commission, called into being to address the great wave of urban riots that took place after 1964,

One thing should be absolutely clear: this matter is far, far too important for politics. It goes to the health and safety of all American citizens—Republicans and Democrats. It goes to the proper responsibilities of officials of both of our Parties. It goes to the heart of our society in a time of swift change and of great stress. I think the composition of this Commission is proof against any narrowness or partisanship. . . . We are looking to you, not to approve our own notions, but to guide us and to guide the country through a thicket of tension, conflicting evidence and extreme opinion.⁴⁴

Unanimity also reflects recognition on the part of commission members that their own status as truth tellers is fragile and can easily be undermined by the manifestation of contradictory conclusions.

The dominant theme in the social science literature is that commissions tend to support the current administration by shifting blame away from powerful interests, deflecting calls for dramatic change in existing institutions of government, and appearing to do something about

42. Platt, *supra* note 35, at 23.

43. In this sense, commissions are not miniature legislatures, where representatives may have political reasons to credibly threaten not to reach agreement (and thus to win the best terms). A representative can hold out because her authority is tied to election cycles, not to one vote on one issue.

44. Platt, *supra* note 35, at 11 (omission in original) (internal quotation marks omitted).

circumstances that have upset and alarmed the public.⁴⁵ They are portrayed as instruments of power designed to address and muffle the threat posed by catastrophic failures of governance. Commissions generally seek “political truth” rather than factual truth, i.e., truth based on political acceptability rather than objectivity.⁴⁶ They are instituted, in Amitai Etzioni’s opinion, “to treat the ‘politics of the situation rather than the situation.’ Their very appointment gets results—it gets the national leadership off the hook.”⁴⁷ Commissions pacify both proponents and opponents of change. For proponents, they indicate that something is being done; for opponents, they indicate that no change will occur without preliminary investigation. Thus, the national commission may serve as an agent of national policy delay, because any steps taken after a commission has been seated and before recommendations are issued are generally thought to be unreasonable.⁴⁸

The net result has often been only modest policy change, leading both critics and defenders of commissions to see them merely as attempts to manage public relations and as largely incapable of forcing those in power to bear responsibility for terrible and possibly avoidable social consequences.⁴⁹ Platt argues that commissions appointed to investigate riots (one of the most ubiquitous American usages in the twentieth century) were systematically biased to favor the interests of the elite classes in maintaining the social conditions that led to riots. Even the most liberal reports, like that of the National Advisory Commission on Civil Disorders

45. The experience of riots and riot commissions has had an important role in shaping the largely negative view that late-twentieth-century social scientists have had of investigatory commissions. See generally MICHAEL LIPSKY & DAVID J. OLSON, *COMMISSION POLITICS: THE PROCESSING OF RACIAL CRISIS IN AMERICA* (1977) (identifying the tactics used by political elites to transform racial crisis into politics as usual); David S. Brown, *The Public Advisory Board as an Instrument of Government*, 15 PUB. ADMIN. REV. 196 (1955) (summarizing the roles and traits of governmental advisory boards); Mark P. Petracca, *Federal Advisory Committees, Interest Groups, and the Administrative State*, 13 CONGRESS & PRESIDENCY 83 (1986) (identifying the potential for industry groups to influence advisory committees); George T. Sulzner, *The Policy Process and the Uses of National Governmental Study Commissions*, 24 W. POL. Q. 438 (1971) (evaluating the pacifying role played by commissions); Amitai Etzioni, Op-Ed, *Why Task Force Studies Go Wrong*, WALL ST. J., July 9, 1968, at 18 (criticizing commissions for being too concerned with politics and not concerned enough with substance). But see WOLANIN, *supra* note 23, at 3, 129-30, 193 (arguing against the view that commissions only serve to obstruct and obscure).

46. See EDWARD JAY EPSTEIN, *INQUEST: THE WARREN COMMISSION AND THE ESTABLISHMENT OF TRUTH* 33 (1966) (arguing that the Warren Commission served both to ascertain and expose the facts behind the assassination of President Kennedy and to protect the national interests of the United States by dispelling rumors).

47. Etzioni, *supra* note 45.

48. See Morton H. Halperin, *The Gaither Committee and the Policy Process*, 13 WORLD POL. 360 (1961) (analyzing the Eisenhower-era Gaither Committee, which studied the adequacy of U.S. defenses against Soviet nuclear attack, as an example of the use of civilian study groups in the executive decisionmaking process).

49. George Sulzner argues that critics have been unrealistic in the degree of reform expected and that commissions can be seen as successful in bringing about incremental change. See Sulzner, *supra* note 45, at 442.

(the Kerner Commission), defined rioting as aberrant individual behavior and placed the imprimatur of neutral public interest on the mandate to maintain order above all else.⁵⁰ The political possibilities opened up by the failure of governance to maintain social order are, Platt contends, squandered by riot commissions that in the end seek to “minimize criticism of the public officials to whom they must look for primary implementation of the report[s].”⁵¹ As Kenneth Clark testified to the Kerner Commission in 1968,

I read that report . . . of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of 1935, the report of the investigating committee on the Harlem riot of 1943, the report of the McCone Commission on the Watts riot.

I must again in candor say to you members of this Commission—it is a kind of Alice in Wonderland with the same moving picture reshown over and over again, the same analysis, the same recommendations, and the same inaction.⁵²

Commissions possess latent parrhesiastic possibilities to the extent that they create a space for truth tellers with a profound and personal knowledge of the catastrophic events the commission has been created to investigate. The typical riot commission has failed to produce *parrhesia* due in part to its unwillingness to permit African Americans with personal knowledge of the most provocative governmental failures to speak out. But some of the most potent narrative legacies from the twentieth-century tradition of riot commissions, like the Kerner Commission’s warning about the risk of dividing into two Americas, have force in large part because they come from persons with long histories of serving at high levels of government where they will naturally have been allied with forces currently or recently in control of government. Their willingness to criticize precisely those institutions and practices with which they are most familiar is what gives their criticism its parrhesiastic force. My contention is that the only modest success of investigatory commissions is due not to a failure to discover the analytics of truth but to a failure to engage in parrhesiastic truth telling.

The commissions with the greatest opportunity to play a role in holding the President accountable are national commissions. These may be appointed by an enacted law (requiring the President’s concurrence or an

50. See Platt, *supra* note 35, at 42-43.

51. *Id.* at 45 (internal quotation marks omitted).

52. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 265 (1968) (omission in original) (internal quotation marks omitted).

override of a veto) or an executive order. Commissions authorized by Congress have generally involved some role for congressional leaders in choosing members, along with the Executive. Members of executive commissions are appointed by the President, although often the President consults with and appoints members of Congress.

National investigatory commissions have tended to fall into one of two categories. One set has focused on impending social problems, like crime,⁵³ violence,⁵⁴ the fiscal crises of Social Security,⁵⁵ or the threat of missile attacks on the United States.⁵⁶ Such commissions are intended to produce policy recommendations that will directly influence the actions taken by both the President and Congress. In some cases they clearly have. The Greenspan Commission on Social Security pushed President Reagan, an opponent of higher taxes of any kind, to support a historic increase in the payroll tax⁵⁷ (a move that erased much of the gain for middle-class taxpayers from Reagan's earlier reduction of the top income tax rates). The Rumsfeld Commission, which endorsed the view that the United States was vulnerable to the possibility of a missile attack by a rogue state like North Korea,⁵⁸ placed sufficient pressure on President Clinton for him to reverse his stance as an opponent of missile defense.⁵⁹

The other set of investigatory commissions, those focused on specific catastrophic events that have already taken place, are intended mainly to determine the facts behind the catastrophes. These often make forward-looking policy recommendations as well, but their primary goal (their commission, in another sense) is to establish a credible account of what happened. Because they are not courts, any accountability exacted following the report of a commission depends on a prosecutor or the Executive to undertake action to discipline or punish those, if any, whose conduct was responsible for the events.

53. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).

54. See NAT'L COMM'N ON THE CAUSES & PREVENTION OF VIOLENCE, *TO ESTABLISH JUSTICE, TO ENSURE DOMESTIC TRANQUILITY: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* (1969).

55. See PAUL LIGHT, *ARTFUL WORK: THE POLITICS OF SOCIAL SECURITY REFORM 163-66* (1985).

56. See COMM'N TO ASSESS THE BALLISTIC MISSILE THREAT TO THE UNITED STATES, *REPORT OF THE COMMISSION TO ASSESS THE BALLISTIC MISSILE THREAT TO THE UNITED STATES* (1998).

57. See LIGHT, *supra* note 55, at 102.

58. See George Lewis et al., *National Missile Defense: An Indefensible System*, *FOREIGN POL'Y*, Winter 1999-2000, at 120, 121-22.

59. See Sebastian Mallaby, *The Irrelevant Election*, *FOREIGN POL'Y*, Sept.-Oct. 2000, at 74, 78.

III. NATIONAL COMMISSIONS

Although investigatory commissions have proliferated over the past century, the work of two national commissions is particularly relevant for our discussion of the 9/11 Commission. The first of these is the Roberts Commission, appointed by President Roosevelt in December 1941 to investigate the attack on Pearl Harbor. The second is the Warren Commission, appointed by President Johnson in December 1963 to investigate the assassination of President Kennedy.

In all three of these catastrophes, national trauma combined with apparent failures on the part of the executive branch. The story of these two prior commissions suggests that the relative success of the 9/11 Commission lies at least partially in its form of truth telling. The Roberts Commission and the Warren Commission both exemplify the analytics of truth that have dominated the modern commission form. Each sought to determine the sequence of events and actions that led to the tragedies by examining witnesses and documents. Like most modern commissions, both ignored parrhesiastic truth telling, and both failed to either hold the Executive accountable or exonerate the Executive of wrongdoing in a popularly effective way.

In both cases, at least part of the failure was attributable to the commission's inability to compel the production of disclosure from powerful executive agencies like the Navy, the FBI, and the CIA. It is not clear, to be sure, that the kind of parrhesiastic truth telling that the 9/11 Commission seems to have embraced was possible in the cultural context of either earlier commission, but neither pursued the kind of relationship with the victims of violence that the 9/11 Commission ultimately developed.

A. *Pearl Harbor and the Roberts Commission*

On December 7, 1941, the Japanese launched a successful surprise attack on the American Pacific Fleet at its chief naval base, Pearl Harbor, Hawaii. The defensive forces at Pearl Harbor were caught unprepared. A substantial number of airplanes were stationed at the base, but they remained lined up neatly on the ground as the Japanese attack aircraft arrived. Some eighteen battleships, cruisers, destroyers, and auxiliary craft and close to 200 aircraft were lost in about two hours. More than 2400 Americans, mostly military personnel, were killed in the raid.⁶⁰

60. GORDON W. PRANGE, *AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR* 539 (1981).

Few Americans knew much about the U.S. territorial possession thousands of miles from the west coast of North America at the time of the attack, and only a tiny fraction knew there was a major military base called Pearl Harbor.⁶¹ But the colossal losses and the surprise nature of the attack made a deep impression on a stunned nation.

Because the target of the attack was a military base, blame quickly focused on the two senior commanders with authority over operations at Pearl Harbor—Admiral Kimmel, commander of the Pacific Fleet, and General Short, the Army commander in charge of Pearl Harbor.⁶² The question of whether they were genuinely negligent has been a source of tremendous controversy ever since. Many contemporary political foes of President Roosevelt were more than prepared to believe that Kimmel and Short were taking the blame for failures that lay far higher up in the administration. For those who most deeply opposed the changes associated with Roosevelt's stewardship of the nation during the Great Depression, a darker scenario was more than plausible. It was no secret that Roosevelt supported providing aid to Britain in the war with Hitler in Europe. Tense negotiations with the Japanese were allowed to break off in November under circumstances some thought demonstrated American intransigence. In Emily Rosenberg's words, "When the dedicated Roosevelt haters advanced December 7 as a day of 'deceit,' they were overwhelmingly concerned with proving that the deceit rested in the White House."⁶³

It was in this context that the President began to assemble an independent investigatory commission within a week of the attacks. This commission would be headed by retired Supreme Court Justice Owen J. Roberts and would include four high-ranking military officers.⁶⁴ Congress,

61. See EMILY S. ROSENBERG, A DATE WHICH WILL LIVE: PEARL HARBOR IN AMERICAN MEMORY 10 (2003).

62. See JOHN TOLAND, INFAMY: PEARL HARBOR AND ITS AFTERMATH 14 (1982).

63. ROSENBERG, *supra* note 61, at 34.

64. Two days after the attack on Pearl Harbor, Secretary of the Navy Frank Knox, a Republican appointed by the Democratic President, launched an investigation that blamed the catastrophe on lack of readiness by both the Army and the Navy. See PRANGE, *supra* note 60, at 584-89. Knox's report was published on December 15, 1941. On that same day, President Roosevelt asked Knox to assist in naming an independent commission to investigate the attacks, which eventually became the Roberts Commission. *Id.* at 592. We see here an important part of the context for independent investigatory commissions. They do not make up for the lack of capacity within the executive and congressional branches to produce truth or engage in truth telling but instead address the credibility and legitimacy of that truth telling. As in subsequent catastrophic failures of national security, the appointment of an independent investigatory commission followed earlier investigations undertaken by agencies within the executive branch or by congressional committees. "By the end of 1945, . . . there had been seven inquiries, seven reports, and thousands of pages of testimony [concerning the attack on Pearl Harbor]." ROSENBERG, *supra* note 61, at 37. In each case, the earlier investigations failed to resolve public concerns that these catastrophic events reflected strategies of hidden attackers, either within government itself or among the nation's foreign enemies. However, in each case, the later

firmly controlled by the President's party, cooperated by staying any congressional investigation.⁶⁵

The Roberts Commission's fact-finding was, at least in retrospect, undertaken too quickly and with too little attention to procedural consistency. Its members met informally for instruction from Secretary of War Henry Stimson on December 17; several days later they took unsworn testimony from key military officers in Washington. Only after arriving in Hawaii did something more like formal investigation commence, with testimony from the principal Hawaii-based military commanders as well as eyewitnesses to the attacks.⁶⁶ The Commission was given only partial intelligence cooperation. They were shown the intelligence known to base commanders in Hawaii but were not provided with the full knowledge that Washington had obtained by having broken the Japanese diplomatic and military codes. This redacted record was sufficient to show that Kimmel and Short were apprised of intelligence that might have led them to believe an attack was possible, but it was fragmentary enough to conceal the great extent of American success in breaking Japan's codes.⁶⁷ The unanimous report concluded that the disaster was a direct result of the commanding officers' failure to implement existing emergency procedures at Pearl Harbor. The two men were found to be personally guilty of a dereliction of duty. The Commission largely exonerated Washington-based military staff as well as the White House.⁶⁸ Shortly after the report of the Commission was released, less than two months after the attack, the government announced it would seek the courts-martial of both Kimmel and Short.⁶⁹

The formation of the Roberts Commission was greeted favorably by the press but did not silence Republican critics of the administration, who continued to push for further investigation.⁷⁰ Before the war ended, additional commissions had been created by both the Army and the Navy. These investigations shifted some of the blame away from Kimmel and Short and back toward Washington. These reports suggested, first, that information available in Washington was not made known to the Hawaiian command and, second, that Roosevelt had allowed the negotiations with Japan to falter by making unreasonable demands.⁷¹

commission's report largely confirmed the conclusions of the earlier, less independent investigations.

65. See PRANGE, *supra* note 60, at 595 (describing Carl Vinson, chair of the House Naval Affairs Committee, as deferring to the "outstanding board" that the President had announced).

66. *Id.* at 593-95.

67. ROSENBERG, *supra* note 61, at 36.

68. *Id.* at 35.

69. PRANGE, *supra* note 60, at 608.

70. ROSENBERG, *supra* note 61, at 36.

71. *Id.* at 37.

The Roberts Commission chose quite deliberately to avoid any association with parrhesiastic truth telling. Indeed, despite the fact that (or perhaps because) Pearl Harbor involved such a large number of casualties, the Commission expressly distanced itself from the emotions associated with the attack:

Regrettable loss of life and extensive damage resulted from the air raid. The nature of that damage and the details of the measures taken to repair it have no direct bearing on the execution of the mandate appointing this Commission, and the subject is dealt with in our report only to the extent that it bears on questions of responsibility for the disaster.⁷²

In focusing primarily on who within the military might be held responsible for failing to anticipate the attack, the Roberts Commission signaled from the start a commitment to leaving unquestioned the blamelessness of the administration itself. In distancing itself from the direct experience of violence, the Commission seemed to signal its singular commitment to an analytics of truth, one primarily focused on whom to blame. These two features may be related. To have adequately questioned the basic structure of the administration's management of its tense negotiations with Japan would have required the Roberts Commission to obtain full disclosure of what the executive branch actually knew about the likelihood of a Japanese attack through its successful code-breaking and communication-intercepting efforts. To have confronted and compelled the administration to provide meaningful disclosure of its most relevant intelligence would have required an extraordinary political lever of the sort that I argue the 9/11 Commission brought to bear upon the Bush Administration through its relationship with the families of the victims.

B. *The Warren Commission*

President Kennedy was mortally wounded by gunshots to his head and neck at approximately noon on November 22, 1963. Less than a month later, President Johnson appointed the Warren Commission. Formally known as the National Commission To Investigate the Assassination of the

72. COMM'N APPOINTED BY THE PRESIDENT OF THE UNITED STATES TO INVESTIGATE AND REPORT THE FACTS RELATING TO THE ATTACK MADE BY JAPANESE ARMED FORCES UPON PEARL HARBOR IN THE TERRITORY OF HAWAII ON DECEMBER 7, 1941, ATTACK UPON PEARL HARBOR BY JAPANESE ARMED FORCES, S. DOC. NO. 77-159, at 2 (1942).

President, and headed by Chief Justice Earl Warren, the Commission published its final report in September 1964.⁷³

We generally view the Warren Commission as a failure because of the large number of Americans who remain skeptical about its most famous conclusion: that Lee Harvey Oswald, acting alone, shot and killed the President from his perch in the Texas School Book Depository.⁷⁴ This negative judgment is unfair, however, for several reasons.

First, public belief that a conspiracy of some sort lay behind the assassination was already shared by a majority of Americans before the Commission even published its conclusions.⁷⁵ The awful and awesome act of murdering a Chief Executive, regicide in modern garb, seems beyond the capacity of an individual. Oswald was no ordinary individual, as reported by the media almost immediately after his arrest. He was a marine who had renounced his citizenship in Moscow and lived in the Soviet Union for several years.⁷⁶ Whether from the left or the right, Oswald seemed to be part of something.

Second, and consistent with this first point, the public concern in 1964 that a conspiracy lay behind President Kennedy's murder focused primarily on the Soviet Union and Cuba, not on the cast of noir characters from the Mafia, the Cuban exile armed-resistance movement, and the Pentagon or CIA that have haunted us ever since.⁷⁷ This is an important difference. While post-1964 conspiracy theories may have contributed to the erosion of public trust in government, the primary theories circulating in 1964 threatened something far worse: to push the United States back into nuclear confrontation with the Soviet Union. Such a confrontation was, in September 1964, an all-too-real possibility, given that just under two years had passed since the superpowers came precariously close to nuclear war over the placement of Soviet nuclear weapons in Cuba in October 1962.⁷⁸ If the Warren Commission's famous conclusion that Lee Harvey Oswald acted alone has never fully won public approval, neither has the potentially destabilizing thesis that our Cold War rival sent a defector back to kill our Chief Executive.⁷⁹

73. See ROBERT DALLEK, *AN UNFINISHED LIFE: JOHN F. KENNEDY, 1917-1963*, at 698 (2003).

74. *Id.* at 698-99.

75. *Id.* at 698.

76. Jonathan Simon, *Ghosts of the Disciplinary Machine: Lee Harvey Oswald, Life-History, and the Truth of Crime*, 10 *YALE J.L. & HUMAN.* 75, 86, 109 (1998).

77. See John Hart Ely, *Reputation Be Damned* (So Long as It's Yours) 8-20 (Oct. 10, 2000) (unpublished manuscript, on file with author).

78. DALLEK, *supra* note 73, at 535-74.

79. An interesting cultural measure of the seriousness of this fear was the premature shuttering of *The Manchurian Candidate*, a 1962 movie that portrayed a "brainwashed" Korean War POW attempting to shoot the President at the behest of communist agents. In an era when

By credibly refuting the communist-conspiracy theory, the Warren Commission eliminated the most destabilizing popular rumors circulating about the assassination, making it safe for a thousand more benign rumors to flourish. The Commission might have been remembered as more effective if it had been able to obtain more adequate documentary disclosure from other agencies of the federal government, including the FBI, the CIA, the Pentagon, and the Department of Justice. This lack of access is what led John Ely to refrain from joining a group of fellow former Warren Commission staff members who signed a public letter denouncing Oliver Stone's *JFK*. Ely thought Stone's thesis was unsupported and irresponsible, but he concluded that the systematic failure of these agencies to disclose relevant and potentially probative information about activities of the government itself made it impossible to disprove it definitively.⁸⁰

In an unpublished essay written in October 2000, Ely discussed his continuing anger at the betrayal of the Warren Commission by the administration and by some of its own members, particularly former CIA Director Allen Dulles, who knew of CIA operations against Cuba but never alerted the Commission or its staff (indeed, he denied there were any such operations).⁸¹ The Warren Commission relied on the administration's representations that it had been provided the full record, but the inadequacy of the record provided to the Commission has become apparent over time. To have challenged that record would have required a mentality of suspicion toward the executive branch that may not have then existed.⁸²

Political pressure for such full disclosure might have come from the prestige of the Commission's members, but the very nature of their prestige, especially that of Chief Justice Warren, dictated against the kind of public confrontation with the executive branch that would have been necessary. It might also have come from President Kennedy's family. His widow and his brothers, especially Attorney General Robert Kennedy, were experienced public figures who could well have brought about a public

movies continued to play at second- and third-run theaters for years after their initial release, *The Manchurian Candidate* disappeared from theaters early in its shelf life. Apparently Kennedy's death made the film's premise unsafe for fantasy. See generally Fred Bernstein, *Director John Frankenheimer's The Manchurian Candidate Plays to a Full House After 26 Years*, PEOPLE, May 16, 1988, at 129 (describing problems encountered by the film after the Kennedy assassination).

80. JOHN HART ELY, ON CONSTITUTIONAL GROUND 333 (1996) (discussing an unpublished letter Ely had written about Stone's film and acknowledging that, due to revelations of systematic withholding of information from the Warren Commission, Ely could no longer vouch for the Warren Report's veracity and completeness).

81. Ely, *supra* note 77, at 20.

82. In an earlier note explaining his changing views on the Warren Commission, Ely explained this changing mentality with typical clarity and humor. "In 1964, one had to be a genuine radical to take seriously the thought that other federal agencies were withholding significant information from the Warren Commission. In 1975, it would take a person of unusual naïveté to ignore that possibility." ELY, *supra* note 80, at 332.

confrontation if they had chosen to speak publicly before the Warren Commission and had demanded an accounting of CIA operations that could have invited retaliations against the President. Had Robert Kennedy been willing to tell the truth to the Commission, even in private, it might well have forced a public confrontation. This would have been classically parrhesiastic truth telling, involving an expression of truth about anguish directed toward those with more power and at considerable risk to the speaker.

C. *The 9/11 Commission*

When it was published in July 2004, the final report of the 9/11 Commission was hailed as a major success that might lead to a watershed reorganization of national security.⁸³ While praise had also greeted its two most famous predecessors, as discussed above, there were several aspects of the way the 9/11 Commission conducted its investigation and launched its report that distinguished it from these precedents and that suggest at least the possibility of a more enduring and powerful influence on both Congress and the Executive. As I discuss below, even before the publication of its report the 9/11 Commission had won a series of unprecedented political victories over the executive branch. This success is rooted not in the Commission's greater fidelity to the analytics of truth (we have no reason to doubt the integrity of Chief Justice Warren and Justice Roberts) but rather in its embrace of parrhesiastic truth telling through its engagement with the families of those who died on September 11.

1. *Distinctive Characteristics*

Four features of the Commission's operation distinguish it sharply from the Roberts and Warren Commissions: (1) greater access to intelligence sources, (2) public confrontation with leading executive branch officials, (3) a critical look beyond the Executive at Congress's own failures in creating conditions for executive accountability, and (4) the extraordinarily popular manner and mode in which the Commission communicated its findings to the general public. All of these distinguishing characteristics, I argue, are anchored in the power unleashed by the victims' families' parrhesiastic truth telling.

83. Presidential historian Michael Beschloss has said that future generations may view the 9/11 Commission less favorably in light of information withheld from it. Jim Dwyer, *Families Forced a Rare Look at Government Secrecy*, N.Y. TIMES, July 22, 2004, at A18.

First, the 9/11 Commission had access to intelligence information that is reported to have gone well beyond what past commissions—or even high-ranking members of Congress—have had access to. This information most famously included the Presidential Daily Briefings, a kind of personal daily newspaper containing intelligence headlines most relevant to the Chief Executive. This alone is highly significant. No other aspect of contemporary national security makes executive power so seemingly unaccountable as its control over the production and distribution of intelligence. Congress's power to effectively evaluate a presidential determination to go to war is inevitably hostage to the intelligence that the executive branch chooses to make available to Congress. The 9/11 Commission obtained sensitive documents that are normally not part of the historical record of a period until many years later.⁸⁴ This remarkable degree of access made it possible for the Commission to write a thorough and comprehensive “history” of the events leading to September 11.

The 9/11 Commission also took sworn testimony from top officers of the intelligence community. The final report contained a detailed timeline of intelligence counterterrorism operations that enables Congress and ordinary citizens to assess the value of a hitherto invisible but unquestionably massive sector of our national security apparatus. While the report has been faulted by some for failing to locate blame on specific individuals or administrations, its detailed reporting made blaming a potent possibility. It is perhaps not coincidental that the only top official to resign as a result of the Commission's revelations was CIA Director George Tenet.⁸⁵

Unsurprisingly, some of the Commission's most widely noted recommendations concern the intelligence community. In particular, the Commission recommended appointing a new National Intelligence Director to oversee national intelligence centers and a reorganized intelligence community.⁸⁶ Whatever judgment history arrives at regarding the success or wisdom of these changes, they mark an unprecedented penetration of the intelligence world by an organ of public accountability.

Second, the 9/11 Commission convinced two presidents (including a sitting one) and their assorted advisors and top executive officials to appear

84. Mark Rozell, an expert on presidential secrecy, has described the access as “extraordinary . . . , particularly in the area of national security, an area that past presidents have been most vigilant in claiming the right to withhold information.” *Id.*

85. Tenet resigned in May 2004, only weeks after 9/11 Commission hearings evaluating the performance of the intelligence community prior to September 11. *See* Nat'l Comm'n on Terrorist Attacks upon the United States, Tenth Public Hearing of the National Commission on Terrorist Attacks upon the United States, <http://www.9-11commission.gov/hearings/hearing10.htm> (last visited Mar. 22, 2005) (containing archived transcripts and video).

86. 9/11 COMMISSION REPORT, *supra* note 34, at 411.

before it, in some cases publicly and under oath. While Congress routinely questions officials like the secretary of defense, the President only reports to Congress through representatives or through the State of the Union.⁸⁷ The final report criticized both the Clinton and Bush Administrations for not making a strong enough effort to confront and disable the al Qaeda network, given the knowledge available beforehand. It is widely believed that unanimity would not have held and the Commission might have divided along party lines had the report made a direct comparison of the culpability of the two administrations.⁸⁸ But even without drawing the most damning conclusions, the report unambiguously found that both administrations had missed potentially critical opportunities to uncover or prevent the terrorist plot.

The Commission's extended criticism of high-level executive actions (and inactions) by both the incumbent administration and its predecessor distinguishes it from past national commissions that have tended only to burnish the status of the presidents who participated in their creation. Some of this autonomy may be attributed to the fact that the Commission was created by an act of Congress.⁸⁹ In contrast, the Warren Commission was called into being by an executive order of President Johnson,⁹⁰ although Congress subsequently strengthened it by granting it subpoena power.⁹¹ President Johnson had discretion to appoint all its members, although he was careful to include representatives from Congress (albeit close allies).

In the case of the 9/11 Commission, it was widely reported that the White House had opposed the formation of the Commission and accepted it only after it became clear that those who had lost loved ones in the attacks were prepared to battle the White House in the media.⁹² Yet neither the President's history of opposition nor the Commission's statutory origins seem necessarily to have produced the critical posture toward the Chief Executive that the Commission's report achieved.⁹³

87. As a matter of routine practice, Congress would never call the President to testify. If it did, the President would undoubtedly invoke executive privilege to decline the invitation.

88. Elizabeth Drew contends that the most important strategic decision the Commission made was not to expressly conclude that the attacks might have been prevented, notwithstanding the fact that both Chairman Thomas Kean and Vice Chairman Lee Hamilton had made public statements consistent with that thesis in the spring. They backed away, according to Drew, to preserve unanimity on the panel. Elizabeth Drew, *Pinning the Blame*, N.Y. REV. BOOKS, Sept. 23, 2004, at 8 (reviewing 9/11 COMMISSION REPORT, *supra* note 34).

89. Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, §§ 601-611, 2002 U.S.C.A.N. (116 Stat.) 2383, 2408-13 (2002).

90. Exec. Order No. 11,130, 28 Fed. Reg. 12,789 (Dec. 3, 1963); *see also* Robert F. Cushman, *Why the Warren Commission?*, 40 N.Y.U. L. REV. 477, 477-78 (1965).

91. Act of Dec. 13, 1963, Pub. L. No. 88-202, 1963 U.S.C.A.N. (77 Stat. 362) 397.

92. *See* Dwyer, *supra* note 83.

93. In a carefully negotiated compromise, the Republican members of the panel and the chair were appointed by the President, save one appointed by Senator John McCain, a Republican with a well-earned reputation for independence from the White House. David Firestone, *White House*

The President's first choice for chair of the 9/11 Commission, former Secretary of State Henry Kissinger, embodied many of the features that historically define commission members and chairs: a distinguished career in governmental service and independence from current government power holders.⁹⁴ Yet Kissinger's reputation as a loyalist to executive power led many critics to argue that any commission under his leadership would defer to the White House. Kissinger resigned after less than a week, citing conflicts of interest with clients of his consulting firm.⁹⁵

The President's second choice, former New Jersey Governor Thomas Kean, then a college president, raised no similar fears of executive control, notwithstanding Kean's friendship with the first President Bush.⁹⁶ Under the leadership of Kean and Vice Chairman Lee Hamilton, a former Democratic representative from Indiana, the Commission repeatedly and publicly confronted the administration over issues of access. In July 2003, the Chair and Vice Chair went directly to the media with a statement that their work was being hampered by "the failure of executive branch agencies, especially the Pentagon and the Justice Department, to respond quickly to requests for documents and testimony."⁹⁷

In September 2003, the Commission publicly threatened to go to court to obtain classified documents that were being withheld by the White House.⁹⁸ Chairman Kean stated bluntly that "[a]ny document that has to do with this investigation cannot be beyond our reach."⁹⁹ A month later the White House essentially gave in and agreed to provide access, albeit limited, to what the *New York Times* described as "some of the most highly classified intelligence reports in the executive branch."¹⁰⁰ In February 2004, again in the face of public pressure from the leaders of the Commission, the White House reversed its earlier opposition and agreed to extend the deadline for the Commission's report, even though a later date would push the report even deeper into the general presidential election campaign.¹⁰¹

Gives Way on a Sept. 11 Commission; House Passes Bill To Create It, N.Y. TIMES, Nov. 15, 2002, at A19.

94. Richard W. Stevenson, *President Names Kissinger To Lead 9/11 Commission*, N.Y. TIMES, Nov. 28, 2002, at A1.

95. David Firestone, *Kissinger Pulls Out as Chief of Inquiry into 9/11 Attacks*, N.Y. TIMES, Dec. 14, 2002, at A1.

96. Philip Shenon, *Bush Names Former New Jersey Governor to 9/11 Panel*, N.Y. TIMES, Dec. 17, 2002, at A21.

97. Philip Shenon, *9/11 Commission Says U.S. Agencies Slow Its Inquiry*, N.Y. TIMES, July 9, 2003, at A1.

98. Philip Shenon, *9/11 Commission Could Subpoena Oval Office Files*, N.Y. TIMES, Oct. 6, 2003, at A1.

99. *Id.*

100. Philip Shenon, *Panel Reaches Deal on Access to 9/11 Papers*, N.Y. TIMES, Nov. 13, 2003, at A1.

101. Philip Shenon, *Bush, in Reversal, Supports More Time for 9/11 Inquiry*, N.Y. TIMES, Feb. 5, 2004, at A21.

The final showdown came in March 2004, when the White House reversed its position that Condoleeza Rice, the President's national security adviser, would not publicly testify before the Commission.¹⁰² Even before any conclusions were drawn, the Commission had already humbled a White House unaccustomed to political defeat.

Third, the 9/11 Commission's report is far more critical of Congress than reports issued by previous national commissions. It found that as the threat of terrorism from al Qaeda began to manifest itself in the 1990s, Congress did not take steps to restructure the federal bureaucracy to respond appropriately. Specifically, Congress gave little guidance to executive branch agencies, did not reform them in any significant way, and did not systematically identify, address, and attempt to resolve the many problems in national security and domestic agencies that became apparent in the aftermath of September 11.¹⁰³ This prolonged pattern of failure of congressional oversight was identified as a contributing factor in the failure of agencies in the executive branch. The Commission described in detail the missed opportunities for oversight and devoted a section of its recommendations to proposals for changes to Congress's committee structure.

Fourth, the 9/11 Commission's approach to producing and distributing its reports and promoting its recommendations was highly innovative. The Warren Report, for example, was initially published by the Government Printing Office; only months later was there any private publication of these documents by a commercial publisher. The 9/11 Commission, by contrast, bypassed the Government Printing Office altogether and immediately published its report in an "authorized edition" by a private corporation, W.W. Norton & Co. Owing in part to this aggressive promotional strategy, the 9/11 Commission Report became a commercial success.

Interest in the Commission's conclusions and their political effect was also enhanced by the distribution of interim draft reports. These draft reports determined the lead news stories for weeks at a time in the spring of 2004 and heightened anticipation for the release of the final version of the report. They also attracted media attention to the public hearings. The attention peaked in March 2004 when Richard Clarke, a counterterrorism official in the administrations of Presidents George H.W. Bush, Clinton, and George W. Bush, apologized to the families of the victims on behalf of a government that he believed had failed them. I take up other aspects of this performance below, but it should be noted here that the interest in Clarke and the credibility of his position were enhanced by the fact that an

102. Philip Shenon & Elisabeth Bumiller, *Bush Allows Rice To Testify on 9/11 in a Public Session*, N.Y. TIMES, Mar. 31, 2004, at A1.

103. See 9/11 COMMISSION REPORT, *supra* note 34, at 419-23.

interim report on executive branch failures had already disclosed the timing of Clarke's retrospectively prescient insistence that the Bush Administration implement a comprehensive strategy designed to counter the growing influence of terrorist organizations such as al Qaeda.¹⁰⁴

While past commissions have spoken only in the form of a report signed by all the members, Chairman Kean and Vice Chairman Hamilton both played a direct and personal role in presenting the report and defending its analysis in the media. This role began before and has extended beyond the publication of the report. Indeed, while every other such investigatory commission in history has gone out of existence or shortly after the moment it released its final report, the 9/11 Commission transformed itself into a private organization dedicated to promoting adoption of its recommendations.

Whatever else they signal, these innovations suggest that, unlike its predecessors, the 9/11 Commission had what can be called a cultural strategy toward law and governance.¹⁰⁵ While past commissions simply produced conventional textual narratives and let them speak for themselves, the 9/11 Commission has worked collectively to influence the reception and preliminary response to its report. The report was also written in a style, almost universally praised, that was calculated to make it interesting and understandable to ordinary citizens.¹⁰⁶

It is too early to know whether the 9/11 Commission will be considered a success in the long run. The Roberts Commission and the Warren Commission also won initial praise, only to be seen eventually as having failed to quell the controversies surrounding the catastrophes they investigated. Already, though, the 9/11 Commission has shown itself to be a different kind of commission. The key difference, in my view, is the larger space of parrhesiastic truth telling that the Commission has opened up. While commissions operate mainly in terms of an analytics of truth, i.e., a claim to validate the truth of statements, they also possess a latent parrhesiastic function. By bringing together those most affected by a catastrophe, commissions engage in corrective criticism out of a sense of duty to the political community. The most important of these groups, as we shall see, has been the surviving family members of the September 11 victims.

104. *See id.* at 212-13.

105. *See generally* Austin Sarat & Jonathan Simon, *Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, in *CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW* 1, 2 (Austin Sarat & Jonathan Simon eds., 2003) (noting that government and other formal organizations increasingly rely on cultural strategies in exercising power).

106. *See* David Johnston & Douglas Jehl, *Report Cites Lapses Across Government and 2 Presidencies*, N.Y. TIMES, July 22, 2004, at A1 ("In contrast to most government reports, the findings were presented in a dramatic, often gripping narrative style . . .").

2. *The Commission's Role as Parrhesiastic Truth Teller*

Parrhesia in the ancient world had four elements that can be seen at work in the 9/11 Commission to an extent unknown in previous investigatory commissions: frankness, criticism, danger, and duty.¹⁰⁷

Frankness. One of the distinguishing features of *parrhesia* as a mode of truth telling is its frank and personal nature. We often associate frankness simply with truth, but when we qualify what we are about to tell with the word “frankly,” we are doing more than promising honesty. We are warning the listener that it is a truth that comes from our deepest knowledge and will be painful to hear. *Parrhesia* in this sense is a truth that is anchored in the experiences of the speaker herself, and if it is effective, it directly touches the self of the interlocutor, whether that be a sovereign-like figure or a democratic assembly.

Because parrhesiastic truth telling is a personal activity rather than a potentially universal abstract act of communication,¹⁰⁸ it has rarely been invoked by institutions (like investigatory commissions) that view themselves as devoted to the analytics of truth. Without giving up its claims to the analytics of truth, the 9/11 Commission kept itself open to truth telling of a personal and frank nature, permitting a rare kind of public criticism of those in executive power and undertaking a risk of personal loss of standing not usually run by the political notables who sit on commissions.

Criticism of Those in Power. Commissions have generally been criticized for protecting the top leadership while focusing blame on subordinates. The 9/11 Commission opened up a space for critical speech directed at high-ranking officials.¹⁰⁹ This critical speech came from commissioners, witnesses, the victims' families, and the media. It is on this point that the openness of the Commission's hearings is most important. While hearings may have little bearing on the analytics of truth, they lend themselves to parrhesiastic truth telling. The 9/11 hearings became a kind of agora in which *parrhesia* could take place. The most stunning exemplar of this principle was certainly Richard Clarke, whose testimony before the Commission over several days represented a powerful indictment of failures by his superiors in the White House, especially in the current Bush Administration.

Danger. In parrhesiastic speech, the truth teller establishes his truthfulness in large part through the danger he accepts that the criticism

107. See FOUCAULT, *supra* note 3, at 11-20.

108. See *id.* at 13-15.

109. *Parrhesia* invariably involves criticism of a person more powerful than the speaker. See *id.* at 17.

directed toward those in power will provoke retaliation.¹¹⁰ Risk to the individual reputations of the 9/11 Commission members, including the Chair and Vice Chair, was substantial. To a degree unprecedented in earlier commissions, individual members of the 9/11 Commission found themselves under attack from public figures of great power. Attorney General John Ashcroft responded to Commissioner Jamie Gorelick's critical statements by attacking her personally for decisions made by Justice Department officials working under President Clinton.¹¹¹ The same fate befell certain key witnesses, such as Clarke, who used their testimony to engage in *parrhesia*. More strongly than perhaps any witness or commissioner, Clarke, the former director of counterterrorism planning in the executive branch under several presidents, blamed the current administration for ignoring the danger of terrorism until it was too late. Clarke was a classic parrhesiastic speaker, addressing the public, with knowledge coming from his direct experience of crafting terrorism policy in several different administrations, criticizing those in power, at risk to himself, and out of an apparent sense of duty to his country and to the victims' families. Clarke's testimony set off what was widely considered to be a barrage of high-level assassinations of his personality and reputation.

Duty. Criticism, particularly today, can easily degenerate into the kind of public entertainment encountered on almost any cable news channel. The 9/11 Commission provided plenty of material for the commentators working in this branch of the culture industry, but to a remarkable extent this did not happen. The reason, I suspect, lies in a classical feature of *parrhesia*: This truth telling arises from, and only from, a profound sense of personal duty.¹¹² This alone assures the interlocutors that the frankness of the criticism is not aimed at entertainment, therapy, self-glorification, or destruction. Notwithstanding the major effort of the administration and its supporters to attack some of the critical speakers, the entire debate remained at a level of seriousness rarely seen in American political life.

This parrhesiastic function has remained only latent in most commissions. Why has it emerged so strongly in the 9/11 Commission? I contend that the most important change has been the cultural availability of the victim of violent crime as a valorized—even idealized—model of the democratic citizen. In the United States, this idea has been linked to the notion of the “war on crime,” which has had an enormous influence on both

110. *See id.* at 16.

111. Eric Lichtblau, *White House Criticizes Justice Dept. over Papers*, N.Y. TIMES, Apr. 30, 2004, at A24.

112. *See* FOUCAULT, *supra* note 3, at 19.

public and private governance.¹¹³ Internationally, the figure of the victim of state violence under conditions of dictatorship has played a parallel role in shaping new legal institutions, especially in states emerging from periods of dictatorship and emergency rule.¹¹⁴ It is to those issues that we now turn.

D. *From Investigatory Commissions to Truth Commissions:
The Role of the Victims*

The powerful role of victims' families in the 9/11 Commission suggests that we need to engage in a broader discussion of the way this kind of truth telling operates in contemporary governance. In ancient Greece, crime victims generated an important form of *parrhesia* but not the only one. Today, crime victims have emerged as perhaps the most important source of *parrhesia*. The role of victims in the criminal justice system has recently drawn interest and mostly skepticism from legal scholars examining the practice of victim-impact statements in capital trials and in other aspects of capital punishment.¹¹⁵ The rise of the victim in the American war on crime is matched by the increasing use of the language of the victim associated with war and with the modern human rights response to war. Sociologist David Garland describes a "new political imperative" in liberal societies like the United States and the United Kingdom, one focused on crime victims: "The victim is now . . . a much more representative character, whose experience is taken to be common and collective, rather than individual and atypical. Whoever speaks on behalf of victims speaks on behalf of us all—or so declares the new political wisdom of high crime societies."¹¹⁶

Victims have also come to play a larger role in the criminal justice system, especially in the many capital sentencing systems that permit victims' family members to speak at the sentencing phase of a capital trial. Although many have argued that terrorism cannot be handled on the model of crime, it is undeniable that some families of the victims of September 11 have emerged as a political force in very much the same way as have family

113. See generally Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111 (2000) (arguing that the imperative of confronting crime is undermining the conditions for democratic political life).

114. See Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2035-51 (1997) (maintaining that transitional justice is primarily criminal justice aimed at establishing responsibility for wrongdoing to victims of repressive rule).

115. See generally Simon, *supra* note 6 (summarizing critical literature on victim participation in capital sentencing proceedings).

116. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 11 (2001).

members of highly publicized crime victims.¹¹⁷ With all of the immediate participants in the terrorist attacks of September 11 killed during the attack and Osama bin Laden uncaptured,¹¹⁸ the pursuit of retribution through harsh criminal punishment (including the death penalty) has been less central to these victims' families than it might have otherwise been. Instead, many of the victims' family members directed their own public acts of *parrhesia* toward the demand for an independent investigation of the attacks of September 11 and later for the implementation of the 9/11 Commission's proposals for reform.¹¹⁹

Clearly a great deal of the 9/11 Commission's success comes from the unique alliance its leaders forged with a mobilized group of victims, particularly a number of New Jersey women whose husbands worked at elite levels of financial firms in the World Trade Center and who have become known in the media as "the Jersey girls."¹²⁰ Indeed, it was in part due to pressure from the victims that the Commission agreed to hold public hearings.¹²¹

The willingness of the victims' families to publicly embarrass the administration played an important and perhaps decisive role in a series of political victories won by the 9/11 Commission. The apparent smoothness of these victories may reflect the fact that President Bush and Attorney General Ashcroft both proved extremely adept at playing the politics of crime victims during their rise to statewide office in Texas and Missouri. They needed little prompting to recognize the political danger of being on the wrong side of what Garland describes as a "zero-sum policy game . . . wherein the offender's gain is the victim's loss, and being 'for' victims automatically means being tough on offenders."¹²² The importance of this relationship to the leaders of the 9/11 Commission is evident in the rather extraordinary tribute the commissioners paid to the victims' families in the

117. During the 1990s, some victims' family members became well-known public advocates for harsh mandatory punishments aimed at repeat offenders. For example, Mike Reynolds of Fresno, California became the primary proponent of California's three-strikes law following the murder of his daughter. See FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 4 (2001).

118. One of the alleged principal conspirators, Khalid Sheik Mohammed, is in custody. See Susan Schmidt, *Mohammed 'the Brain' in al Qaeda*, WASH. POST, Mar. 2, 2003, at A1.

119. Following the strong recommendation of the 9/11 Commission, President Bush signed into law the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 2004 U.S.C.A.N. (118 Stat.) 3638. The Act established a new system integrating the fifteen separate intelligence agencies under a single command structure headed by a single director who reports directly to the President. See Peter Baker & Walter Pincus, *President Bush Signs Measure on Intelligence Reform*, WASH. POST, Dec. 19, 2004, at A23.

120. Sheryl Gay Stolberg, *9/11 Widows Skillfully Applied the Power of a Question: Why?*, N.Y. TIMES, Apr. 1, 2004, at A1.

121. The victims' families felt strongly that hearings ought to be in public. Interview with Daniel Marcus, General Counsel of the 9/11 Commission, in Berkeley, Cal. (Nov. 11, 2004).

122. GARLAND, *supra* note 116, at 11.

preface to the 9/11 Commission Report: “We thank the families of 9/11, whose persistence and dedication helped create the Commission. They have been with us each step of the way, as partners and witnesses. They know better than any of us the importance of the work we have undertaken.”¹²³ Commission member James Thompson, former Republican governor of Illinois, was even more explicit in his invocation of the victims and their loved ones:

Our reform recommendations are urgent We have come together with the families to agree on that. If these reforms are not the best that can be done for the American people, then the Congress and the president need to tell us what’s better. But if there is nothing better, they need to be enacted and enacted speedily. If something bad happens while these recommendations are sitting there, the American people will fix political responsibility for failure—and that responsibility may last for generations.¹²⁴

Thompson, another politician whose career paralleled the rise of crime politics in the United States, brilliantly drew together the critique of liberal crime policy and its apparent failure to protect ordinary Americans from crime.¹²⁵ Thompson seemed to signal the danger that his own party, now in control of both Congress and the presidency, might be blamed by another generation for failing to protect the victims of terrorism.

Notably, the report issued by the 9/11 Commission includes elements that go beyond the analytics of truth to recognize the experience of victimization as part of the truth of 9/11. For example, the report includes gripping descriptions of what happened onboard United Flight 93, which crashed near Shanksville, Pennsylvania, after what had been widely reported as a revolt of passengers against the hijackers. The report goes beyond confirming the existence of this revolt to capture as much as possible the events experienced by the passengers on the flight.¹²⁶

The mutually advantageous relationship between the victim and the investigatory commission has taken on a new global relevance in societies undergoing the legal constructions necessary to handle profound political

123. 9/11 COMMISSION REPORT, *supra* note 34, at xvii.

124. Philip Shenon, *9/11 Report Calls for a Sweeping Overhaul of Intelligence*, N.Y. TIMES, July 23, 2004, at A1 (internal quotation marks omitted).

125. See generally Jonathan Simon, *Gun Rights and the Constitutional Significance of Violent Crime*, 12 WM. & MARY BILL RTS. J. 335 (2004) (arguing that popular anger with government over crime effectively amended the Constitution to create an individual right to bear arms).

126. See 9/11 COMMISSION REPORT, *supra* note 34, at 12-14.

change, which Ruti Teitel has called transitional jurisprudence.¹²⁷ Indeed, something very much like the investigatory commission has arisen in the field of transitional justice, in particular the institutionalization of transitional justice that has emerged since 1989.

A truth commission is an official body, often created by a national government, to investigate, document, and report on human rights abuses within a country over a specified period of time. First used in Argentina, the investigatory model is now associated with the response adopted in post-apartheid South Africa in the 1990s. At least twenty-one truth and reconciliation commissions of various types have since been proposed or convened throughout the world and often garner significant international support.¹²⁸ The rise of these commissions corresponded to a shift away from the retributive justice sought by the first generation of post-fascist transitional regimes and toward a singular preoccupation with truth as a positive social value in itself.

One of the most striking changes in the institutionalization of transitional justice since the first wave of post-World War II practices such as Nuremberg is the emergence of the victim as a central focus in place of the earlier focus on universalizable mandates of justice. Like other truth commissions, including those in South Africa and Argentina, the 9/11 Commission operated in a powerful and complex way to address the victims' sense of exposure, one shared by both the witnesses to the attacks and those who had a direct connection to people who perished on September 11. While perhaps leaving unsatisfied the desire for retribution against individual members of the government for failing to stop the September 11 plot, the 9/11 Commission gave both kinds of victims unique access to the record of government knowledge and response at the highest levels and an authoritative judgment that the government's response was inadequate.

The rise of transitional justice institutions might influence the development of investigatory commissions like the 9/11 Commission. The generally positive global media attention to the truth and reconciliation process in post-apartheid South Africa may have increased the aspiration of commissions in stable liberal regimes, including the 9/11 Commission, to achieve new forms of relevance to the democratic process.¹²⁹

127. See Teitel, *supra* note 114, at 2014 (“[T]he conception of justice in periods of political change is extraordinary and constructivist . . .”).

128. *Id.* at 2049-50.

129. I have no evidence that such an influence was a conscious factor. One key attorney on the staff was aware of no discussion of the practice of truth commissions in relation to the 9/11 Commission by other staff or Commission members. Interview with Daniel Marcus, *supra* note 121.

Indeed, the commission form is well suited to a moment when transitional justice seems to have spread throughout the liberal world, both to new democracies and longstanding ones. "By the end of the twentieth century, it seemed that all justice had become transitional, *ex post*, and backward-looking."¹³⁰ The 9/11 Commission was both backward looking and progressive, establishing a consensus narrative as to how the terrorist attacks succeeded and demanding changes in governance to protect society against intolerable risks. It was focused on "truth" rather than blame, insisting that while blame was widespread, the real errors exceeded the grasp of individuals and came from institutional failures of imagination.

If the 9/11 Commission is something like a truth commission in the transitional justice sense, then its ability to stimulate new democratic accountability over national security is anchored in the way victims (both those individuated by the death of a loved one and the population as a whole understood as potential victims and witnesses of mass murder) act within and respond to the Commission.

CONCLUSION

John Hart Ely's *War and Responsibility* remains today a powerful indictment of unaccountable executive authority over national security. The events since the terrorist attacks of September 11, 2001 have confirmed the importance of that line of criticism. But the same recent history underscores why Ely's statutory solution, a "War Powers . . . Act That Works,"¹³¹ will not check executive power on its own. Ely's proposal relies heavily on the willingness of the judiciary to compel Congress to do its constitutional duty and meaningfully affirm a war initiated by the President or shut it down. Such solutions might work in times of normal politics and law, but they seem likely to fail under current circumstances. Indeed, the precedent of the Iraq War resolution highlights the futility of Ely's solution, because this resolution does not assure or even substantially increase the likelihood that Congress will accept the responsibility to evaluate the rationales for the war or hold the Executive accountable for the way it has been fought.

Since the 1970s, Congress has produced a number of governmental innovations designed to deal with the seemingly irreversible shift of political power from the legislative to the executive branch in the context of modern war and the welfare state. One of them is the kind of framework legislation that Ely proposed as an improvement to the 1973 War Powers Resolution. Ely himself drew parallels with the 1985 Gramm-Rudman-

130. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 85 (2003).

131. ELY, *supra* note 1, app. at 115.

Hollings Budget Control Act,¹³² which was designed to force Congress to reduce spending or raise taxes (politically unpalatable moves).¹³³ Yet there are no good examples of such backbone-enhancing legislation working to substantially improve democratic accountability.¹³⁴

Another strategy that we can see in retrospect as a kind of transitional politics solution was the independent counsel mechanism created by Congress in the aftermath of Watergate.¹³⁵ Much has been written about whether that law went too far in undermining the power of the Chief Executive over foreign affairs or in general. Epic battles between independent counsel Lawrence Walsh and the first Bush Administration and between independent counsel Kenneth Starr and the Clinton Administration suggest that unlike framing statutes, this strategy actually did alter the political realities of executive power. It is clear that special prosecutors have succeeded in distracting and weakening Presidents, as happened to Reagan in 1987 and Clinton in 1998. But whether they mourn or celebrate the termination of the law, few critics believe it enhanced the power of Congress or made the Executive more accountable for national security. Indeed, with its strong connection to practices of criminal prosecution, the special prosecutor law seems to have divorced accountability from politics, holding presidents and their top advisers accountable not for policies but for technically false statements. Rather than leading to broad public and congressional debate on issues of policy, these prosecutions fed a personality-oriented politics of scandal.

The 9/11 Commission might not seem like an innovation in the same way. It did not require inventing any new institutions, because investigatory commissions have been a traditional mechanism of both congressional and executive governance. Yet once created, the 9/11 Commission entered into a special relationship with the victims of the 9/11 terrorist attacks. That alliance, and the parrhesiastic flow of critical speech it unleashed, shows much greater promise for checking executive power than either of the previous mechanisms. The Commission has its critics. Richard Posner, while praising its public relations and literary success, suggests that it is the wrong mechanism—and the 9/11 attacks the wrong justification—for the most significant redesign of national security institutions since the end of

132. 2 U.S.C. §§ 901-922 (2000).

133. ELY, *supra* note 1, at 48.

134. That does not mean that such statutes are not worth trying, especially when it comes to controlling newly extended powers of the Executive. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

135. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601(a), 1978 U.S.C.C.A.N. (92 Stat.) 1824, 1867-73 (expired 1999).

World War II.¹³⁶ While Posner may be right on the merits of reform, he is wrong to discount the importance of the public truth telling that the commission facilitated and publicized.

John Hart Ely believed that the Constitution's promise of democratic accountability over war powers deserved nothing less than a statutory guarantee that could and would be enforced by courts. This article does not take issue with that aspiration. Yet the history of our nation's engagements from Vietnam to Iraq compels us to look beyond the question of power to the question of truth. Proposals such as Ely's ultimately turn on an analytic view of the truth, designed to answer questions such as, Are our forces in situations where "imminent involvement in hostilities is clearly indicated"?¹³⁷ This article suggests that if we are to craft institutions capable of sustaining the promise of the Constitution, we need to consider other kinds of truth telling, particularly the personal, critical, risky truth telling that the ancient Greeks called *parrhesia*.

136. Richard A. Posner, *The 9/11 Report: A Dissent*, N.Y. TIMES, Aug. 29, 2004, §7 (Book Review), at 1.

137. ELY, *supra* note 1, app. at 116 (internal quotation marks omitted).