



## FAQs: Creating a Commission to Investigate January 6th and Prevent Future Attacks

The U.S. has a long history of establishing independent commissions to undertake investigative and advisory work on complex national issues.<sup>1</sup> These commissions have typically served to both complement and cohere investigatory work by Congress and the Executive Branch; to provide the public with an authoritative source of information about a complex national issue; and to deliver comprehensive recommendations to policymakers generated by nonpartisan experts.

In the wake of the January 6th assault of the U.S. Capitol Complex, a broad and bipartisan range of former senior government officials,<sup>2</sup> advocacy organizations,<sup>3</sup> former 9/11 Commissioners,<sup>4</sup> and current lawmakers<sup>5</sup> have called for a national commission<sup>6</sup> to investigate the facts and causes of the attacks and to deliver findings and recommendations in order to prevent similar attacks in the future. The following FAQs are intended to provide summary answers to commonly asked questions about such a commission.

### Why a commission?

Independent national commissions have been used in the past to assist the federal government in large-scale investigatory and advisory work. Commissions have been employed by Congress in the wake of, and in response to, significant national crises, and to solve for distinct challenges where other tools fall short.<sup>7</sup> If structured properly with appropriate powers and resources, commissions can be especially well positioned to:

- **Interrogate complex causes:** Commissions can assemble a wide variety of experts across a broad range of topics to interrogate an event's complex and interacting causes. As was the case with the September 11th attacks, such a commission is especially appropriate in relation to January 6th which, as national security officials have explained, was the result of a breadth of complex national security threats beyond the immediate intelligence and security failings that precipitated the event—ranging from disinformation campaigns, to non-transparent financing of extremist groups, to potential malign foreign influence operations.<sup>8</sup>
- **Pull together threads from separate investigatory work:** National crises may instigate investigatory work across a wide range of government entities. In the case of January 6th, investigations are ongoing not only across the legislative and executive branches, but also across state and local entities, such as state law enforcement. The sprawling and decentralized nature of these investigations poses at least two significant problems: (1) it is difficult for the public to track and comprehend the work of disparate investigations; and (2) it is difficult for lawmakers to access a centralized source for conclusive findings and analysis. National commissions, therefore, can cohere various investigatory efforts for both the public and for lawmakers.
- **Create space for nonpartisan analysis:** Properly led, funded, and staffed, independent commissions can establish a constructive distance between sensitive topics and the risks of partisanship. As was the case with the 1967 Kerner Commission, which investigated violent and race-related civil unrest, independent entities can be especially well positioned to objectively examine events. Similarly, Congress established the 9/11 Commission “in part because of a recognition that congressional investigations of the attacks on the World Trade Center and

Pentagon had possessed a limited scope and were marred by the partisan goals of some lawmakers.”<sup>9</sup>

- **Dedicate focus over a longer time horizon:** Commissions can serve as dedicated investigatory instruments insulated from political pressures and free from competing priorities. In contrast to congressional committees, which are often under significant time and resource constraints, and must wrestle with competing priorities, commissions can serve Congress’s needs (i.e., investigate events and deliver advice) but through exclusive focus on the issue over a longer period of time.
- **Deliver authoritative recommendations:** Properly led, funded, and staffed, commissions can command public trust as a source of nonpartisan, objective, and expert recommendations behind which the public and lawmakers can unite. To be sure, commissions do not always guarantee universal legitimacy or support. Nonetheless, they are likely better positioned to assemble and deliver findings and recommendations that enjoy broader-based support than traditional partisan actors.<sup>10</sup> Research also suggests that commissions can build public trust and confidence over time.<sup>11</sup>

## Why are congressional efforts by themselves not sufficient?

As referenced above, a commission can excel precisely where Congress experiences difficulties, including by (1) distancing itself from partisanship, (2) cohering investigatory work across all of government, and (3) giving an issue undivided attention, free from competing priorities. Additionally, there are at least two other critical reasons why a commission is well positioned to complement congressional efforts.

First, **a national commission can solve for jurisdictional issues in Congress.** A thorough probe of the January 6th assault would need to at minimum examine issues spanning homeland security, intelligence, communication technologies, nontransparent financing, and potential foreign involvement, among a variety of other issues that may have contributed to the attack, according to security and intelligence officials.<sup>12</sup> No single congressional committee possesses jurisdiction over all these areas. However, as a solution, Congress can authorize a commission with “the mandate and expertise needed to cover many bases,” as it has frequently done.<sup>13</sup> This was most recently the case with the bipartisan Cyberspace Solarium Commission, which examined a variety of issues that spanned multiple committees’ jurisdictions and delivered wide-ranging recommendations that Congress in turn enacted.<sup>14</sup>

Second, congressional committees have in practice struggled to effectively enforce compliance with their subpoenas in order to compel the production of documentation and testimony critical to investigatory work, especially with respect to sensitive national security issues where a variety of privilege claims may prevent timely and full access to information.<sup>15</sup> A commission signed into law by the President, and thus authorized by *both* branches **to issue and enforce its subpoenas**, is likely better positioned to effectively engage with Executive Branch entities throughout its fact-finding processes.<sup>16</sup>

## Does a commission risk duplicating investigatory work by Congress?

There are several important ways to ensure a commission avoids the risk of duplicating efforts, and instead complements and expands upon congressional investigatory work. First, **legislative language can explicitly direct a commission to avoid duplication** and coordinate with existing or recent investigations by congressional committees, as well as investigations by other government bodies, including law enforcement. Second, in practice, commissions have often *followed* congressional investigatory work—i.e., built upon the groundwork laid by lawmakers.

The 9/11 Commission provides a strong model for reference, as it directly followed the Joint Inquiry by the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence.<sup>17</sup> According to members and staff of the Commission, the groundwork laid by the Joint Inquiry formed much of the basis for the Commission’s work.<sup>18</sup> Thus, properly directed and sequenced, **commissions can carry forward initial investigative work by Congress**, strengthening the federal government’s response.

## **Will a commission delay current fact-finding efforts by Congress?**

No. Particularly with respect to issues that implicate the nation’s security, a commission would not—and should not—cause inappropriate delays in urgent fact-finding efforts. Instead, as is currently underway via multiple ongoing investigations in both chambers of Congress with respect to January 6th, lawmakers should investigate and remedy the *most immediate security concerns*. In addition to cohering a complete picture of events that build upon congressional work, a commission should be directed to recommend remedies to the event’s underlying causes in order to prevent the recurrence of an attack. For example, the Commission could recommend that Congress modernize the Electoral Count Act of 1887, as the act’s dated text led to confusion and disagreement about the processes for election disputes.

As with the federal government’s response to September 11th, immediate investigations by Congress and various executive agencies have worked to rapidly secure the country against another imminent attack. And just as the 9/11 Commission was permitted to investigate a multitude of underlying causes of the attack, including structural vulnerabilities—such as the balkanization of intelligence gathering and sharing—that permitted the government’s security and intelligence failings, so too should Congress empower a commission to look into the vulnerabilities that led to the January 6th attacks. Thus, **near-term fact-finding exercises by Congress and the broader remit of a Commission serve complementary but distinct purposes**.

## **How would a commission affect the ongoing work of federal law enforcement?**

Criminal investigations and prosecutions are essential to understanding what happened on January 6th, who was responsible for the associated crimes, holding those individuals accountable, and deterring similar behavior in the future. But not all of the activity that must be understood and deterred was criminal in nature. Thus, much will fall outside the scope of current law enforcement investigations. Furthermore, criminal prosecutors secure convictions; they do not make recommendations for reform. **A 1/6 Commission would complement the work of federal law enforcement.**

**Additional guardrails can also ensure that investigations are complementary.** Legislation can expressly require respect for ongoing law enforcement investigations and that commission staff “build upon the investigations of other entities and avoid unnecessary duplication by reviewing the findings, conclusions, and recommendations.” Additionally, there are existing procedures in place to ensure that the parallel efforts operate in symbiosis rather than competition or distraction. The Department of Justice frequently tackles issues that have civil, criminal, regulatory, and administrative components and has policies that stress early and frequent communication, coordination, and cooperation with parallel proceedings.<sup>19</sup> Those practices should guide federal law enforcement and the commission’s investigators as well.

## How would a commission be credible in a polarized environment?

National commissions do not guarantee uncontested public support. However, existing research suggests that **independent commissions “often excel at bipartisanship, particularly compared to other political institutions.”** A vast majority (more than two-thirds) of national commissions have issued unanimous reports, despite membership comprising individuals representing both political parties.<sup>20</sup>

The same research finds that “commissions are more likely to conduct their work in a bipartisan manner and reach consensus on their findings and recommendations when their members are not holding public office or engaged in other political roles during their tenure.”<sup>21</sup> Thus, policy decisions by lawmakers in the design of a commission’s membership structure, composition, and qualifications have direct and significant implications for its ability to command credibility and generate public support.

### Questions? Contact:

- Elise Wirkus, ewirkus@issueone.org
- Grant Tudor, grant.tudor@protectdemocracy.org

---

<sup>1</sup> Protect Democracy, Towards Non-Recurrence, December 2020, pgs. 21-22, available at: [https://assets.documentcloud.org/documents/20454489/towards-non-recurrence\\_protect-democracy011421.pdf](https://assets.documentcloud.org/documents/20454489/towards-non-recurrence_protect-democracy011421.pdf)

<sup>2</sup> See, e.g., “Statement from the National Council on Election Integrity,” May 2021, available at: <https://actionnetwork.org/forms/sign-up-to-show-your-support-for-a-january-6th-commission/>; and “Letter From Former Senior National Security, Military, and Elected Officials Calling On Congress To Create A Bipartisan 1/6 Commission,” April 6, 2021, available at: <https://bit.ly/3fggL6Q>

<sup>3</sup> See, e.g., “Cross-partisan Coalition Urges Congress to Establish Comprehensive January 6 Commission,” February 19, 2021, available at <https://assets.documentcloud.org/documents/20488305/20210218-coalition-letter-to-speaker-pelosi-january-6th-commission.pdf>; “Fix the System groups call on House leaders to establish a bipartisan commission to investigate January 6 Capitol riot, February 26, 2021, available at: <https://static1.squarespace.com/static/5c66d9bf70468053084aeefa/t/603970cda29f1439a2007610/1614377165832/FTS-2.26.21-Letter.pdf>

<sup>4</sup> “Letter to White House and Hill Leadership: Investigating the U.S. Capitol Assault,” February 16, 2021, available at: <https://bipartisanpolicy.org/letter/investigating-capitol-assault/>

<sup>5</sup> Margaret Shields and Heather Szilagyi, “Chart: Comparing Pelosi’s Draft Legislation on Jan. 6 Commission to Other Bills and Prior Commissions,” Just Security, March 16, 2021, available at: <https://www.justsecurity.org/75373/chart-comparing-pelosis-draft-legislation-on-jan-6-commission-to-other-bills-and-prior-commissions/>

<sup>6</sup> These FAQs are responsive to questions about a commission that would be established through legislation—i.e., created by an act of Congress and signed into law by the President—and provided with operational independence. It does not contemplate a commission established through executive order, which may imply different answers to the questions presented here.

<sup>7</sup> Heather Szilagyi and Nicholas Tonckens, “Investigating a Crisis: A Comparison of Six U.S. Congressional Investigatory Commissions,” Just Security, April 6, 2021, available at: <https://www.justsecurity.org/75671/investigating-a-crisis-a-comparison-of-six-u-s-congressional-investigatory-commissions/>

<sup>8</sup> “Letter From Former Senior National Security, Military, and Elected Officials Calling On Congress To Create A Bipartisan 1/6 Commission,” April 6, 2021, available at: <https://bit.ly/3fggL6Q>

<sup>9</sup> Jordan Tama, “How a January 6 Commission Can Succeed: What Empirical Research Tells Us,” Just Security, February 24, 2021, available at: <https://www.justsecurity.org/74925/how-a-january-6-commission-can-succeed-what-empirical-research-tells-us/>

<sup>10</sup> Jordan Tama, “Members of Congress want a commission to investigate the Capitol invasion. Here’s when these work.” Washington Post, January 19, 2021, available at: <https://www.washingtonpost.com/politics/2021/01/19/members-congress-want-commission-investigate-capitol-invasion-heres-when-these-work/>

<sup>11</sup> Protect Democracy, *Towards Non-Recurrence*, December 2020, pgs. 21-22, available at: [https://assets.documentcloud.org/documents/20454489/towards-non-recurrence\\_protect-democracy011421.pdf](https://assets.documentcloud.org/documents/20454489/towards-non-recurrence_protect-democracy011421.pdf)

<sup>12</sup> Daniel Byman and Benjamin Wittes, “Nine Questions for the Capitol Insurrection Commission,” Lawfare, January 26, 2021, available at: <https://www.lawfareblog.com/nine-questions-capitol-insurrection-commission>

<sup>13</sup> Jordan Tama, “Members of Congress want a commission to investigate the Capitol invasion. Here’s when these work.” Washington Post, January 19, 2021, available at: <https://www.washingtonpost.com/politics/2021/01/19/members-congress-want-commission-investigate-capitol-invasion-heres-when-these-work/>

<sup>14</sup> “NDAA Enacts 25 Recommendations from the Bipartisan Cyberspace Solarium,” January 02, 2021, available at: <https://www.king.senate.gov/newsroom/press-releases/ndaa-enacts-25-recommendations-from-the-bipartisan-cyberspace-solarium-commission>

<sup>15</sup> E.g., see Congressional Research Service, “Congressional Subpoenas: Enforcing Executive Branch Compliance March 27, 2019, available at: <https://crsreports.congress.gov/product/pdf/R/R45653>. (Evidence from years years suggests that “the existing mechanisms are at times inadequate—particularly in the instance that enforcement is necessary to respond to a current or former executive branch official who has refused to comply with a subpoena.”)

<sup>16</sup> Daniel Marcus, “The 9/11 Commission and the White House: Issues of Executive Privilege and Separation of Powers,” American University National Security Law Brief, Vol 1. Issue I (2011).

<sup>17</sup> The Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001,” S. Rept. No. 107- 351, 107th Congress, available at: <https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-107srpt351-5.pdf>

<sup>18</sup> Jordan Tama, *Terrorism and National Security Reform: How Commissions Can Drive Change During Crises*, Cambridge University Press; 1st edition (March 14, 2011)

<sup>19</sup> See, e.g., U.S. Dep’t of Justice, *Manual for U.S. Attorneys*, Title 9 Sec. 27 “Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings,” available at: <https://www.justice.gov/jm/organization-and-functions-manual-27-parallel-proceedings>.

<sup>20</sup> Jordan Tama, *Terrorism and National Security Reform: How Commissions Can Drive Change During Crises*, Cambridge University Press; 1st edition (March 14, 2011)

<sup>21</sup> Jordan Tama, *Terrorism and National Security Reform: How Commissions Can Drive Change During Crises*, Cambridge University Press; 1st edition (March 14, 2011)