

# OBAMA “LOOKS FORWARD” ON FINANCIAL FRAUD, TOO

Obama just issued a signing statement to the bill establishing the "Pecora Commission," mandated to investigate the financial meltdown. The statement seems to signal a desire to "look forward" on financial fraud, in the same way he continues to try to "look forward" on torture and other abuses of power.

The complete statement reads,

Today I have signed into law S. 386, the "Fraud Enforcement and Recovery Act of 2009." This Act provides Federal investigators and prosecutors with significant new criminal and civil tools to assist in holding accountable those who have committed financial fraud. These legislative enhancements will help the Department of Justice to combat mortgage fraud, securities and commodities fraud, and related offenses, and to protect taxpayer money that has been expended on recent economic stimulus and rescue packages. With the tools that the Act provides, the Department of Justice and others will be better equipped to address the challenges that face the Nation in difficult economic times and to do their part to help the Nation respond to this challenge.

Section 5(d) of the Act requires every department, agency, bureau, board, commission, office, independent establishment, or instrumentality of the United States to furnish to the Financial Crisis Inquiry Commission, a legislative entity, any information related to any Commission inquiry. As my Administration communicated to the

Congress during the legislative process, the executive branch will construe this subsection of the bill not to abrogate any constitutional privilege.

Which affects the following section, laying out the Commission's investigative power.

(d) Powers of the Commission-

(1) HEARINGS AND EVIDENCE- The Commission may, for purposes of carrying out this section-

(A) hold hearings, sit and act at times and places, take testimony, receive evidence, and administer oaths; and

(B) require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of books, records, correspondence, memoranda, papers, and documents.

(2) SUBPOENAS-

(A) SERVICE- Subpoenas issued under paragraph (1)(B) may be served by any person designated by the Commission.

(B) ENFORCEMENT-

(i) IN GENERAL- In the case of contumacy or failure to obey a subpoena issued under paragraph (1)(B), the United States district court for the judicial district in which the subpoenaed person resides, is served, or may be found, or where the subpoena is returnable, may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt of that court.

(ii) ADDITIONAL ENFORCEMENT- Sections 102 through 104 of the Revised Statutes of the United States (2 U.S.C. 192

through 194) shall apply in the case of any failure of any witness to comply with any subpoena or to testify when summoned under the authority of this section.

(3)iii) ISSUANCE- A subpoena may be issued under this subsection only—

(I) by the agreement of the Chairperson and the Vice Chairperson; or

(II) by the affirmative vote of a majority of the Commission, a majority being present.

(3) CONTRACTING- The Commission may enter into contracts to enable the Commission to discharge its duties under this section.

(4) INFORMATION FROM FEDERAL AGENCIES AND OTHER ENTITIES-

(A) IN GENERAL- The Commission may secure directly from any department, agency, bureau, board, commission, office, independent establishment, or instrumentality of the United States any information related to any inquiry of the Commission conducted under this section, including information of a confidential nature (which the Commission shall maintain in a secure manner). Each such department, agency, bureau, board, commission, office, independent establishment, or instrumentality shall furnish such information directly to the Commission upon request.

(B) OTHER ENTITIES- It is the sense of the Congress that the Commission should seek testimony or information from principals and other representatives of government agencies and private entities that were significant participants in the United States and global financial and housing markets during the time

period examined by the Commission.

I find the signing statement troubling for a number of reasons. First, Obama's celebration of investigative tools to combat fraud going forward seems like the same old "look forward" language with which Obama has thus far prevented any inquiry into Bush-era torture and other abuses. Investigative tools are nice, but we need to know what the beast we're investigating really looks like, which is what the Pecora Commission should tell us.

Also, I just spent several days wading through the 9/11 Commission archives. Having recently been reminded of Bush's stonewalling of that Commission, on which this Pecora Commission is based (though this Commission will have more members from Obama's party), I really don't relish the thought that Obama may soon be stonewalling in similar fashion.

More specifically, though, I'm concerned about what this says about Obama's approach to executive privilege. The privilege has, traditionally, arisen out of a real concern to protect precisely the subject of the 9/11 Commission—national security information. Bush was, of course, stonewalling the 9/11 Commission to protect himself from embarrassment, but at least any executive privilege there arose out of the traditional purpose for executive privilege.

But this Pecora Commission is mandated with investigating a **financial** failure, not a national security one. Yet Obama's signing statement suggests he may invoke privilege to hide details of that failure.

Now, there is one use of the privilege that does apply here—deliberative privilege, in which the President can shield conversations with top advisors to protect the President's ability to get unvarnished advice (it's a use of executive privilege that I find rather bogus, but it there is precedent for it). So perhaps Obama plans to invoke executive privilege to shield

conversations he had with the Masters of the Universe surrounding him about why they shouldn't nationalize Bank of America, for example, instead of throwing away money on a bailout that may be far less effective. But that's precisely the kind of conversation this Pecora Commission needs to be able to investigate, if we're going to avoid similar meltdowns in the future.

It's not a good sign, frankly. The meltdown and the bailout have been largely managed through the executive branch behind closed doors (or, barring that, behind the opacity of the Fed). If Obama plans to shield events that happened behind those closed doors, we may never find out the causes for the economic meltdown.