State of New Jersey

FIRST ANNUAL REPORT

of the

COMMISSION OF INVESTIGATION

of the

STATE OF NEW JERSEY

to

THE GOVERNOR AND THE LEGISLATURE

of the

STATE OF NEW JERSEY

January 1970

STATE OF NEW JERSEY
STATE COMMISSION OF INVESTIGATION

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To: The Governor and the Honorable Members of the Senate and Assembly of the State of New Jersey

The New Jersey Commission of Investigation is pleased to submit its first annual report and recommendations pursuant to Section 10 of P. L. 1968, Chapter 266 (N. J. S. A. 52:9M-10), the Act establishing the Commission of Investigation.

Respectfully submitted,

William F. Hyland, Chairman,
Charles L. Bertini
James T. Dowd
Glen B. Miller, Jr.

THE COMMISSION OF INVESTIGATION
OF THE STATE OF NEW JERSEY

Commissioners

William F. Hyland, Chairman
Charles L. Bertini
James T. Dowd
Glen B. Miller, Jr.
*Emory J. Kiess

Executive Director

Andrew F. Phelan

Counsel to the Commission

George P. Doyle
Gary L. Gardner
Wilbur H. Mathesius
Kenneth P. Zauber

Administrative Assistant
to the Commission

James A. Donahue

329 West State Street
Trenton, New Jersey 08618

* Died August 21, 1969—Vacancy filled by Hon. James T. Dowd. Appointed September 12, 1969.

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"Organized crime is a special danger to our society, for it has no hesitation in corroding and distorting the very institutions and fabric of society itself."

—Report of Joint Legislative Committee To Study Crime and the System of Criminal Justice in New Jersey - April 22, 1968, p. 8.

FOREWORD.

The annual net income of organized crime is estimated to be at least seven billion dollars, predominantly untaxed. The sources of that income include illegal gambling, loan sharking, labor racketeering, distribution of narcotics, and hijacking. There has also been an invasion of legitimate business by organized crime personnel, affording an aura of respectability to hoodlums.

Known variously as La Cosa Nostra, the Mafia, the Syndicate, or the Mob, the core of organized crime today exerts a sinister and increasing influence over the daily lives of our citizens and institutions. U. S. Attorney General John N. Mitchell has said that the power of the Mafia in this country is so pervasive that it "can hike the price of bread in the supermarket."

There is no question that La Cosa Nostra is the most profitable organization in the United States. Seven billion dollars is more than the annual net income of General Motors, General Electric, United States Steel, Standard Oil of New Jersey, I.B.M., R.C.A. and du Pont, all put together.

The financial sinews of organized crime stretch into places undreamed of ten years ago. No branch of government—federal, state or local—is secure from the threat of subversion. Organized crime needs to corrupt men whose duty and trust it is to attend to the affairs of the public. The only question which remains is whether organized crime has perhaps become so powerful that our government is no longer able to deal with it effectively.

LEGISLATIVE ACTION LEADING TO FORMATION OF THE COMMISSION.

On March 11, 1968, the Legislature adopted Senate Concurrent Resolution No. 44 calling for creation of a Joint Legislative Committee to Study Crime and the System of Criminal Justice in New Jersey. The special legislative committee consisted of 14 members, seven Senators appointed by the President of the Senate and seven Assemblymen appointed by the Speaker of the General Assembly. Senator Edwin B. Forsythe became chairman.

Following extensive public hearings and a study of state agency reports and statistical data, the Forsythe Committee issued its report, which said, in part, "New Jersey has a serious and growing crime problem and a crisis in crime control ... with major action needed immediately." The Committee Report expressed alarm over what it called expanding activities of organized crime in New Jersey and suggested that for such widespread criminal activities to exist "there must be failure to some considerable degree in the system itself, official corruption or both."

Concerned over a lack of any new and meaningful developments which would help alleviate the problem, the Forsythe Committee offered a series of sweeping recommendations for improving the administration of criminal justice, including the establishment of a New Jersey Commission of Investigation. Formation of a high-level New Jersey Commission of Investigation modelled along the lines of the highly-successful New York State Investigation Commission, the Committee said, would combat expanded organized crime operations and "benefit immensely from the continued presence of such a small but expert investigative body." At the time, the New York Commission was the only one of its kind in the country and had enjoyed a 10-year history of success that brought it nationwide attention as it delved into organized crime and official corruption.

Creation of state-wide crime investigation commissions was also recommended by the President's Commission on Law Enforcement and Administration of Justice in its report, *The Challenge of Crime in a Free Society.* The report, widely-circulated stated:

> States that have organized crime groups in operation should create and finance organized crime investigation commissions with independent, permanent status, with an adequate staff of investigators, and with subpoena power. Such commissions should hold hearings and furnish periodic reports to the legislature, Governor, and law enforcement officials.

The Forsythe Committee Report called for a four-member non-partisan Commission of Investigation with the broad jurisdiction of the New York Commission, and a similar structure. The report concluded that "this commission will provide a significant, independent watchdog for the entire system of administering criminal justice in New Jersey."

CREATION AND JURISDICTION OF THE COMMISSION.

The bill creating a four-member, bi-partisan State Commission of Investigation was introduced April 29, 1968, in the Senate by Senators Edwin B. Forsythe, Frank X. McDermott, Wayne Dumont, Jr., Joseph C. Woodcock, Jr., Milton A. Waldor, Matthew J. Rinaldo, Joseph J. Maraziti, William T. Hiering and Alfred D. Schiaffo. On September 4, 1968, the bill was passed, creating the Commission for a five-year term ending December 31, 1974, and appropriating $400,000 for the first year's operation. It is cited as Public Law 1968, Chapter 266.

The primary and paramount statutory responsibility vested in the Commission is set forth in Section 2 of the Act. It provides:

2. The Commission shall have the duty and power to conduct investigations in connection with:

a. The faithful execution and effective enforcement of the laws of the State, with particular reference but not limited to organized crime and racketeering;

b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

c. Any matter concerning the public peace, public safety and public justice.

Further, Section 3 provides that at the direction of the Governor or by concurrent resolution of the Legislature the Commission shall conduct investigations and otherwise assist in connection with: a) the removal of public officers by the Governor; b) the making of recommendations by the Governor to any other person or body, with respect to the removal of public officers; c) the making of recommendations by the Governor to the Legislature with respect to changes in or additions to the existing provisions of law required for the more effective enforcement of the law.

Constituted as an investigative body, the Commission is empowered to hold public or private hearings throughout the State in its fact-finding capacity, and is authorized to compel testimony and production of records and confer immunity on witnesses.

Section 1 of the Act provides that two members of the Commission shall be appointed by the Governor, one by the President of the Senate and one by the Speaker of the General Assembly, each for five years. The Governor is granted power to designate one of his appointees to serve as chairman.

Not more than two of the four members shall belong to the same political party.

FORMING THE COMMISSION AND STAFF.

Appointments to the Commission were concluded in December, 1968. Governor Richard J. Hughes appointed William F. Hyland, of Cherry Hill, and Charles L. Bertini, of Wood-Ridge. Mr. Hyland was designated chairman. Senator Edwin B. Forsythe, then president of the Senate, named Glen B. Miller, Jr., of Princeton, and Assemblyman Albert S. Smith, then Speaker of the Assembly, selected Emory J. Kiess,[1] of Atlantic City.

The new Commission was formally introduced to the public at a press conference in Cherry Hill on December 26, 1968, attended by Governor Hughes, Senator Forsythe and Assemblyman Smith.

In its first public statement the Commission declared:

> The members of the State Commission of Investigation have been appointed by the highest elected officials of the State of New Jersey; that is, by the Governor and by the leaders of the State Legislature.
>
> Therefore we look upon our assignment as a direct mandate from the people of New Jersey themselves to inquire into a variety of areas where serious law infractions may be involved or where the existing law enforcement agencies have for some reason failed to afford the public the protection it deserves from lawless elements.
>
> The Commission will proceed with maximum speed to recruit a professional staff and to prepare itself in all other respects for the responsibilities it has been given. In recruiting this staff, our sights will be high. Men of

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[1] Commissioner Kiess died on August 21, 1969. The vacancy was filled with the appointment of James T. Dowd of Essex Fells, New Jersey, on September 12, 1969, by Assemblyman Peter Moraites, Speaker of the General Assembly. Mr. Dowd was sworn into office on September 16, 1969.

unquestionable professional skill and integrity will be sought because the competence of our staff will be the keystone of our effectiveness as a Commission.

Members of the Commission, after being sworn into office January 3, 1969, immediately began a round of conferences with law enforcement officials and experts in the organized crime field in New Jersey and New York for the purpose of informing themselves and to seek recommendations for staff appointments.

The members of the New York Commission of Investigation gave generously of their time and advice in the formative days.

The search to fill the key post of Executive Director ended with the selection of Andrew F. Phelan, of Buffalo, New York, who resigned as U. S. Attorney for the Western District of New York to accept the appointment. Mr. Phelan brought to this post invaluable experience in the organized crime field. He worked closely with the prototype Department of Justice Strike Force, which was located in Buffalo, successfully prosecuting that body's most important indictments of Cosa Nostra chieftains. He directed extensive investigations into Cosa Nostra activities, leading to important indictments. Among his accomplishments was securing the indictment of the reputed chairman of the ruling national Cosa Nostra Commission.

Recruitment of staff continued throughout the year. Many weeks were devoted to establishment of the procedures and policies which were to be used as the basis for subpoenaeing witnesses and documents, conducting investigations, holding public and private hearings and dealing with the many other legal ramifications inherent in the operation of an investigative agency which faced legal challenges all along its planned route.

GENERAL ACTIVITIES.

The initial ten months of work has been challenging and productive.

More than 80 witnesses have been subpoenaed and have given testimony on various inquiries in private, formal hearings presided over by Commission members and held in various sections of the state. Testimony has filled more than 5,000 pages of formal hearing transcripts. One hundred and eight subpoenaes have been issued for production of public and private records and files. All required systematic review and use in connection with investigations.

All hearings are conducted with full regard to the constitutional rights of witnesses and in keeping with the safeguards afforded witnesses under the Code of Fair Procedure.

The Commission conducted an investigation in Monmouth County, with particular emphasis on Long Branch. Delay has been occasioned by legal actions brought against the Commission in state and federal Courts. The investigation is not yet complete.

At the request of the Legislature, the Commission also conducted an investigation into the waste disposal industry and submitted its report and legislative recommendations. That investigation will be treated separately in this report.

Counsel to the Commission have been called on to defend several legal challenges made in the state and federal courts against the constitutionality of its enabling statute. One such challenge was brought by Francis Albert Sinatra who had been subpoenaed in the belief that he could furnish information at a private hearing that would be useful for Commission purposes. The Third Circuit Court of Appeals at Philadelphia, Pennsylvania, has the issue of constitutionality in this particular suit under advisement.

Earlier in the year a close review of the enabling statute convinced the Commission of needed amendments if the

agency's capabilities for coping with organized crime were not to be fatally limited. As a result, Senate Bill 724 was introduced by Senator Edwin B. Forsythe, giving the Commission broader powers with respect to contempt of court and arrest warrants and giving broader privileges to the Commission with respect to suits for defamation and invasions of privacy. This amendment was adopted by the Legislature and signed into law by Governor Hughes.

An extensive intelligence file has been developed, with significant portions of the material being collected by our own field investigations. Two-way liaison has been established with state and federal agencies throughout the country. The background of the staff has been extremely helpful in all of these contacts and exchanges of information.

More than 200 Citizen Complaints have been received since announcement of the Commission's formation. Some of these letters required two or three days of investigation before disposition was made. In other cases the information supplied became part of inquiries currently underway. Effort is made to give each letter individual attention and response. Occasionally, jurisdiction is lacking and the citizen's complaint is referred to an appropriate state or local agency. There are indications from some of the complaints that the Commission is looked on by a number of citizens as a statewide Ombudsman. Although the Commission is not specifically constituted to perform the role of receiving and investigating complaints made by individuals against abuses or capricious acts of public officials, it does make every effort to respond helpfully and judiciously.

Gambling is considered to be the greatest source of income to organized crime. The State Lottery Commission headed by Senator Harry L. Sears is considering the type and frequency of a lottery to be established. While the primary purpose of the lottery was to raise revenues, there was hope that the lottery also could be used to compete with the numbers racket controlled by organized crime.

The Commission has not yet studied this question. Its members' personal initial reactions are divided on it and on the broader overall question of the effect which legalized gambling would have on organized crime.

On December 3, Governor Hughes wrote to the Chairman of the Commission and requested that an investigation be made into what he termed an alarming upsurge in the use of illegal narcotics, particularly by the young. He pointed to the spreading use of marijuana and the "tragic beginnings of addiction to heroin and other 'hard' drugs."

During 1970, the Commission plans to hold one or more hearings to highlight the seriousness and growing prevalence of the drug problem in the State. To the extent possible, the Commission will also study the degree of involvement of organized crime in drug distribution and sale.

INVESTIGATION INTO AFFAIRS OF LONG BRANCH AND MONMOUTH COUNTY.

Prior to and shortly after creation of the Commission serious allegations were made of official misconduct in various municipalities in Monmouth County, and in Long Branch, particularly. An investigation was ordered and Special Agents of the Commission dispatched to the shore area.

While the investigation was underway, the U. S. Attorney for New Jersey released 13 volumes of transcripts of conversations recorded by the Federal Bureau of Investigation, involving Simone Rizzo DeCavalcante, reputed "Boss" of a Cosa Nostra "Family."

Publication of the transcripts shocked the citizenry and prompted Governor Hughes to order the Commission to investigate "the entire contents of the alleged transcripts and other information concerning the activities of organized

crime in New Jersey." By the time the transcripts were released, the Commission's investigation into organized crime in the shore area had turned up many of the same names contained in the bugged recordings, now known as the DeCavalcante Papers.

Convening private hearings beginning July 8, the Commission summoned many of them for appearances. Following this confrontation, which received wide public attention through extensive coverage by the communications media, one major newspaper in the state made this editorial comment:

> Whatever comes of it—after all the legal complications, and with the Cosa Nostra's code of silence difficult to penetrate—at least the Commission's efforts will have exposed this criminal hierarchy for all of us to take a good look at them.
>
> Everybody can see their faces, remember their names, note their activities—and be repulsed by their moral code and the cheapness in which they hold life.
>
> If only this, the investigation will have produced much gain.

The first legal challenge to the Commission's constitutionality was brought by attorneys for Joseph Zicarelli and Angelo DeCarlo in the federal courts. These individuals had been subpoenaed to appear as witnesses before the Commission in private hearings and had been named in the DeCavalcante Papers.

Their arguments were answered by counsel for the Commission. Chief Judge William H. Hastie of the Third U. S. Circuit Court of Appeals ruled in favor of the Commission, declaring that the constitutionality of such investigative agencies was firmly established in law. The private hearings continued.

Two key witnesses summoned before the Commission subsequent to the court ruling illegally fled the hearing room

in the State House Annex. They were Frank Cocchiaro, alias Frank Condi, and Robert Basile Occhipinti. The statewide Grand Jury returned criminal indictments against them. Mr. Occhipinti later surrendered. His trial is pending. Mr. Cocchiaro remains a fugitive.

The incident prompted the Commission to recommend an amendment to Title 18 of the U. S. Code, Section 1073, making it a federal crime to flee across state lines to avoid appearance before an authorized state commission of investigation. The recommendation was sent to Attorney General John N. Mitchell for inclusion in the Administration's new omnibus bill. Support for the amendment has come from U. S. Senators Clifford Case, Harrison A. Williams, Jr., and the U. S. Department of Justice.

An important weapon in the Commission's arsenal is the power to grant immunity to witnesses under several safeguards spelled out in the law. The Commission decided to use it in an effort to compel testimony from Anthony Russo, Joseph Zicarelli and Robert Basile Occhipinti. Each of the three thwarted the Commission's statutory powers by refusing to answer questions even after ordered to with immunity.

In a major legal court test in Superior Court, Mercer County, the Commission successfully prosecuted its contempt of court charges against Russo, Zicarelli and Occhipinti. Each was ordered to jail by Judge Frank J. Kingfield until he purged himself of contempt by answering the questions as ordered. Judge Kingfield, however, ordered execution of jail sentences stayed until the defendants could be heard by appellate courts of the state.[1]

Meanwhile, the investigation into Long Branch and Monmouth County proceeded with private hearings convened

[1] On January 20, 1970, the New Jersey Supreme Court upheld the constitutionality of the State Commission of Investigation and the exercise of its immunity powers with respect to Zicarelli, Occhipinti and Russo. See Attachment 4. On January 27, 1970, the United States Supreme Court refused to grant a stay in execution of the contempt judgments.

in the shore area. There came a time when the process of the investigation turned to the Office of the County Prosecutor and the Chief of County Detectives, John M. Gawler. Various records of that office were subpoenaed. On October 15 a subpoena was served on Chief Gawler for his appearance at a private hearing. The following day Chief Gawler was found dead of carbon monoxide poisoning in the garage of his home in Atlantic Highlands.

The overall investigation has been hindered by several factors. The flight of Frank Cocchiaro, reportedly being groomed by Cosa Nostra to take over Monmouth County operations, deprived the Commission of one of its key witnesses. The refusal by important witnesses to answer the questions of the Commission has provided a serious impediment to the gaining of information. The death of Chief Gawler also sealed off an important area of the inquiry.

The consequence of the delays and complications that have arisen is that to date the investigation is still in process. No report has been made. The Commission will convene public hearings at the earliest feasible date.

AN INVESTIGATION OF THE GARBAGE INDUSTRY.

Reflecting growing concern over reports that criminal elements had invaded the garbage industry, the Legislature called for an investigation by this agency. The referral was contained in Assembly Joint Resolution No. 3, approved February 24, 1969.

The Commission then proceeded with its investigation into certain practices and procedures in the garbage industry. The inquiry involved the collection of information by agents of the Commission, the study of exhibits obtained through the power of subpoena and transcripts of prior hearings and reports of public agencies, together with testimony elicited at a series of private hearings which concluded September 24, 1969.

Undesirable practices were found to exist in this industry, both in collection and disposal. The investigation also revealed that some organized criminal elements have been moving into the field, although the involvement was in a relatively incipient stage.

The inquiry disclosed that the industry could become a natural avenue for expansion of organized crime activities because of the high capital investment required for modern garbage collection and sanitary landfill equipment. Opportunities for bribery and corruption abound, it was found, because so many municipalities are involved. Because of these reasons the Commission has decided to continue its surveillance of this aspect of the industry.

Meanwhile, the Commission made three recommendations for consideration by the 1970 Legislature. They were:

(1) Enact legislation which will prohibit customer and territorial allocations in the garbage industry. This legislation should also prohibit price fixing arrangements and collusive bidding among waste collection contractors and make unlawful present trade association constitutions, by-laws and resolutions which prohibit or discourage one waste collector from taking a customer from another.

(2) Enact legislation providing for the licensing by the State (to the exclusion of municipal licensing) of all waste collectors throughout the state. This licensing law should provide for the availability to the public of the names of the real persons in interest of each waste collection and waste disposal company.

(3) Enact legislation prohibiting the discrimination either as to availability or as to price in the use of privately owned waste disposal areas.

CONCLUSION.

While formation of the Commission did not relieve law enforcement agencies of their primary responsibilities, it did serve notice that a concerned public and Legislature wanted a spotlight thrown on organized crime. It further served notice that situations and circumstances taken for granted in the past were now subject to inquiry by a new group of professionals who could and would work across municipal and county lines of jurisdiction.

Indeed, the Commission has been told that the new emphasis on organized crime by such a group of "untouchables" gave heart to the majority of those in law enforcement. The ever presence of the Commission, it is felt, serves as a salutary effect, stimulating investigation and action throughout the state by law enforcement agencies, big and small.

The Commission acknowledges full cooperation of the many law enforcement agencies which have given it assistance in the past year. It thanks the members of the Legislature who have shown their concern in various ways.

Without the support of the news media this Commission would have been severely hampered in achieving initial objectives and goals established in the first year. Their support is even more welcome when consideration is made of the extreme limitations imposed by statute on the Commission on the release of information, which these media often need for interpretation and assessment.

Frequent expressions of public support have been gratifying. This confidence will be sought on a continuing basis through the Commission's pledge to discharge its responsibilities competently and effectively, to the best of its abilities.

". . . The extraordinary thing about organized crime is that America has tolerated it so long."

. . . from the President's Commission on Law Enforcement and Administration of Justice.

ATTACHMENTS.

1. P. L. 1968, Chapter 266 (N. J. S. A. 52:9M-1 et seq.).

2. Amending P. L. 1969, Chapter 67 (N. J. S. A. 52:9M-12 et seq.).

3. Code of Fair Procedure, P. L. 1968, Chapter 376 (N. J. S. A. 52:13E-1 et seq.).

4. Zicarelli et als. v. The New Jersey State Commission of Investigation, —— N. J. ——.

ATTACHMENT NO. 1.

L. 1968, CHAPTER 266, R. S. CUM. SUPP. 52:9M-1 ET SEQ.

Revised Statutes Cumulative Supplement

Senate Bill 716.

Chapter 9M. STATE COMMISSION OF INVESTIGATION.

TITLE.

AN ACT creating a temporary State Commission of Investigation; prescribing its functions, powers and duties; making an appropriation therefor.

[*Forsythe, McDermott, Dumont, Woodcock, Waldor, Rinaldo, Maraziti, Hiering and Schiaffo*]

52:9M-1. Creation; members; appointment; chairman; terms; salaries; vacancies. There is hereby created a temporary state commission of investigation. The commission shall consist of 4 members, to be known as commissioners.

Two members of the commission shall be appointed by the governor, one by the president of the senate and one by the speaker of the general assembly, each for 5 years. The governor shall designate one of his appointees to serve as chairman of the commission.

The members of the commission appointed by the president of the senate and the speaker of the general assembly and at least one of the members appointed by the governor shall be attorneys admitted to the bar of this state. No member or employee of the commission shall hold any other public office or public employment. Not more than 2 of the members shall belong to the same political party.

Each member of the commission shall receive an annual salary of $15,000.00 and shall also be entitled to reimbursement for his expenses actually and necessarily incurred in the performance of his duties, including expenses of travel outside of the state.

Vacancies in the commission shall be filled for the unexpired term in the same manner as original appointments. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission.

52:9M-2. Duties and powers. The commission shall have the *duty and power to conduct investigations* in connection with:

a. The faithful execution and effective enforcement of the laws of the state, with particular reference but not limited to organized crime and racketeering;

b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

c. Any matter concerning the public peace, public safety and public justice.

52:9M-3. Additional duties. At the direction of the governor or by concurrent resolution of the legislature the commission *shall conduct investigations* and otherwise assist in connection with:

a. The removal of public officers by the governor;

b. The making of recommendations by the governor to any other person or body, with respect to the removal of public officers;

c. The making of recommendations by the governor to the legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law.

52:9M-4. Investigation of management or affairs of state department or agency. At the direction or request of the legislature by concurrent resolution or of the governor or of the head of any department, board, bureau, commission, authority or other agency created by the state, or to which the state is a party, the commission shall investigate the management or affairs of any such department, board, bureau, commission, authority or other agency.

52:9M-5. Cooperation with law enforcement officials. Upon request of the attorney general, a county prosecutor or any other law enforcement official, the commission shall co-operate with, advise and assist them in the performance of their official powers and duties.

52:9M-6. Cooperation with federal government. The commission shall co-operate with departments and officers of the United States government in the investigation of violations of the federal laws within this state.

52:9M-7. Examination into law enforcement affecting other states. The commission shall examine into matters relating to law enforcement extending across the boundaries of the state into other states; and may consult and exchange information with officers and agencies of other states with respect to law enforcement problems of mutual concern to this and other states.

52:9M-8. Reference of evidence to other officials. Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evi-

dence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer.

52:9M-9. Executive director; counsel; employees. The commission shall be authorized to appoint and employ and at pleasure remove an executive director, counsel, investigators, accountants, and such other persons as it may deem necessary, without regard to civil service; and to determine their duties and fix their salaries or compensation within the amounts appropriated therefor. Investigators and accountants appointed by the commission shall be and have all the powers of peace officers.

52:9M-10. Annual report; recommendations; other reports. The commission shall make an annual report to the governor and legislature which shall include its recommendations. The commission shall make such further interim reports to the governor and legislature, or either thereof, as it shall deem advisable, or as shall be required by the governor or by concurrent resolution of the legislature.

52:9M-11. Information to public. By such means and to such extent as it shall deem appropriate, the commission shall keep the public informed as to the operations of organized crime, problems of criminal law enforcement in the state and other activities of the commission.

* * * * * * * * *

52:9M-14. Request and receipt of assistance. The commission may request and shall receive from every department, division, board, bureau, commission, authority or other agency created by the state, or to which the state is a party, or of any political subdivision thereof, co-operation and assistance in the performance of its duties.

* * * * * * * * *

52:9M-16. Impounding exhibits; action by superior court. Upon the application of the commission, or a duly authorized member of its staff, the superior court or a judge thereof may impound any exhibit marked in evidence in any public or private hearing held in connection with an investigation conducted by the commission, and may order such exhibit to be retained by, or delivered to and placed in the custody of, the commission. When so impounded such exhibits shall not be taken from the custody of the commission, except upon further order of the court made upon 5 days' notice to the commission or upon its application or with its consent.

52:9M-17. Immunity; order; notice; effect of immunity. a. If, in the course of any investigation or hearing conducted by the commission pursuant to this act [chapter], a person refuses to answer a question or questions or produce evidence of any kind on the ground that he will be exposed to criminal prosecution or penalty or to a forfeiture of his estate thereby, the commission may order the person to answer the question or questions or produce the requested evidence and confer immunity as in this section provided. No order to answer or produce evidence with immunity shall be made except by resolution of a majority of all the members of the commission and after the attorney general and the appropriate county prosecutor shall have been given at least 24 hours written notice of the commission's intention to issue such order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity.

b. If upon issuance of such an order, the person complies therewith, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, *except that such person may nevertheless be prosecuted for any perjury committed in such answer or in pro-*

ducing such evidence, or for contempt for failing to give an answer or produce in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or upon any investigation, proceeding or trial against him for such contempt.

52:9M-18. Severability; effect of partial invalidity. If any section, clause or portion of this act [chapter] shall be unconstitutional or be ineffective in whole or in part, to the extent that it is not unconstitutional or ineffective it shall be valid and effective and no other section, clause or provision shall on account thereof be deemed invalid or ineffective.

52:9M-19. There is hereby appropriated to the Commission the sum of $400,000.

52:9M-20. This Act shall take effect immediately and remain in effect until December 31, 1974.

ATTACHMENT NO. 2.

L. 1969, CHAPTER 67, R. S. CUM. SUPP. 52:9M-12 ET SEQ.

Revised Statutes Cumulative Supplement.

Senate Bill 724.

TITLE.

AN ACT to amend "An act creating a temporary State Commission or Investigation; prescribing its functions, powers and duties; making an appropriation therefor," approved September 4, 1968 (P. L. 1968, c. 266).

[*Forsythe, Bateman, Sears, Dumont, McDermott, Hiering, Woodcock and Schiaffo*]

52:9M-12. Additional powers; warrant for arrest; contempt of court. With respect to the performance of its functions, duties and powers and subject to the limitation contained in paragraph d of this section, the commission shall be authorized as follows:

a. To conduct any investigation authorized by this act [chapter] at any place within the state; and to maintain offices, hold meetings and function at any place within the state as it may deem necessary;

b. To conduct private and public hearings, and to designate a member of the commission to preside over any such hearing;

c. To administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, and require the production of any books, records, documents or other evidence it may deem relevant or material to an investigation; and the commission may designate any of its members or any member of its staff to exercise any such powers;

d. Unless otherwise instructed by a resolution adopted by a majority of the members of the commission, every witness attending before the commission shall be examined privately and the commission shall not make public the particulars of such examination. The commission shall not have the power to take testimony at a private hearing or at a public hearing unless at least 2 of its members are present at such hearing;

e. Witnesses summoned to appear before the commission shall be entitled to receive the same fees and mileage as persons summoned to testify in the courts of the state.

If any person subpoenaed pursuant to this section shall neglect or refuse to obey the command of the subpoena, any

judge of the superior court or of a county court or any municipal magistrate may, on proof by affidavit of service of the subpoena, payment or tender of the fees required and of refusal or neglect by the person to obey the command of the subpoena, issue a warrant for the arrest of said person to bring him before the judge or magistrate, who is authorized to proceed against such person as for a contempt of court.

Note. This section was enacted by L. 1968, c. 266, §12, approved Sept. 4, 1968, effective immediately.

52:9M-13. Powers and duties unaffected. Nothing contained in sections 2 through 12 of this act [chapter] shall be construed to supersede, repeal or limit any power, duty or function of the governor or any department or agency of the state, or any political subdivision thereof, as prescribed or defined by law.

Note. This section was enacted by L. 1968, c. 266, §13, approved Sept. 4, 1968, effective immediately.

52:9M-15. Disclosure forbidden; statements absolutely privileged. Any person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined, or any information obtained or given upon such examination or investigation, except as directed by the governor or commission, shall be adjudged a disorderly person.

Any statement made by a member of the commission or an employee thereof relevant to any proceedings before or investigative activities of the commission shall be absolutely privileged and such privilege shall be a complete defense to any action for libel or slander.

Note. This section was enacted by L. 1968, c. 266, §15, approved Sept. 4, 1968, effective immediately.

ATTACHMENT NO. 3.

CODE OF FAIR PROCEDURE.

Chapter 376, Laws of New Jersey, 1968, N. J. S. 52:13E-1 to 52:13E-10.

An Act establishing a code of fair procedure to govern state investigating agencies and providing a penalty for certain violations thereof.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. As used in this act:

(a) "Agency" means any of the following while engaged in an investigation or inquiry: (1) the Governor or any person or persons appointed by him acting pursuant to P. L. 1941, c. 16, s. 1 (C. 52:15-7), (2) any temporary State commission or duly authorized committee thereof having the power to require testimony or the production of evidence by subpoena, or (3) any legislative committee or commission having the powers set forth in Revised Statutes 52:13-1.

(b) "Hearing" means any hearing in the course of an investigatory proceeding (other than a preliminary conference or interview at which no testimony is taken under oath) conducted before an agency at which testimony or the production of other evidence may be compelled by subpoena or other compulsory process.

(c) "Public hearing" means any hearing open to the public, or any hearing, or such part thereof, as to which testimony or other evidence is made available or disseminated to the public by the agency.

(d) "Private hearing" means any hearing other than a public hearing.

2. No person may be required to appear at a hearing or to testify at a hearing unless there has been personally served upon him prior to the time when he is required to appear, a copy of this act, and a general statement of the subject of the investigation. A copy of the resolution, statute, order or other provision of law authorizing the investigation shall be furnished by the agency upon request therefor by the person summoned.

3. A witness summoned to a hearing shall have the right to be accompanied by counsel, who shall be permitted to advise the witness of his rights, subject to reasonable limitations to prevent obstruction of or interference with the orderly conduct of the hearing. Counsel for any witness who testifies at a public hearing may submit proposed questions to be asked of the witness relevant to the matters upon which the witness has been questioned and the agency shall ask the witness such of the questions as it may deem appropriate to its inquiry.

4. A complete and accurate record shall be kept of each public hearing and a witness shall be entitled to receive a copy of his testimony at such hearing at his own expense. Where testimony which a witness has given at a private hearing becomes relevant in a criminal proceeding in which the witness is a defendant, or in any subsequent hearing in which the witness is summoned to testify, the witness shall be entitled to a copy of such testimony, at his own expense, provided the same is available, and provided further that the furnishing of such copy will not prejudice the public safety or security.

5. A witness who testifies at any hearing shall have the right at the conclusion of his examination to file a brief sworn statement relevant to his testimony for incorporation in the record of the investigatory proceeding.

6. Any person whose name is mentioned or who is specifically identified and who believes that testimony or other evidence given at a public hearing or comment made by any member of the agency or its counsel at such hearing tends to defame him or otherwise adversely affect his reputation shall have the right, either to appear personally before the agency and testify in his own behalf as to matters relevant to the testimony or other evidence complained of, or in the alternative at the option of the agency, to file a statement of facts under oath relating solely to matters relevant to the testimony or other evidence complained of, which statement shall be incorporated in the record of the investigatory proceeding.

7. Nothing in this act shall be construed to prevent an agency from granting to witnesses appearing before it, or to persons who claim to be adversely affected by testimony or other evidence adduced before it, such further rights and privileges as it may determine.

8. Except in the course of subsequent hearing which is open to the public, no testimony or other evidence adduced at a private hearing or preliminary conference or interview conducted before a single-member agency in the course of its investigation shall be disseminated or made available to the public by said agency, its counsel or employees without the approval of the head of the agency. Except in the course of a subsequent hearing open to the public, no testimony or other evidence adduced at a private hearing or preliminary conference or interview before a committee or other multi-member investigating agency shall be disseminated or made available to the public by any member of the agency, its counsel or employees, except with the approval of a majority of the members of such agency. Any person who violates the provisions of this subdivision shall be adjudged a disorderly person.

9. No temporary State commission having more than 2 members shall have the power to take testimony at a public or private hearing unless at least 2 of its members are present at such hearing.

10. Nothing in this act shall be construed to affect, diminish or impair the right, under any other provision of law, rule or custom, of any member or group of members of a committee or other multimember investigating agency to file a statement or statements of minority views to accompany and be released with or subsequent to the report of the committee or agency.

ATTACHMENT NO. 4.

OPINION OF SUPREME COURT OF NEW JERSEY.

(Filed January 20, 1970.)

In the Matters of JOSEPH ARTHUR ZICARELLI, ROBERT BASILE OCCHIPINTI, and ANTHONY RUSSO, Charged with Civil Contempt of the State Commission of Investigation.

JOSEPH ARTHUR ZICARELLI, ROBERT BASILE OCCHIPINTI, and ANTHONY RUSSO,
Appellants,

v.

THE NEW JERSEY STATE COMMISSION OF INVESTIGATION,
Respondent.

Argued December 15, 1969—Decided January 20, 1970.

On appeal from the Superior Court, Law Division, Mercer County.

MR. MICHAEL A. QUERQUES argued the cause for appellant Zicarelli; MR. SAMUEL D. BOZZA argued the cause for appellant Occhipinti (MR. DANIEL E. ISLES and MR. HARVEY WEISSBARD, of counsel and on the brief; MESSRS. QUERQUES ISLES & WEISSBARD, attorneys for appellant Zicarelli).

MR. WILLIAM POLLACK argued the cause for appellant Russo.

MR. WILBUR H. MATHESIUS and MR. KENNETH P. ZAUBER argued the cause for respondent.

The opinion of the Court was delivered by
WEINTRAUB, C. J.

Appellants refused to answer questions before the State Commission of Investigation (herein S.C.I.) and persisted in that refusal notwithstanding a grant of immunity. Upon the S.C.I.'s application to the Superior Court, each was ordered to be incarcerated until he answered. We certified their appeals before argument in the Appellate Division.

I.

Appellants contend the statute creating the S.C.I. denies due process of law in violation of the Fourteenth Amendment because individuals summoned before the Commission are denied the protections accorded an accused by the Bill

of Rights.[1] The argument rests upon the false premise that the role of the S. C. I. is to decide whether an individual has committed a crime and to publicize the verdict. That is not its mission.

For this reason, appellants' reliance upon *Jenkins v. McKeithen*, —— U. S. ——, 23 L. ed. 2d 404 (1969), is misplaced. That case involved a Louisiana statute which created a body called the Labor-Management Commission of Inquiry. The Commission consisted of nine members appointed by the Governor. The Commission could act only upon referral by the Governor when, in his opinion, there was substantial indication of "widespread or continuing violations of existing criminal laws" affecting labor-management relations. Upon such referral the Commission was to proceed by public hearing to ascertain the facts, and was required to determine whether there was probable cause to believe such criminal violation had occurred. Such findings were to be sent to appropriate federal or state law enforcement officials, and although not evidential in any trial, the findings were to be made public and could include conclusions as to specific individuals.

In *Jenkins* the trial court dismissed the complaint on motion. Four members of the Court, in an opinion by Mr. Justice Marshall, thought there was enough to warrant a hearing upon the complaint and hence reversed the judgment; two members of the Court thought the statute was invalid on its face; and the remaining three voted to affirm the trial court's judgment upholding the statute.

Mr. Justice Marshall stressed that the Commission had no role whatever in the legislative process. He pointed to

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[1] The S.C.I. contends that appellant Zicarelli is estopped to argue the constitutionality of the statute in its entirety or of the immunity provision because he was defeated on both scores in a proceeding in the United States District Court for the District of New Jersey and withdrew his appeal from the judgment there entered. We pass this objection since the issue must be met at the behest of the other appellants, and even as to Zicarelli "collateral estoppel" would not be a satisfying basis for decision.

the Commission's power to make public findings with respect to individual guilt of crime and cited the allegations in the complaint that the power was so used "to brand them as criminals in public" (—— U. S. at ——, 23 L. ed. 2d at 420). He continued that "In the present context, where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime, we think that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights," and as well the right to call witnesses, subject to reasonable restrictions. (—— U. S. at ——, 23 L. ed. 2d at 421.) Finally the opinion emphasized that it did not hold that appellant was entitled to declaratory or injunctive relief but only that he was entitled to a chance "to prove at trial that the Commission is designed to and does indeed act in the manner alleged in his complaint, and that its procedures fail to meet the requirements of due process." (—— U. S. at ——, 23 L. ed. 2d at 422.)

It should be stressed that both the plurality opinion and the dissenting opinion unreservedly reaffirmed *Hannah v. Larche,* 363 U. S. 420, 4 L. ed. 2d 1307 (1960), which had rejected a similar attack upon the statute creating the Civil Rights Commission. Distinguishing *Hannah*, Mr. Justice Marshall in *Jenkins* said (—— U. S. at ——, 23 L. ed. 2d at 419-420):

> "The appellants in Hannah were persons subpoenaed to appear before the Civil Rights Commission in connection with complaints about deprivations of voting rights. They objected to the Civil Rights Commission's rules about nondisclosure of the complainants and about limitations on the right to confront and cross-examine witnesses. This Court ruled that the Commission's rules were consistent with the Due Process Clause of the Fifth Amendment. The Court noted that '"[d]ue process" is an elusive concept. Its exact boundaries are undefinable, and its content varies ac-

cording to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.' 363 U. S., at 442, 4 L. Ed. 2d at 1321.

In rejecting appellants' challenge to the Civil Rights Commission's procedures, the Court placed great emphasis on the investigatory function of the Commission:

'[I]ts function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative and executive action.' 363 U. S., at 441, 4 L. Ed. 2d at 1320.

The Court noted that any adverse consequences to those being investigated, such as subjecting them to public opprobrium, were purely conjectural, and, in any case, were merely collateral and 'not . . . the result of any affirmative determinations made by the Commission. . . .' 363 U. S., at 443, 4 L. Ed. 2d at 1322."

The S.C.I. is in no sense an "accusatory" body within the meaning of *Jenkins*. Rather, in words which *Jenkins* repeated from *Hannah*, the purpose of the S.C.I. is "to find facts which may subsequently be used as the basis for legislative and executive action." This plainly appears from a review of the statute.

The S.C.I. consists of four members, two appointed by the Governor and one each by the President of the Senate and the Speaker of the General Assembly. N. J. S. A. 52:9M-1. Section 2 of the statute reads:

> "The commission shall have the duty and power to conduct investigations in connection with:
>
> a. The faithful execution and effective enforcement of the laws of the State, with particular reference but not limited to organized crime and racketeering;
>
> b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;
>
> c. Any matter concerning the public peace, public safety and public justice."

Section 3 provides:

> "At the direction of the Governor or by concurrent resolution of the Legislature the commission shall conduct investigations and otherwise assist in connection with:
>
> a. The removal of public officers by the Governor;
>
> b. The making of recommendations by the Governor to any other person or body, with respect to the removal of public officers;
>
> c. The making of recommendations by the Governor to the Legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law."

Section 4 requires the S.C.I. to investigate any department or State agency at the direction or request of the Legislature or the Governor or such department or agency. Upon the request of the Attorney General, a county prosecutor or any other law enforcement official, the S.C.I. shall cooperate with, advise and assist them in the performance of their official powers and duties. Section 5. The S.C.I. shall cooperate with federal officials in the investigation of violations of federal laws within the State, section 6, and

may consult and exchange information with officers of other States, section 7, and whenever it shall appear to the Commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the Commission shall refer the evidence to the officials authorized to conduct the prosecution or to remove the public officer. Section 8.

The legislative mission of the S.C.I., evident in section 3 quoted above, is emphasized by section 10 which reads:

> "The commission shall make an annual report to the Governor and Legislature which shall include its recommendations. The commission shall make such further interim reports to the Governor and Legislature, or either thereof, as it shall deem advisable, or as shall be required by the Governor or by concurrent resolution of the Legislature."

Section 11 does provide that

> "By such means and to such extent as it shall deem appropriate, the commission shall keep the public informed as to the operations of organized crime, problems of criminal law enforcement in the State and other activities of the commission."

but section 11 does not require the S.C.I. to make and publicize findings with respect to the guilt of specific individuals and thus does not invite the problem involved in *Jenkins*. In other words, the S.C.I. can respect the demands of due process without disobeying the letter or the spirit of the statute. Nor does the discretion given by section 12 to hold public hearings in any way mandate an infraction of any constitutional right. Under the statute the S.C.I. may, and under the Constitution it must, work within basic limits.

We add that nothing occurred in the present matter which suggests the S.C.I. intends to transgress those limits. The S.C.I. met the provisions of the Code of Fair Procedure (L. 1968, c. 376), N. J. S. A. 52:13E-1 to 10. A copy of that statute was served upon each appellant with the sub-

poena, and the subpoena contained a sufficient statement of the subject of the investigation.[2] N. J. S. A. 52:13E-2. The right to have counsel present and to receive his advice, N. J. S. A. 52:13E-3, was respected. The hearing was private. There has been no trace of a purpose to deny due process.

In sum, then, we have a typical commission created to discover and to publicize the state of affairs in a criminal area, to the end that helpful legislation may be proposed and receive needed public support. That the commission may also aid law enforcement by gathering evidence of crime and transmitting it to the appropriate agency for evaluation or prosecution does not militate against the power of the Legislature to seek the facts for its own purposes through such a commission. We do not suggest that a commission whose role was solely to aid the executive branch by ferreting out evidence of guilt for transmittal to the executive officers would be barred by the Federal Constitution. No provision of that instrument stands in the way. Nor do we understand appellants to say there is. The federal attack under the present point is based on the due process clause, and the result does not turn upon whether the agency is characterized as "legislative" or "executive" or both. Rather the question is whether the agency, whatever its classic nature in the context of separation of powers, has an accusatory role, and if so, whether individual rights pertinent to an accusatory function have been denied. As to this, the answer is that the role of the S.C.I. is not

[2] It read:

"Whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas."

accusatory and the rights accorded the individuals concerned are appropriate and adequate in the light of the agency's mission and powers.

We add that the United States District Court for the District of New Jersey rejected the same attack in *Sinatra v. New Jersey State Commission of Investigation*, decided January 9, 1970.

II.

Appellants contend the statute violates Article III, ¶1, which reads:

> "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

The gist of the complaint seems to be that the statute's division of the power of appointment between the legislative and executive branches offends the provisions of the State Constitution dealing with appointments to office.

Appellants say that if the S.C.I. is a legislative agency, the statute must fall because the power of appointment of two of the commissioners is allocated to the Governor. The power to appoint, as such, is not the special power of any one branch. *Ross v. Board of Chosen Freeholders of the County of Essex*, 69 N. J. L. 291, 294-296 (E. & A. 1903). The question then is whether there is something in the facts of this case which nonetheless requires the appointments to be made by the Legislature itself. We see no fundamental incongruity within the broad principle of Article III, ¶1, quoted above, in permitting the Governor to appoint to a legislative agency. The Governor is a party to the legislative process. He is required to address the Legislature upon "the condition of the State" and to "recommend such measures as he may deem desirable." Art. V, §I, ¶12. All

bills must be presented to him for his approval or disapproval. Art. V, §I, ¶14. Hence it cannot offend the policy of Art. III, ¶1, to authorize the Governor to appoint to a "legislative" commission.

Nor does any constitutional provision dealing with the specific subject of appointments forbid that course. On the contrary, the stated restriction with respect to appointments is upon the legislative branch alone. Art. IV, §V, ¶5, provides that "Neither the Legislature nor either house thereof shall elect or appoint any executive, administrative or judicial officer except the State Auditor." See *Richman v. Neuberger,* 22 N. J. 28 (1956); *Richman v. Ligham,* 22 N. J. 40 (1956). Hence, if the S.C.I. is a legislative commission within the meaning of our State Constitution, no difficulty resides in the circumstance that the Governor shares the appointing power.

The alternative argument is that the S.C.I. must be deemed to be an executive agency and therefore the Legislature may not appoint because of the affirmative restriction upon a legislative appointment of any executive or administrative officer contained in Art. IV, §V, ¶5, referred to above. In contending the S.C.I. is "executive" appellants stress the authority given the S.C.I. by the statutory provisions quoted in Point I to investigate at the request and in aid of the Governor or officers within his branch of government.

The power to investigate reposes in all three branches. *Eggers v. Kenny,* 15 N. J. 107, 114-115 (1954). And, absent a threat to the essential integrity of the executive branch, see *David v. Vesta Co.,* 45 N. J. 301, 326 (1965), the Legislature may investigate official performance within the executive branch, for it is the responsibility of the Legislature to legislate with respect to executive offices and their powers and duties. This being an appropriate area for legislative inquiry, it is of no significance that Art. V, §IV, ¶5, also empowers the Governor to investigate official performance within his department.

A separation-of-powers issue would arise only if the Legislature authorized the S.C.I. to go beyond investigation and to take action which invades an area committed exclusively to another branch. So, for example, if the S.C.I. were empowered to indict or to adjudicate charges of violation of our criminal laws, there would be an encroachment upon the judicial branch, *David v. Vesta Co., supra,* 45 N. J. at 326-327, and if the S.C.I. were authorized itself to prosecute criminal charges, the executive power would be involved. But the S.C.I. does none of this. Its investigations will at most yield material which may also be of interest to executive officials and be referred to them for handling. This being so, the S.C.I. is not vested with authority peculiarly executive in the sense of the separation-of-powers doctrine. Hence it cannot be said that the S.C.I. is an executive agency within the meaning of the provision barring legislative appointments of executive or administrative officers.

Nor does the statute offend Art. IV, §V, ¶2, which reads:

> "The Legislature may appoint any commission, committee or other body whose main purpose is to aid or assist it in performing its functions. * * *"

This provision appears to focus upon the power of appointment, and authorizes the Legislature to exercise that power if the "main purpose" is to aid or assist that branch of government and inferentially to deny that power if the "main purpose" is to aid or assist another branch.

We must assume the Legislature intended to abide by the Constitution and that the "main purpose" was to aid the legislative branch. That the S.C.I. is directed to investigate at the request of the Governor or agencies within his department does not point the other way. Notwithstanding the executive aid which may ensue, the legislative interest persists, for the legislative power touches all things, subject only to restraints the Constitution imposes. It being within the power of the Legislature to appoint to a commission to inquire into performance in public office, to trace

the tentacles of crime in the public and the private sectors, and to inform the Legislature and the public to the end that the sufficiency of existing legislation or the need for remedial measures may be known, the legislative purpose remains dominant notwithstanding that the product of investigations will be available to the executive branch. The separation-of-powers doctrine contemplates that the several branches will cooperate to the end that government will succeed in its mission. It is consistent with the legislative responsibility to provide that a legislative agency shall investigate an area of legitimate legislative interest upon an executive request or shall alert law enforcement agencies, state and federal, with respect to criminal events it uncovers. Hence the assistance to the executive branch, state and federal, does not dispute the premise that the "main purpose" of the S.C.I. is legislative.

III.

Appellants contend the immunity provision of the statute violates the Fifth Amendment guarantee that no person "shall be compelled in any criminal case to be a witness against himself."

N. J. S. A. 52:9M-17(b) provides that a person complying with the S.C.I.'s order to answer "shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate." Several objections are raised to the constitutional sufficiency of this immunity.

The first is that the statute does not grant a "transactional" immunity, *i.e.*, from prosecution for the offense to which the compelled testimony relates, but rather grants only a "testimonial" immunity, *i.e.*, protection against the use of the compelled testimony and the fruits thereof leaving the witness subject to trial upon the basis of other

evidence the State acquires independently of that testimony. We believe the statute need go no further.

Appellants rely upon *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. ed. 1110 (1892). There the statute protected the witness from the use of the evidence obtained from him but did not forbid the use of other evidence to which the witness's testimony might lead. The Court made it plain that the Fifth Amendment would not be satisfied unless the witness were also shielded from the evidence the prosecution uncovered by reason of the leads obtained from the witness, but in its final statement the Court spoke in terms which could be found to be more demanding. It said (142 U. S. at 585-586, 35 L. ed. at 1122):

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect, we give our assent rather to the doctrine of *Emery's Case,* in Massachusetts, than to that of *People v. Kelly,* in New York; and we consider that the ruling of this court in *Boyd v. United States,* 116 U. S. 616, supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

The last sentence in this quotation observes that the statute did not protect against use of the fruit of the compelled

testimony, and thus states a narrower basis for decision than the opening proposition that a statute will not suffice unless it grants an absolute immunity from prosecution.

The application of the self-incrimination clause to a *defendant* in a criminal proceeding is evident and simple, but the Constitution is read to protect as well a *witness* in every proceeding, and here difficulties arise. When the private interests of a witness are served by his silence, it is at the expense of litigants who need his testimony or at the expense of the State if the witness thereby withholds what the public needs to know in a judicial or legislative inquiry. Discordant values are involved, and the task is to reconcile their demands.

One approach could be to require the witness to answer and then to shield him from the use of the testimony thus compelled. We did that in a setting in which the good faith of the asserted fear of incrimination could not be tested. *State v. De Cola,* 33 N. J. 335 (1960). In general, however, the courts chose to permit the witness to refuse to answer, but since, if that right were absolute, the State could be denied evidence it needed for public prosecutions or investigations, the competing values were adjusted by requiring the witness to testify if the State conferred an immunity which would leave him no worse off than if his claim to silence had been allowed. On the face of things, an immunity against *prosecution* would exceed what the Fifth Amendment protects, for the Fifth Amendment protects the witness only with respect to what the witness himself can furnish and not from evidence from other sources.

At the time *Counselman* was decided, the immunity question concerned only the jurisdiction which sought to compel testimony. *Counselman* dealt with a federal statute and with the restraint the Fifth Amendment imposed upon the federal government. Since then the Fifth Amendment has been found to apply to the States as well, and in addition the view has taken hold that evidence the federal government or a State obtains by forbidden compulsion may not

be used by either jurisdiction. In that setting, the scope of the required immunity assumes new significance. If the immunity must protect against prosecution with respect to any offense, both state and federal, to which the testimony relates, the States would be unable to compel testimony no matter how urgent the public need since they could not immunize a witness from federal prosecution. And although the Congress can, in furtherance of federal investigations, bar state prosecutions, still, the State's responsibility and interest in criminal matters being usually more pervasive and demanding, it might be too high a price to pay. See *Knapp v. Schweitzer,* 357 U. S. 371, 378-379, 2 L. ed. 2d 1393, 1400 (1958). In this new setting, the more acceptable solvent is to protect the witness against the use of his compelled testimony by both jurisdictions but with each remaining free to prosecute on the basis of evidence independently obtained.

The problem was accordingly resolved in those terms in *Murphy v. Waterfront Commission of New York Harbor,* 378 U. S. 52, 12 L. ed. 2d 678 (1964). The case involved a New Jersey statute which granted immunity from state prosecution but of course did not purport to protect the witness with respect to federal offenses. On the basis of prior decisions of the United States Supreme Court, we held the statute was valid even though the witness remained subject to federal prosecution. *In re Application of Waterfront Commission of N. Y. Harbor,* 39 N. J. 436 (1963). The United States Supreme Court agreed that the statute should be upheld, but upon the ground that the witness would indeed be protected in a federal prosecution by virtue of the Fifth Amendment itself. This conclusion had to reject the thesis that the Fifth Amendment required an immunity from prosecution rather than an immunity from the use of the coerced testimony. Indeed, *Murphy* read *Counselman v. Hitchcock* to have denounced the statute there involved, not because it failed to provide for immunity against prosecution, but because it did not protect

the witness from the use of the fruit of the compelled testimony (387 U. S. at 78-79, 12 L. ed. 2d at 694-695). *Murphy* concluded in these words (378 U. S. at 79, 12 L. ed. 2d at 695):

> "* * * we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."

That *Murphy* rejected the view that the Fifth Amendment requires a grant of immunity from *prosecution* was emphasized in the concurring opinion of Mr. Justice White (378 U. S. at 93, 12 L. ed. 2d at 703).

In *Albertson v. Subversive Activities Control Board,* 382 U. S. 70, 15 L. ed. 2d 165 (1965), the Court, in summarizing *Counselman v. Hitchcock,* did include a reference in *Counselman* to "absolute immunity against future prosecution for the offence to which the question relates" but this issue was not in focus, and the opinion did not stop there, but rather pointed out that the immunity statute before it did not protect against the use of the compelled statement as evidence in all situations nor against the use of the leads it furnished (382 U. S. at 80, 15 L. ed. 2d at 172). The question whether an immunity against compelled testimony and

its fruits is enough was left open in *Stevens v. Marks*, 383 U. S. 234, 244, 15 L. ed. 2d 724, 732 (1966). But in *Gardner v. Broderick*, 392 U. S. 273, 20 L. ed. 2d 1082 (1968), the Court said that "Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruit in connection with a criminal prosecution against the person testifying," citing both *Counselman* and *Murphy* (392 U. S. at 276, 20 L. ed. 2d at 1085). Thus the view of *Murphy* was reasserted.

We are satisfied that the Fifth Amendment does not require immunity from prosecution. An immunity of that breadth exceeds the protection the Fifth Amendment accords. More importantly, to find that demand in the Fifth Amendment would in practical terms deny state government access to facts it must have to meet its duty to secure the well-being of all the citizens. We heretofore deemed the Constitution to require immunity against use of testimony rather than immunity from prosecution, see *State v. Spindel*, 24 N. J. 395, 404-405 (1957), and recently our Legislature, in adopting the Model State Witness Immunity Act, substituted an immunity from use for an immunity from prosecution. See *In re Addonizio*, 53 N. J. 107, 114-115 (1968).

There is a difference in that *Murphy* dealt with a federal-state setting whereas we are here dealing with the claim that our statute does not protect a witness from prosecution under our state law. But the question in both is the same, *i.e.*, what immunity the Fifth Amendment requires in exchange for compulsion to answer. The values involved are the same. We see no sensible basis for a different answer. *Gardner v. Broderick* treated the issue as one and the same, citing both *Counselman* and *Murphy*. *Murphy* held and *Gardner* repeated that the Fifth Amendment requires protection only from the use of the compelled testimony and the leads it furnishes, and that protection our statute expressly provides. See *United States v. McClosky*, 273 F. Supp.

604 (S. D. N. Y. 1967); *Application of Longo*, 280 F. Supp. 185 (S. D. N. Y. 1967).

The remaining questions concerning self-incrimination may be disposed of quickly. It is contended the statutory immunity is inadequate because it does not protect a witness with respect to a prosecution in a sister State or in a foreign land. As to a sister State, it seems clear that if the Fifth Amendment requires protection against the use of the testimony by a sister State, the Amendment itself will provide that protection. *Murphy* can mean no less. *United States v. McClosky, supra,* 273 F. Supp. at 606; *Application of Longo, supra,* 280 F. Supp. 185; *cf. In re Flanagan,* 350 F. 2d 746, 747 (D. C. Cir. 1965). As to a foreign land, even if *Murphy* means that liability under foreign law is now relevant, the danger in the case before us is too imaginary and unsubstantial to sustain a refusal to answer. See *Murphy,* 378 U. S. at 67-68, 12 L. ed. 2d at 688.

Nor do we see substance to the complaint that our statute protects the witness only with respect to "responsive" answers or evidence. The limitation is intended to prevent a witness from seeking undue protection by volunteering what the State already knows or will likely come upon without the witness's aid. The purpose is not to trap. Fairly construed, the statute protects the witness against answers and evidence he in good faith believed were demanded.

IV.

The orders under review provide that appellants shall be incarcerated until they answer the questions they refused to answer. Appellants contend the statute authorizes only a penal prosecution for contempt of the Commission, for which a fixed sentence must be imposed.

With reference to "contempt" of court, we have tried to distinguish sharply between (1) the public offense, *i.e.*,

"contempt," for which the court may punish the offender and (2) the injured litigant's right to apply for relief to satisfy his private claim arising out of the same offending act or omission. *New Jersey Department of Health v. Roselle*, 34 N. J. 331 (1961); *In re Application of Waterfront Comm. of N. Y. Harbor, supra*, 39 N. J. at 466; *In re Carton*, 48 N. J. 9, 19-24 (1966); *In re Buehrer*, 50 N. J. 501, 515-516 (1967). The procedure and rights of the person concerned depend very much upon the purpose of the proceeding, and hence our rule of court prescribes the processes carefully to the end that he may know at once whether he is to meet a penal charge or the civil claim of a litigant, and may be afforded the rights appropriate to the proceeding. R. 1:10-1 to 5.

It would be helpful if legislative draftsmen abided by our semantics, but we cannot insist that they shall. Our responsibility remains to find and enforce the legislative intent.

N. J. S. A. 52:9M-17b provides that a person given immunity "may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission. * * * " Appellants insist this language contemplates a penal prosecution and nothing else. But the sense of the situation goes strongly against that limitation, for the mission of the S.C.I. is to obtain facts for the Legislature and the mere punishment of a recalcitrant witness would not achieve that end.

We can think of no reason why the Legislature would want to permit a witness to block the inquiry if he is willing to accept a penalty. Mindful, as we are, that the expression "prosecution for contempt" has been used widely to describe a proceeding arising out of contumacy, whether the object of the proceeding is to compel compliance or to punish for noncompliance or both, we must seek the legislative design in that light, notwithstanding that the terms employed are

not the ones we prefer. Here we have no doubt that the Legislature intended the S.C.I. to obtain the facts, whatever the wish of the person subpoenaed. The very provision for a grant of immunity repels the notion that a witness may choose to be silent for a price.

Nor is it critical whether the statutory language fits snugly within our rule of court relating to judicial proceedings in aid of subpoenas of a public officer or agency. R. 1:9-6. Subsection (a) deals with *ex parte* applications for compliance, subsection (b) with applications for compliance made on notice, and (c) with applications to "punish" where a statute authorizes that course. These provisions were intended to reflect statutory provisions of which the draftsmen of the rule were aware. Needless to say, the rule does not mean that the judiciary will withhold its hand unless the statute falls within the language of the rule. R. 1:1-2 provides that "In the absence of rule, the court may proceed in any manner compatible" with the purpose "to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Here appellants were plainly informed that the objective of the proceedings was to have them jailed until they complied with the order of the S.C.I. There can be and there is no complaint on that score.

We should add some further observations. The section of the statute here involved deals with defiance of the order of the S.C.I. itself rather than with defiance of an order obtained by the agency from a court. We see no difficulty in the circumstance that the statute does not call for an intermediate order by a court to be followed by enforcement of the court's mandate, but we point out that the absence of such an intermediate step does not deny a witness the opportunity to have the court pass upon the validity of the agency's order to answer. There was no misunderstanding here in that regard. Appellants were heard fully upon the

propriety of the questions. They do challenge the validity of certain questions but there is no charge that the hearing before the trial court upon those objections was inadequate.

V.

The remaining issues warrant little more than mention.

Zicarelli and Occhipinti charge that the questions put to them offended their freedom of association guaranteed by the First Amendment. *Sweezy v. New Hampshire,* 354 U. S. 234, 1 L. ed. 2d 1311 (1957), which they cite, dealt with a legislative inquiry into political associations. Here the questions relate to an allegedly massive criminal organization, and to the witness's associations in that context. The subject matter is incontestably criminal and the interest of the State is manifest. We see no affront to the values protected by the First Amendment.

Appellants complain that the questions "sought to probe into the most secret recesses of the witness' minds and to expose these private thoughts to public view," and this they say is barred by the Fourth Amendment, alone or in conjunction with the First and Fifth Amendments. Granted the right of the Legislature to inquire, the pertinency of the questions and the sufficiency of the immunity with respect to self-incrimination, all of which must be accepted for the immediate purpose, the proposition advanced, simply stated, is that the Constitution prohibits a subpoena to a mere witness. It is plainly frivolous.

Appellants' reliance upon the Sixth Amendment appears to raise no issue beyond the due process question discussed in "I" above.

Their further claim that if the statute is valid, it nonetheless has been so applied or implemented as to violate the Constitution has no basis.

The trial court properly refused to permit an examination of the Executive Director of the S.C.I. as to whether the agency already had the information it sought from appellants or whether the S.C.I. was following a path revealed by illegal wire-taps or bugging. As to the first, it would be an unwarranted interference with the legislative branch thus to superintend its exercise of its constitutional authority to investigate. It is difficult to conceive of a showing which would justify that course. Surely nothing before us suggests a serious issue in that regard.

With respect to the effort to learn whether evidence illegally obtained prompted the legislative investigation or the questions put to appellants, they cite no authority for the extraordinary proposition that such illegality will taint the legislative process. The suppression of the truth because it was discovered by a violation of a constitutional guarantee is a judge-made sanction to deter insolence in office. It is invoked in penal proceedings, and then only at the behest of a defendant whose right was violated. *Farley v. $168,400.97,* 55 N. J. 31, 47 (1969). Even there, the wisdom of a suppression of the truth is not universally acknowledged. *Farley, supra,* 55 N. J. at 50. Appellants ask us to go further, and to suppress the truth on behalf of a mere witness, to the end that he may choose to be silent. Still more, appellants ask that we visit the sanction upon the legislative process, even though that process cannot result in a judgment against them. Pressed relentlessly and without regard to all other values, the sanction thesis could indeed deny the Legislature access to facts, and even taint a statute adopted in response to facts illegally revealed, but we think such an extension would be absurd.

Finally, Russo asserts the questions put to him are improper because they allegedly enter an area in which he has been convicted of perjury. The conviction, as described in his brief, was for perjury in denying to a grand jury that he had said to a policeman that he, Russo, had the Mayor

and some councilmen of the City of Long Branch "in his pocket." We do not see a problem. His testimony before the S.C.I. could not be used in a retrial of that perjury charge. Nor do the questions here involved include the one which led to the conviction, so as to raise the prospect that if Russo repeats his former testimony he will be indicted on a fresh charge of perjury. We need not anticipate issues such an indictment might raise.

The orders are affirmed.