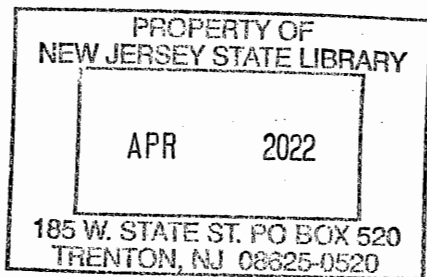


REPORT OF
THE GOVERNOR'S COMMITTEE TO
EVALUATE THE STATE COMMISSION
OF INVESTIGATION

Prepared Pursuant To
Executive Order No. 20,
April 11, 1975



COMMITTEE MEMBERS:

HON. JOSEPH WEINTRAUB
HON. NATHAN L. JACOBS
HON. EDWARD F. BRODERICK

COMMITTEE COUNSEL:

RICHARD W. BERG, ESQ.



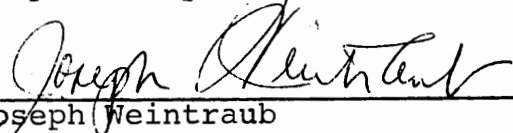
STATE OF NEW JERSEY
GOVERNOR'S COMMITTEE TO EVALUATE
THE STATE COMMISSION OF INVESTIGATION

October 6, 1975

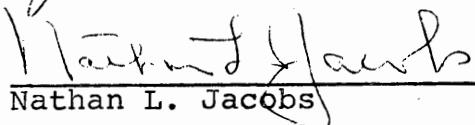
TO: The Governor and the Attorney General of the State of
New Jersey

The Governor's Committee to Evaluate the State
Commission of Investigation is pleased to submit its report
and recommendations pursuant to Executive Order No. 20,
April 11, 1975.

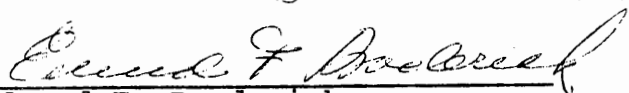
Respectfully submitted,



Joseph Weintraub



Nathan L. Jacobs



Edward F. Broderick

INTRODUCTION

This study was undertaken pursuant to Executive Order No. 20, promulgated and signed by Governor Brendan T. Byrne on April 11, 1975. The Executive Order noted that there had been considerable public debate and controversy over the effectiveness of the State Commission of Investigation (hereinafter the S.C.I.), which had been in operation for six years as a temporary agency. The Executive Order established and directed this Committee to study and evaluate the statutory responsibilities and performance of the S.C.I. and report its findings to the Attorney General and the Governor, together with any recommendations concerning statutory amendment or administrative modification. The order provided that all departments and agencies of this State shall cooperate fully with the Committee, and make available upon request and in confidence any books, documents and records.

Accordingly, this Committee has examined the pertinent statutes, has compared the framework and performance of the S.C.I. with similar investigative agencies in other jurisdictions, and has studied the historical antecedents of such bodies. It has also reviewed judicial decisions dealing with the S.C.I. and similar agencies. The general public was invited to attend and participate in an open hearing June 27, 1975, and invitations were extended to individuals deemed exceptionally knowledgeable or interested. The Committee heard numerous witnesses including individuals

now or formerly connected with the S.C.I., to wit, the Attorney General of New Jersey (who was the first Chairman), the present Chairman, and the former and present Executive Directors of the S.C.I. The Committee also received numerous written comments from citizens, some of whom hold or held public office, federal and State. The annual and interim reports of the S.C.I. served as an important source for this study, since they detailed the activities of the S.C.I. and contained the agency's findings and recommendations resulting from its investigations.

The Committee will deposit with the State Librarian the transcript of the proceedings before it, research material, and all communications received, to the end that interested persons may there find the materials which, together with the public reports of the S.C.I., constituted the record upon which the Committee makes this report.

We acknowledge our debt to Richard W. Berg, Esquire, who was of great help to us in his capacity as counsel to this Committee.

After thoroughly studying the materials, this Committee makes the following findings:

I.

The S.C.I. is not a unique agency. Legislative, executive and administrative investigating committees, commissions and agencies are as old as the Republic.¹ A glance

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The first full-fledged congressional investigating committee was established in 1792 to "inquire into the causes of the failure of the late expedition under Major General St. Clair." 3 Annals of Congress 493 (1792). The development and use of legislative investigation by the colonial governments is discussed in Eberling, Congressional Investigations, 13-30 (1972). The English origin of legislative investigation is discussed in Dimock, Congressional Investigating Committees, 46-56 (1929).

at any index of federal² and state³ agencies indicates that they exist in prolific numbers. These bodies may be divided into two categories: those that are quasi-judicial (adjudicative) in nature, and those that are fact-finding (investigative). The courts have held that depending on the function of the committee, commission or agency, persons who are subject to the process of these bodies have differing rights and privileges.⁴

In Jenkins v. McKeithen, 395 U.S. 411 (1969), rehearing denied 396 U.S. 869 (1969), the Supreme Court elaborated further on the distinction between investigative and accusatory agencies. In essence, the Court held that the requirements of due process vary with the type of proceeding involved. Fewer procedural safeguards are required by the due process clause in hearings before purely investigative agencies or agencies conducting purely investigative hearings, as in Hannah v. Larche, 363 U.S. 420 (1960). The Jenkins Court, however, distinguished

² See the Appendix to the opinion in Hannah v. Larche, 363 U.S. 420 (1960) for a partial listing of such investigative agencies, the scope of the agency's investigative authority, the extent of its subpoena power and the rights of witnesses.

³ See the partial listing of Investigating and Temporary Commissions of New Jersey in the Manual of the Legislature of New Jersey, pp. 657-666 (1975).

⁴ In Hannah v. Larche, supra, n.2, the Supreme Court held that persons whose conduct is under investigation by the United States Commission on Civil Rights, a purely investigative and fact-finding governmental agency which does not adjudicate, are not entitled, by virtue of the due process clause, to know the specific charges that are being investigated or the identity of complainants, or to have the right to cross-examine those complainants and other witnesses.

an agency performing an adjudicatory or accusatory function in the sense that it is used to find named individuals guilty of crimes, or to make similar determinations finally and directly affecting substantial personal interests. In the latter respect, the Court held that the due process clause requires the full panoply of procedural safeguards traditionally required in adjudicatory proceedings.

The S.C.I. has been repeatedly held to be a legislative investigatory commission, not accusatory in function, and thus governed by the principles applying to fact-finding agencies.⁵

The S.C.I. might be called the child of the Joint Legislative Committee to Study Crime and the System of Criminal Justice in New Jersey (the Forsythe Committee). It was created at a time when New Jersey was believed by some to be gaining a reputation as a "haven for organized crime ... a governmental cesspool, a bedroom for hired killers and a dumping ground for their victims."⁶ After lengthy legislative hearings in 1968 the Forsythe Committee formulated and submitted bills for the creation of the S.C.I., the Division of Criminal Justice, the State Grand Jury, as well as bills authorizing wiretaps and

⁵ See Zicarelli v. New Jersey State Commission of Investigation, 55 N.J. 249, 261 A.2d 129 (1969), aff'd 406 U.S. 472 (1972); United States ex rel. Catena v. Elias, 465 F.2d 765 (3d Cir. 1972); Freeman and Bass, P. A. et al. v. New Jersey State Commission of Investigation, 486 F.2d 176 (3rd Cir. 1973).

⁶ Statement By Attorney General William F. Hyland at p. 1. (Exhibit I).

the grant of witness immunity. According to Congressman (then State Senator) Forsythe, the S.C.I. "was to be a fact-finding investigatory body, one that would bring the facts to the public's attention, and make recommendations for the improvement in state laws and the operations of government." Envisioned as "an independent Commission that would function outside the control of any politician or any administration", it was established not only to aid the Legislature in the exercise of its powers but also to complement "the efforts of existing crime fighting organizations ... "7

The structure of the S.C.I. resembles the model proposed by the National Conference of Commissioners on Uniform State Laws in 1952. Several states, including New York, had already enacted legislation creating such agencies, and the New York commission served as a prototype for our own S.C.I. In 1967 the President's Commission on Law Enforcement and Administration of Justice recognized that crime investigating commissions are among the most effective vehicles for providing public information on organized crime.⁸ It spoke favorably of both private and governmentally sponsored nonpartisan crime commissions:

7 Statement of Congressman Edwin B. Forsythe at p. 1. (Exhibit 2).

8 President's Commission on Law Enforcement and Administration of Justice, Challenge of Crime In a Free Society (1967) at 198; * * * , Task Force Report: Organized Crime (1967) at 14.

"Among the most effective vehicles for providing public information on organized crime are the crime investigating commissions, which exist in a number of States. When established without having to rely on continuing governmental financial support and the resulting potential political pressures, the private crime commission has frequently rendered major service in exposing organized crime and corruption and arousing public interest. The Chicago Crime Commission and the Metropolitan Crime Commission of New Orleans have played major roles in informing the citizens within their jurisdictions of the menace of organized crime and have fulfilled substantial educational, investigative, and legislative functions.

A governmentally sponsored nonpartisan crime commission, such as the New York State Temporary Commission on Investigation, has significant benefits. Established shortly after the Appalachian meeting, it has through a series of public hearings exposed organized crime and corruption. Recent loan-shark hearings prompted legislative action to make prosecution of such offenders less difficult. The Illinois Crime Commission, through public hearings and the efforts of its own investigators, continually exposes organized criminal activity. A governmental commission in California detailed the operations of criminal cartels in that State in the early 1950's and recommended action that subsequently proved effective."

The President's Commission noted that legislative proposals to combat organized crime would likely result from the hearings of these commissions. It went on to recommend:

"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."⁹

Over the years, a growing number of jurisdictions have enacted legislation creating investigative agencies with similar purposes. Many jurisdictions, including New Jersey, have also provided by statute or rule for specific rights of witnesses and parties to such investigations.

The statute creating our S.C.I. empowers it to conduct investigations in connection with: "the faithful execution and effective enforcement of the laws of the State, with particular reference but not limited to organized crime and racketeering"; the conduct of public officers and employees, and "any matter concerning the public peace, public safety and public justice." N.J.S.A. 52:9M-2.

We need not list the extensive investigations undertaken by the S.C.I. and their results, since the annual and interim reports contain that information. We are satisfied that the S.C.I. has performed effectively and has significantly advanced the public interest.

This committee at its public hearing listened to an impressive array of witnesses who commended the work of the S.C.I. since its inception and strongly urged that it be retained.

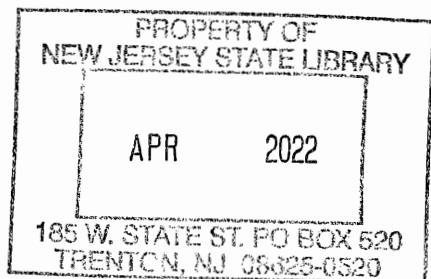
⁹ Challenge of Crime In a Free Society, supra at 207; Task Force Report: Organized Crime, supra at 23.

Many offered constructive suggestions and recommended changes which they believe would improve the effectiveness of the agency.

The adverse critics urged that the S.C.I. merely duplicates existing agencies and hence is unnecessary. To this is added the claim that individuals are subjected to opprobrium or ridicule by a process which denies them a forum for a fair hearing upon charges.

As to the proposition that the agency is unnecessary, we are satisfied that there is a continuing need for the agency's contributions to both the legislative process and the executive branch. Our evaluation of the work of the S.C.I. convinces us that the agency has performed a very valuable function and should not be abolished. The current public skepticism of governmental performance emphasizes the continuing need for a credible agency to delve into the problems that plague our institutions, an agency which can provide truthful information and sound recommendations. There must be constant public awareness if we are to retain a healthy and vibrant system of government. Indeed we see no likelihood that the need for the S.C.I. will abate, a subject which we will presently mention again in considering a proposal that the agency, now a temporary body, be made permanent.

With respect to the criticism that the process of an agency such as the S.C.I. may reflect unfavorably upon individuals without a trial-type hearing upon charges, the criticism is not without foundation. That risk of hurt is inevitable, but as



in so many matters a balance must be struck between this potential for injury and the benefits to be realized by all individuals comprising our society when their interests are protected from those hostile acts and failures to which the agency's efforts are directed. We believe that the balance must be struck in favor of the preponderate interests of the total citizenry. The issue, of course, is not new. It is inherent in legislative and investigative administrative agencies, which are constitutionally unable to try or adjudge the guilt of anyone. Recognizing the potential for unavoidable harm, our Legislature adopted the Fair Witness Procedures Act which provides a measure of preventive relief. N.J.S.A. 52:13E-1 et seq.

In the final analysis we must look to the Commissioners themselves for the maximum security against avoidable harm. There is no mere mechanism which can substitute for a sense of fairness. The Commissioners are thereby charged with the heavy obligation to avoid the stigma or embarrassment of individuals whenever it is possible to do so, and this solemn obligation must attend its decision with respect to whether to hold a public hearing and with respect to the content of its public reports. We recognize that the informing function of the S.C.I. would be impaired if the S.C.I. could not deal publicly with specifics necessary to give credibility and force to its findings and recommendations. The caveat is that the agency, in composing the conflicting demands, must be mindful that an individual who may be affected has no immediate opportunity to try out the truth of the charge, a fact of which the public is not generally aware.

II.

N.J.S.A. 52:9M-1

A. As we have already noted, the Commission is a "temporary" body. It was created by a statute, effective September 4, 1968, which by its terms was to expire on December 31, 1974. By an act effective November 13, 1973, the expiration date was extended to December 31, 1979. The question is whether the agency should continue as a "temporary" body subject to periodic renewal by future legislation, or should be made a permanent body, subject, of course, to dissolution by future legislation.

Attorney General Hyland suggested that the reason advanced for temporary existence is that an agency so extraordinarily powerful might impinge on personal liberties and, consequently, the Legislature from time to time should reevaluate the need for the agency.

The present Chairman of the S.C.I. Joseph Rodriguez testified that the temporary status of the agency had not hampered its work, but he felt that the Commission should be made permanent with periodic reviews by the Legislature in order that the S.C.I. can attract capable employees with expertise. He expressed a fear that under the present statute the S.C.I. might terminate by the inaction of the Legislature rather than by any decisional process.¹⁰

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Testimony of Chairman Rodriguez at 2T67-17 to 2T69-21.
[2T represents Volume II of the transcript of our public hearing on June 27, 1975.]

Whether an agency should be temporary or permanent in character depends upon an assessment as to the continuing need for the agency. Thus measured, the S.C.I. should be a continuing body, for there is no reason to say that the demand for the commission is likely to expire. If the need is thus indeterminate, as we judge it to be, the question really is whether the agency's existence should nonetheless be "conditional", rather than "temporary," upon the thesis that the agency will be energized by a continuing need to excel in order to obtain renewal of life. We think that end is better pursued by excellence in appointments. The difficulty with a specified limited life is that the quality of staff may be impaired if continuing employment thus depends upon a renewal of the agency. Further, the fact that the agency could be terminated by mere legislative inaction, without show of hands, could deny the agency the measure of independence needed in the public interest.

Therefore, we recommend that the word "temporary" be deleted from N.J.S.A. 52:9M-1 and that the expiration date of the statute as amended be deleted.

B. The S.C.I. is required by statute to conduct investigations at the direction of the Governor or by concurrent resolution of the Legislature and otherwise assist in connection with the removal of public officers by the Governor; the making of recommendations by the Governor to any other person or body, with respect to the removal of public officers; 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; and the investigation of the management or affairs of State government departments, boards, bureaus, commissions, authorities and other agencies. N.J.S.A. 52:9M-3 and 4. Moreover, some of the agency's functions are carried out in cooperation with the Attorney General and other law enforcement officials. N.J.S.A. 52:9M-5 and 6. The commission makes its reports to the Governor and the Legislature and includes in such reports its recommendations. N.J.S.A. 52:9M-10.

The statute provides that "[t]he Governor shall designate one of his appointees to serve as chairman of the commission." N.J.S.A. 59:9M-1. It does not expressly say whether that designation extends throughout the commissioner's term.

The Attorney General recommended that the statute be amended to make it clear that the Chairman of the S.C.I. shall serve as chairman at the pleasure of the Governor. We will refer presently to the circumstances which led the Attorney General to advance this proposal.

The proposal was challenged as tending to impair the independence of the S.C.I. Some observations upon the subject of independence are appropriate. Independence in government must always be qualified. There is no room for absolute independence in any office, for independence,

if absolute, could breed tyranny or insolence. Rather, the goal must be the measure of independence which will best advance the public interest in the light of an agency's assigned mission.

One important duty of the Commission is to serve the authorities who appoint the Commissioners, i.e., the Legislature, which, through the heads of its houses, appoints two members, and the Governor who appoints a like number and also designates one of his appointees to be the Chairman. The agency is intended to aid and assist the Legislature and the Governor. Consequently, the public interest is served when the Governor has confidence in the integrity and impartiality of the Commissioners, for obviously a Governor will neither use nor respect the recommendations of an agency he believes or suspects to be slanted or incompetent. On the other hand, this agency is authorized to investigate on its own, and hypothetically it might embark upon an investigation some incumbent Governor might not want. In this connection, we note that the Legislature did not provide that the Commissioners serve at the pleasure of the appointing authorities, but rather fixed their terms at five years, a period unrelated to the terms of any of the appointing parties.

The circumstances which prompted the Attorney General's proposal are that in December 1973, three of the four commissioners were appointed by officials whose power to appoint was to pass in the following month to others of another political persuasion. More precisely, the President of the Senate and the Speaker of the House, both Republican, each named a commissioner, and

of course for a term of five years, notwithstanding that both houses, upon organizing in January 1974, would pass to Democratic control; and the then Governor, also Republican, appointed a commissioner for a five year term and designated him as chairman, notwithstanding that a new Governor, a Democrat, would take office in January 1974. Thus an outgoing administration, executive and legislative, named three of the four members of the S.C.I. (the fourth continued as a "holdover") and as well designated the chairman.

These appointments became possible because of the history of the statutes creating and continuing the S.C.I. The statute creating the agency became effective on September 4, 1968, and was to expire on December 31, 1974. Thus, the granted life of the agency was roughly six years while the terms of the commissioners' offices were fixed at five years. The statute was silent as to whether the incumbents would "holdover" until the statute expired. The statute was later extended until December 31, 1979, but the extender statute became effective November 13, 1973 (L. 1973, c. 288, sec. 1), thus permitting appointments by the outgoing authorities. It may be that an interregnum was feared but that fear could have been allayed without "midnight" appointments, either by confirming an original intent that the incumbent commissioners "holdover" or by authorizing appointments for an intervening one-year term. At any rate, the statute did permit outgoing appointing authorities to make the five year appointments to which the Attorney General referred.

Since the S.C.I.'s investigatorial role includes exploration of the past no less than vigilance for the future,

it is understandable that a successor regime might not feel assured as to the objectivity of a commission thus constituted. The Attorney General did not question the integrity of any of the persons concerned with those appointments, and of course we do not do so. Rather the subject is viewed at an institutional level, and at that level, such appointments to an investigatorial body, although not in contravention of the statute, have the capacity, nonetheless, to generate unfortunate doubts.

The Attorney General stated candidly that the lines of communication between the present administration and the S.C.I. are not as good as they should be, and he believes the circumstances just stated have compromised the confidence of the new administration and of the public in the independence of the agency. The Attorney General believes that the necessary rapport could be established if the Chairman of the S.C.I. served at the pleasure of the Governor, and that the statute should be clarified to that end.

It is not clear, however, that the power to designate the chairman would be an effective antidote if one is needed. The influence of a chairman would likely depend upon the respective strengths of the members of the Commission, although those who advocate that an incoming Governor have the power to designate a chairman and those who oppose that power share a common belief that the power to designate would make a difference. On the other hand, a continuing power to terminate a designation might affect the independence of a chairman, and hence if it be preferable that an incoming

Governor have the power to designate a chairman, still he need not be given the power thereafter to vacate the designation he made. In terms of the public good, there are pluses and minuses on both sides.

It is suggested to us that under the statute, as it exists, the designation of a chairman is at the Governor's will.¹¹ We cannot express a binding view, and do not venture one. But we think the problem should be resolved by a different structural change, better calculated to further the neutrality and independence of the agency, to wit, staggered terms for the commissioners, to the end that the agency will be trusted by a new administration while still deemed free and unfettered to investigate what transpired in a prior administration.

It is probable that the terms were not staggered because of the limited life of the statute which created the S.C.I. We believe the S.C.I. should be made a permanent agency for the reasons we have stated. If that recommendation is accepted, there will be a ready vehicle for a system of staggered terms and we strongly recommend that structural change.

C. The statute contains no express provision for "hold-over" commissioners. When the term of a commissioner ends, the S.C.I. can operate at full strength only if the commissioner whose term expired retains his membership until a replacement is appointed, and if all of the commissioners' terms were to expire,

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Counsel to the Governor has recently taken the position that the Governor has the inherent power to replace the chairman even though the statute is silent on the point. See, e.g., Morgan v. Tennessee Valley Authority, 115 F.2d 990 (6th Cir. 1940), cert. den. 312 U.S. 701 (1941).

as nearly happened in 1973, the functions of the S.C.I. would come to a standstill unless the commissioners lawfully held over. In that eventuality, there might be serious consequences to pending investigations, and as well a serious legal problem with respect to the release of recalcitrant witnesses who have been adjudged in civil contempt and imprisoned. Hence, the Chairman of the S.C.I. recommended that the statute be clarified to provide expressly that a commissioner shall continue in office until his successor is appointed and qualified.

As we have already indicated, the statute could easily be viewed to contemplate holding over since a five year term was provided for a body authorized to endure for six years. We note that Commissioner Bertini has continued to function as a holdover. We agree, of course, that any doubt should be obviated by amendment, without however suggesting that the amendment is legally needed.

III.

N.J.S.A. 52:9M-4 and 52:9M-5

A. The statute presently provides that "[a]t 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."

N.J.S.A. 52:9M-4.

In his testimony before us, Attorney General Hyland expressed concern that a proliferation of referrals from a variety of department heads and officials might bog down the work of the agency. While he felt that the Legislature, the Governor and the Attorney General should retain the unfettered authority to ask for such investigations, the Attorney General recommended that the statute be modified to provide for a screening mechanism with respect to other department heads and officials, to require their requests to be channelled through the Governor, or in the alternative, the Attorney General. The thrust of this recommendation, therefore, is to avoid the mandatory attention to an uncontrolled number of referrals.

We think the problem of possible overload is better resolved by leaving it to the S.C.I., if it believes the demands upon it are excessive, to ask the Governor or the

Attorney General to review requests that the agency believes should be withdrawn. The S.C.I. is in the better position to evaluate its ability to meet demands upon it and to determine priorities.

B. Under the statute the S.C.I. is authorized to respond to a request of any State department or State agency to "investigate [its] management or affairs." N.J.S.A. 52:9M-4. The statute directs the S.C.I. to go further with respect to the Attorney General, a county prosecutor and other law enforcement officials. As to them, the S.C.I. is directed "to cooperate with, advise and assist them in the performance of their official powers and duties." N.J.S.A. 52:9M-5. Mr. Holleran proposed that this additional role for cooperative assistance, now limited to law enforcement officials, be extended to include any and all State agencies with respect to the performance of their respective duties, so that each such agency could call upon the S.C.I., not only to "investigate [its] management or affairs" but also to assist the requesting agency with respect to the performance of its own statutory duties.

We think an additional role of that breadth could alter the nature and mission of the S.C.I., and so burden the S.C.I. as to impair its effectiveness within the areas in which it was designed to function.

IV.

N.J.S.A. 52:9M-8

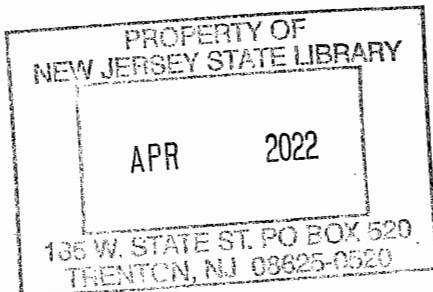
As previously noted, the S.C.I. is a factfinding agency which makes recommendations to the Governor and Legislature for administrative and legislative action. It is not an accusatory agency and does not prosecute individuals even when its investigations uncover criminal wrongdoing. Rather, the S.C.I. is required by N.J.S.A. 52:9M-8¹² to refer evidence of crimes or of official misconduct to the officials authorized to conduct the prosecution or to remove the public officer.

The Attorney General expressed concern that such evidence might not be made available to prosecutors in time to permit investigation and accumulation of evidence, particularly when the crime is still in progress. Accordingly, he proposed that the statute be amended to require the S.C.I. to transmit such evidence to the appropriate prosecuting agency "forthwith".

We doubt the desirability of mandating that the S.C.I. transmit such data "forthwith" in all cases. There may well be special situations in which that mandate would deny the S.C.I. opportunities to obtain confidential information which

¹² The statute presently provides that "[w]hensoever 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 of such crime or misconduct to the officials authorized to conduct the prosecution or remove the public officer." N.J.S.A. 52:9M-8.

would not be forthcoming if the S.C.I. lacked discretion as to the time for disclosure. There may also be special situations in which an investigation by the S.C.I. might be hampered or defeated by premature disclosure. The S.C.I. of course is under the plain statutory duty to cooperate with law enforcement officials, and surely understands that its investigations might interfere with or defeat the efforts of law enforcement officers if cooperation is delayed. It is unlikely that a formula could be devised which would itself provide a ready solution. The matter is better left to the discretion of the S.C.I. which of course must act with an awareness of its responsibility to cooperate in law enforcement.



N.J.S.A. 52:9M-12

Attorney General Hyland's final recommendation was that the S.C.I. be obligated to notify and confer with the Attorney General and appropriate prosecutors before deciding to hold a public hearing.

This proposal parallels the provision presently existing under N.J.S.A. 52:9M-17, which requires the S.C.I. to confer with the Attorney General and the appropriate county prosecutor when it is considering the grant of immunity to a prospective witness. Under that section the Attorney General and the prosecutors do not have the power to bar a grant of immunity, but they do have the opportunity to alert the Commission to the hazards and drawbacks that might result from such action.

The Attorney General noted that there may be damage to an ongoing investigation or prosecution if a public hearing is held by the S.C.I. Moreover, the publicity generated by the public hearing might prevent a fair trial and thus result in reversal of a conviction on appeal. The Attorney General does not seek the authority to make a final decision with respect to a public hearing. He seeks only a statutorily mandated opportunity for him or other prosecutorial officials to present their views to the S.C.I. before the S.C.I. makes its decision. The proposal is reasonable and in our view would advance the public interest. We see no threat from this proposal to the independence of the S.C.I.

VI.

N.J.S.A. 52:9M-17

Another matter which has been the subject of much controversy arises out of the power of the S.C.I. to grant immunity to witnesses and compel their testimony.

A witness who, notwithstanding a grant of immunity from self-incrimination, refuses to testify after having been ordered to do so, is amenable to two judicial processes. One is wholly civil in nature, intended to obtain the testimony for the benefit of the party concerned, here the S.C.I. To that end, the recalcitrant witness may be imprisoned until he obeys the order. The imprisonment is intended to coerce, rather than to punish, and hence the recalcitrant witness has it within his continuing power to terminate the coercion by yielding to it. This process is sometimes called "civil contempt."

The second process to which a recalcitrant witness becomes subject is a criminal process, intended to punish him for the public wrong involved in his refusal to comply with the order to testify. That process is usually called "criminal contempt." The sentence imposed is intended to be punitive, and it is for a fixed penalty, which the defendant cannot terminate by belated submission to the order to testify.

A number of individuals have refused to testify in inquiries involving organized crime. They have been incarcerated in civil proceedings, but have refused to yield to that coercion despite several years of coercive imprisonment.

Recently the Supreme Court of New Jersey held that the imprisonment must be ended when there no longer is a substantial likelihood that continued imprisonment will succeed. Catena v. Seidl, 65 N.J. 257 (1974), 66 N.J. 32 (1974) and ___ N.J. ___ (Decided August 19, 1975).

Thus the civil process may be defeated by obstinacy, or may be seriously debilitated if vital witnesses choose to litigate the durability of their recalcitrance. The question whether coercion will succeed seems to be a matter of prophecy rather than of fact, and it being held that this matter of prophecy is a triable issue, the coercive effect of imprisonment may be diluted by a hope that some judge will "find" that coercion will not overcome the reluctant witness, if not today, then tomorrow, or the next.

The Catena decision brings to the fore the question whether the criminal process should be invoked to deal with the public injury which ensues when a witness thus refuses to obey an order to testify. The very mission of the S.C.I. depends upon an ability to obtain the facts. It is intolerable that any man may choose to frustrate an inquiry by government upon a matter of concern to all the citizens of the State. The ensuing wrong exceeds the affront to the State when in litigation of limited moment a witness defies the State's authority. Here the public injury which inheres in every contempt is compounded by the fact that an agency of government is impeded or even finally blocked in a matter of overriding public concern.

We believe a criminal process with appropriate sanctions

should be available. The existing penalties for criminal contempt are manifestly inadequate in the light of the special public hurt involved. We believe it therefore necessary to provide that a willful refusal to obey a lawful order to testify or to adduce evidence before the S.C.I. shall constitute a high misdemeanor, triable of course by jury upon indictment. The maximum punishment should be substantial so that the sentence may reflect the gravity of the particular offense. We recommend a maximum of 10 years plus a fine of \$10,000. Because of the continuing nature of the public injury, the statute should provide that a defendant shall not be eligible for parole consideration under statutes relating to parole unless it is shown that the defendant has furnished the testimony or evidence since the return of the indictment. It would be appropriate to permit a defendant to apply to the trial court for reconsideration of his sentence upon a showing that after the sentence he testified or furnished the required evidence and did so at a time when the needs of the S.C.I. were substantially met by such testimony or evidence. The statute should, of course, permit a witness to seek review of the legality of an order to testify and hence upon a timely appeal the trial of an indictment should be stayed to await the judgment on the appeal; and the indictment should be dismissed if the order to answer is set aside on appeal or if the defendant notifies the S.C.I. within 30 days after an adverse termination of his appeal that he will comply with the order and does so comply promptly upon being given an opportunity to do so. The statute should not affect in any way resort to

the coercive civil remedy to compel testimony, but any period of incarceration in such civil proceeding should be credited upon a jail sentence in the criminal proceeding.

CONCLUSIONS

(1) The S.C.I. performance has been creditable and effective.

(2) There is a continuing need for the agency.

(3) Since it is likely that the need will continue indefinitely, the public interest would be served by making the agency a permanent body, subject of course to dissolution by a future legislature.

(4) The terms of the Commissioners should be staggered, thereby to assure confidence in the agency's neutrality and independence.

(5) Although we believe a Commissioner whose term expires does hold over until a successor qualifies, it would be well to amend the statute to embody an express provision for holdover.

(6) With respect to the concern expressed that the S.C.I. might be overwhelmed by demands upon it from executive bodies, the statute should be amended to provide that the agency, if confronted with demands exceeding its capacity, may at its discretion ask the Governor or Attorney General to review requests from such bodies.

(7) With respect to the time for referral of evidence by the S.C.I. to law enforcement agencies, we find the statute as it exists is adequate to protect the public interest.

(8) The statute should be amended to provide that the Attorney General and appropriate law enforcement officials

be consulted by the S.C.I. prior to its determination to hold a public hearing, to the end that the S.C.I. will be fully aware of the concern of these officials.

(9) A statute should be enacted making it a high misdemeanor, triable by jury upon indictment, for any person, who having been granted immunity against self-incrimination, shall refuse to testify or to produce evidence, the statute to contain the several provisions set forth in the preceding report. Such statute should leave unimpaired the coercive civil remedy now available.