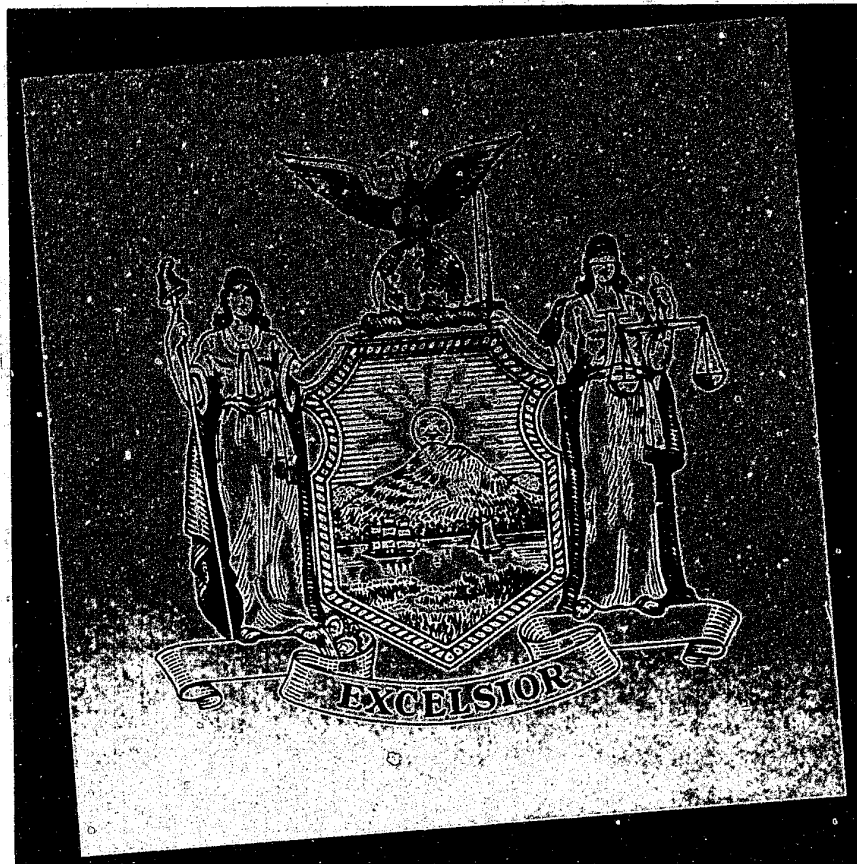


STATE OF NEW YORK

COMMISSION OF
INVESTIGATION



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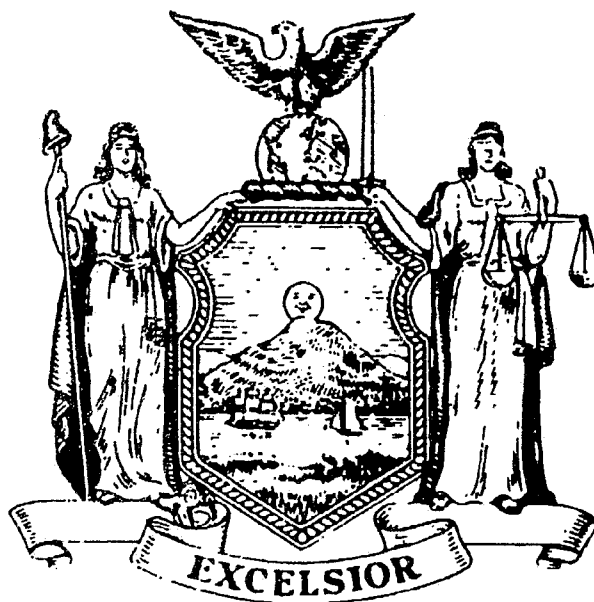
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The enabling act of the Commission of Investigation (Chapter 989, Laws of 1958; McKinney's Unconsolidated Laws, Section 7501, *et seq.*) grants it the duty and power to conduct investigations in connection with:

- 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.

TABLE OF CONTENTS

FOREWORD	i
INTRODUCTION	1
PUBLIC REPORTS 1993	4
INVESTIGATIONS 1958 - 1993	15
Table of Reports 1958 - 1993	26
THE COMMISSION OF INVESTIGATION	29
Background.....	29
Establishment of the Commission and its Enabling Acts.....	29
Related Statutes.....	30
Civil Rights Law Section 73.....	30
Penal Law Section 215.65.....	30
Civil Practice Law and Rules 2308.....	31
Criminal Procedure Law 2.10 (3).....	31
Structure of the Commission.....	31
PROFILE OF COMMISSIONERS	32
COMMISSION STAFF	35

FOREWORD



Left to right first row: Commissioners Thomas J. Culhane; Donald O. Chesworth; Earl W. Brydges, Jr.; second row: Salvatore R. Martoche; Joseph S. Dominelli; William F. Passannante.

The Commission of Investigation respectfully submits its Annual Report for the year 1993 to the Governor, the Legislature and the People of the State of New York. As in the past, this Report highlights several investigations of diverse subjects conducted by the Commission during 1993. The Report illustrates the Commission's broad mandate to investigate a wide range of matters and report its findings to governmental officials, members of law enforcement and the public.

As a background for the Commission's past and current activities, this Report contains a Table of Reports for the years 1958-1993. A summary of the Commission's history, jurisdiction and statutory authority is also provided.

This Report does not reflect, however, the wide range of ongoing investigations and those matters which, for various reasons, are referred to prosecutorial agencies or otherwise resolved without a public hearing or report. Included in this category are many of the more than 400 complaints in 1993 received by the Commission from members of the public, some of which result in full investigations by the Commission as well as public reports. The confidential nature of the Commission's work prevents discussion of pending matters.

New York, New York

January, 1994

Donald O. Chesworth,

Chairman

Earl W. Brydges, Jr.

Thomas J. Culhane

Joseph S. Dominelli

Salvatore R. Martoche

William F. Passannante

Commissioners

INTRODUCTION

With a broad statutory mandate to investigate "any matter concerning the public peace, public safety and public justice," the State Commission of Investigation undertakes investigations of corruption, fraud and mismanagement in New York State and local government. Additionally, the Commission is charged with conducting investigations into organized crime and labor racketeering and their relation to the enforcement of State law.

The Commission's purely investigative character enables it to address problems -- and suggest legislative and administrative remedies -- beyond the jurisdiction of other agencies. When evidence of criminal behavior is developed in the course of an investigation, it is referred to an appropriate prosecutor.

Of equal importance is the Commission's role as a "sunshine agency." In an effort to focus public attention on particular problems of local or statewide importance, the Commission conducts public hearings. At the conclusion of major investigations, the Commission informs the Governor, the Legislature and the public of its significant investigative findings and recommendations in public reports. As a result, throughout its existence, the Commission's recommendations have been the catalyst for the passage of new laws and amendments to existing laws. In investigations of more local character, the Commission's findings may be reported directly to complainants, the subject of the investigation, and authorities with the power to remove or sanction the officials involved.

While recognizing the importance of vigorous and unbiased investigation, the Commission is mindful of its special responsibilities to witnesses and subjects of Commission investigations. Just as an important part of the Commission's function is to draw attention to a state or local problem, so too, is the Commission vigilant to ensure that until an investigation is presented in a public forum, its work is confidential. Members of the press are routinely advised that it is Commission policy to neither confirm nor deny that a matter is under investigation. While it is not always possible to dissuade witnesses and attorneys who appear before the Commission from making statements while a matter is under investigation, the Commission vigilantly safeguards the confidentiality of its investigative work.

The Commission's statewide investigative powers extend to more than 80 State agencies, divisions, boards and authorities as well as over 1,500 political subdivisions of the State -- including the State's 62

counties and more than 500 villages, 900 towns and 60 cities. Its broad investigative jurisdiction also includes thousands of school, water and sewer districts throughout the State. In most instances, outside of the local district attorney, the Commission is the only independent investigative body in the State with the power to review and investigate allegations of fraud, waste, corruption and malfeasance. Unlike a local prosecutor's office, the Commission through its "sunshine" role, has the authority to address these types of allegations outside the traditional criminal justice forum and highlight these instances of government malfunctioning for the Governor, the Legislature and the public. Furthermore, the Commission is the only State agency with both investigative and "sunshine" mandates.

In addition to major investigations which result in public hearings and public reports, the Commission, each year, conducts numerous investigations and preliminary inquiries. During 1993, for example, the Commission conducted approximately twenty-five preliminary inquiries and fourteen long term investigations. While some investigations result in public hearings or public reports, many cases conclude with a referral to State or federal authorities for criminal prosecution or disciplinary or other administrative action.

During 1993, the Commission issued the following public report: *An Investigation Into the Conduct of Warren County District Attorney William E. Montgomery, III*. The Commission also issued several private reports. In April, 1993, the Commission provided the Governor and Legislative leaders with its findings relating to allegations that a 1990 homicide case had been improperly investigated by the Nassau County Police Department and District Attorney's Office. The Commission, however, found no basis for the appointment of a special prosecutor in this matter. The Commission's findings are discussed in this report at page 16, *infra*. In December, 1992, the Commission issued a private report setting forth its findings in an investigation of a homicide case in Westchester County. Based upon its investigation, the Commission recommended the appointment of a special prosecutor to investigate this matter. Subsequently, the Governor appointed the State Attorney General as a special prosecutor to investigate this case. The special prosecutor's investigation is pending as of the date of this report. See pages 15-16, *infra*, for a discussion of the Commission's inquiry in this matter.

The Commission receives a large volume of complaints from individuals throughout the State or through referrals from other governmental agencies or officials. Presently, a preliminary inquiry is underway into a matter referred to the Commission by the Kings County District Attorney's Office. Additionally, the Commission has continued to forge stronger and more cooperative relationships with federal law enforcement agencies, including the Federal Bureau of Investigation and the United States Customs Service.

The complaints received annually by the Commission, both from individuals and government agencies or officials may allege violations of law, administrative abuse, official misconduct, conflicts of interest and requests for assistance in personal problems. Each such complaint is carefully analyzed by the Commission, thoroughly investigated by the Commission's staff, and referred to the appropriate agency. The Commission also notifies each complainant regarding the action taken by the Commission concerning the individual's complaint, inasmuch as the Commissioners believe that it is critical for citizens all over the State to know there is a statewide governmental agency which will fully and impartially consider their concerns. During 1993, the Commission received more than 400 complaints, many of which resulted in the initiation of investigations by the Commission. In addition, a number of complaints received are directed to agencies which provide the relief sought by the complainant.

The Commission also receives numerous requests from the public and other government agencies for information pursuant to the State's Freedom of Information Law ("FOIL"), Public Officers Law, Section 84 *et seq.* In 1993, the Commission received and answered 97 requests for information under the New York State FOIL statute.

Many of the investigations detailed in this report were initiated as the result of referrals of complaints by citizens. Additionally, in 1993, the Commission pursued five investigations into matters which were referred to the Commission from the Governor's Office. The Commission also investigated several matters referred to it by State agencies, municipalities, District Attorney's Offices, the Federal Bureau of Investigation and the Offices of the United States Attorney for the Eastern and Southern Districts of New York.

The Commission's statutory mandate to assist other governmental agencies also results in a considerable effort each year. During 1993, the Commission received,

reviewed and reported on 1,385 requests for background checks from the State Police in connection with governmental appointments and applications for police and State employment and 103 requests from New York City appointments committees for judicial and other government positions. The Commission also receives numerous requests for assistance from out-of-state governmental agencies. In 1993, the Commission received and responded to forty-five such requests.

Concurrently, the Commission frequently turns to outside sources for assistance in obtaining research information and other documents necessary to the investigations it is conducting. One of these organizations, the National Conference of State Legislatures ("NCSL") has provided assistance and information to the Commission on several matters regarding relevant statutes and programs in other states. This information has assisted the Commission in assessing the adequacy of existing State statutes and programs and in determining whether to recommend legislative action in these areas. The Commission gratefully acknowledges the assistance provided by the NCSL during the past year.

Additionally, the Commission is associated with several interstate law enforcement commissions and networks. The Commission exchanges information relating to law enforcement problems and other areas of mutual concern and contributes to seminars and training sessions sponsored by these agencies. Presently, the Commission is participating in a joint project with the States of New Jersey and Pennsylvania to investigate certain organized crime issues which may have a significant impact on the tri-state region.

Last year, members of the Commission met with a five member delegation of the Comité Ciudadano Plural Procuraduría General de la República of Mexico (Attorney General's Citizen Oversight Committee of the Republic of Mexico), a citizen's watchdog group which reports incidents of abuse and corruption on the part of public servants, such as the state police, to the Attorney General of Mexico. The five member delegation traveled to the United States in 1992 in order to learn more about the United States' criminal justice system.

The Citizen's Oversight Committee subsequently invited Commission Chairman, Donald O. Chesworth to provide a keynote address at a January, 1993 law enforcement conference organized by the Citizen's Oversight Committee in Baja, Mexico. The Citizen's Oversight Committee paid for the Chairman's expenses

in connection with this trip. The conference was attended by law enforcement groups from Mexico and the United States. At this conference, Chairman Chesworth emphasized the importance of developing and maintaining trustworthy relationships between members of the law enforcement community and the citizens whom law enforcement officers are appointed to protect. The Chairman emphasized that government watchdogs can only function when an informed citizenry reports incidents of corruption, waste and fraud; thus, these agencies can only be effective in a society which has confidence in the honesty of its government officials, especially its law enforcement officers.

PUBLIC REPORTS 1993¹

AN INVESTIGATION INTO THE CONDUCT OF THE WARREN COUNTY DISTRICT ATTORNEY WILLIAM E. MONTGOMERY, III

By a letter dated December 5, 1991, Governor Mario M. Cuomo requested that the New York State Commission of Investigation ("the Commission") conduct an investigation into allegations of misconduct by Warren County District Attorney William E. Montgomery, III. The Governor based his request on an October 10, 1991 letter written by Warren County Sheriff Frederick C. Lamy to Criminal Justice Director, Richard H. Girgenti, in which Sheriff Lamy alleged that District Attorney Montgomery had engaged in a variety of activities which raised serious concerns about Mr. Montgomery's judgment, competency and honesty. Additionally, the Commission received an independent request for an inquiry into the activities of District Attorney Montgomery from Glens Falls City Court Judge David B. Krogmann. By unanimous resolution, dated January 23, 1992, the Commission authorized an investigation.

Sheriff Lamy's Allegations

In his letter, Sheriff Lamy alleged that Warren County District Attorney William Montgomery improperly refused to prosecute certain defendants who were arrested as a result of a narcotics investigation conducted by a joint task force consisting of members of the Warren County Sheriff's Department, the New York State Police and the Federal Drug Enforcement Administration ("the D.E.A."). Sheriff Lamy also claimed that Mr. Montgomery had failed to take appropriate action upon being advised that a former assistant district attorney in Mr. Montgomery's office had compromised

an ongoing federal criminal investigation; that Mr. Montgomery had become "personally involved" in a criminal complaint against his brother; that Mr. Montgomery had been arrested on several occasions prior to his admission to the Bar and that he may have failed to report these arrests on his Bar application; and that Mr. Montgomery failed to timely and accurately file required election financial disclosure statements.

Finally, Sheriff Lamy raised a number of allegations concerning Mr. Montgomery's personal dealings and professional relationships. The Commission investigated these allegations and found them to be unsubstantiated. Accordingly, the Commission determined that it was inappropriate either to enumerate or to discuss the substance of these various charges.

Judge Krogmann's Allegations

In a letter dated January 13, 1992, Glens Falls City Court Judge David B. Krogmann requested that the Commission initiate an investigation of Mr. Montgomery based upon two incidents involving Mr. Montgomery's conduct as Warren County District Attorney. On March 17, 1992, the Commission spoke with Judge Krogmann regarding his allegations against District Attorney Montgomery.

Judge Krogmann informed the Commission that the District Attorney overzealously prosecuted a misdemeanor assault case, *People v. O'Connor* for improper purposes. Additionally, counsel for the defendant in that case claimed that Mr. Montgomery had intimidated an out-of-state defense witness to the incident, thereby causing the witness to refuse to return to New York for the purpose of testifying. Ultimately, Judge Krogmann dismissed the assault case against Mr. O'Connor in the interest of justice, largely due to the District Attorney's refusal to permit the witness to return to New York without fear of prosecution.

¹ This section contains an abbreviated discussion of the public report issued by the Commission during 1993. Copies of this report in its entirety are available from the Commission pursuant to written request and payment of the appropriate fees. See Table of Reports 1958-1993, *infra*.

Judge Krogmann further alleged that, in retaliation for his ruling dismissing the case, Mr. Montgomery maliciously backdated and sent a letter to an assistant United States attorney for the Northern District of New York in which Mr. Montgomery inquired as to whether the federal government was conducting a narcotics investigation of Judge Krogmann or the judge's son. This letter was copied to the Warren County Sheriff and the D.E.A.; subsequently, information pertaining to the allegation about Judge Krogmann and his son appeared in a Glens Falls newspaper. In a letter, which he copied to the Warren County Sheriff and the D.E.A., the assistant United States attorney wrote to Mr. Montgomery, denying that he either conducted or participated in any federal investigation of Judge Krogmann or the judge's son.

The Commission's Investigation

During the course of its investigation, the Commission obtained documents and other materials, including federal grand jury testimony, pertaining to the joint task force narcotics investigation from the United States Attorney's Office for the Northern District of New York. The Commission also secured documents from the Warren County Sheriff's Department concerning an incident at 149 River Street in Warrensburg, New York, which involved Mr. Montgomery's brother, Spencer. Finally, the Commission obtained Mr. Montgomery's December, 1982 Bar application and other materials relating to his January, 1983 admission to the Bar from the Appellate Division, Third Department.²

The Commission conducted forty-four interviews of private individuals and public officials. The Commission obtained testimony from fourteen individuals at private hearings, including Virginia Sleight, First Assistant Warren County District Attorney; John Wappett, an Assistant Warren County District Attorney; six Warren County Sheriff's deputies; Jeffrey Matte, a former Assistant Warren County District Attorney; Glens Falls Police Captain Stanley Wood; Jeffrey Canale, a former Assistant Warren County Attorney; and two civilian witnesses to the 149 River Street incident, Colin Faulkner and Richard Oehler, Jr.

Mr. Montgomery testified before the Commission on September 24, 1992. Although he was advised that he had the right to be represented by counsel, Mr. Montgomery waived that right and appeared without an attorney at the hearing. Prior to his appearance, the Commission advised Mr. Montgomery that it sought to question him about the *O'Connor* prosecution, certain narcotics prosecutions, the 149 River Street incident and prior criminal charges he had faced. At the hearing, Mr. Montgomery produced numerous exhibits, including documents and photographs, each of which was accepted into evidence by the Commission. The Commission also provided Mr. Montgomery with the opportunity to provide explanations concerning his testimony during the hearing, which he did, and to submit a supplemental written statement after the hearing, which he declined to do.

Mr. Montgomery's Actions Regarding the 149 River Street Incident

In the late evening of Friday, June 14, 1991, a brawl took place at 149 River Street, a seven unit apartment house owned by Mr. Montgomery in Warrensburg, New York. On one side of the altercation were Colin Faulkner, a tenant at 149 River Street, his roommate Eric LaPorte and guests at a party held by Mr. Faulkner, including Richard Oehler, Jr., a local resident. William Montgomery's brothers, Spencer, who also lived at the apartment building, and Timothy were on the other side of the fight. During the brawl, Spencer Montgomery allegedly assaulted Mr. Faulkner, causing facial injuries. By the time Sheriff's deputies arrived at the scene in the early morning hours of June 15th, both participants in the altercation and witnesses to the brawl were outside the apartment building. In Mr. Faulkner's apartment at 149 River Street, Sheriff's deputies found a Maine driver's license bearing a photograph of Eric LaPorte. Mr. LaPorte already had given one of the deputies a license with a different name and date of birth, but bearing the same picture.

Following departmental procedure, the ranking officer at the scene, Sgt. Michael Greene, directed his deputies to remove the parties to the Warrensburg

² The Commission obtained certain of the records pertaining to Mr. Montgomery's Bar admission through a court order.

Sheriff's Department Substation where they could be interviewed individually.

At the Warrensburg Substation, Sheriff's deputies separately interviewed the participants and the witnesses to the fight. Colin Faulkner, while at the substation, informed an unidentified deputy that he wanted to file a complaint against Spencer Montgomery. Accordingly, a complaint charging Spencer with assault was prepared which Mr. Faulkner signed before he went to the hospital to receive medical treatment for his injuries. Prior to leaving the substation, Sgt. Greene photographed Mr. Faulkner to document his injuries. Another complaint charging Eric LaPorte with possession of a forged driver's license was partially completed. While the investigation was underway, District Attorney Montgomery arrived at the substation.

Sgt. Greene, at a private hearing, informed the Commission that he explained the circumstances of the investigation to the District Attorney upon the latter's arrival at the substation, after which the District Attorney asked to speak with his brothers. After speaking with them, the District Attorney again conferred with Sgt. Greene, who informed the District Attorney that a complaint charging Spencer Montgomery with assault had been signed. The District Attorney then asked Sgt. Greene to refrain from taking any action in the matter until Monday to provide the District Attorney with an opportunity to review the case and interview the other individuals involved. Sgt. Greene testified that after the District Attorney made this request, he contacted his supervisor, Major Larry Cleveland, who acceded to the District Attorney's request. Consequently, the deputies were ordered to cease processing the paperwork and to make no arrests.

After being informed of Major Cleveland's approval of the postponement in processing the arrests, District Attorney Montgomery told Sgt. Greene that he wanted to sign a trespass complaint against Richard Oehler, Jr., who had previously been warned to stay away from the premises at 149 River Street. In accordance with this request, Sgt. Greene directed a deputy to draft a trespass complaint against Richard Oehler. Subsequently, Richard Oehler was issued a desk appearance ticket charging him with trespass, returnable for Monday, June 17th, before being permitted to leave the substation. The Sheriff's deputies, however, took no

further action concerning the completed assault complaint against Spencer Montgomery or the partially completed possession of a forged instrument complaint against Eric LaPorte.

William Montgomery testified before the Commission that he appeared at the Warrensburg Substation that evening in his capacity as the landlord of 149 River Street and not in his official capacity as district attorney. He also stated, in sum and substance, that he was unaware at that time of the existence of a complaint accusing his brother of assault and that he did not request or direct the Sheriff's deputies to refrain from filing a complaint against his brother. He admitted requesting the deputies to prepare a complaint charging Richard Oehler with trespass and to take a statement about damage to the lawn at 149 River Street from another of Mr. Faulkner's party guests, Thomas Bolton.

Mr. Montgomery also denied speaking with Colin Faulkner at the substation that evening and stated that he learned about the assault complaint against his brother, Spencer, months later, in September, 1991, through a newspaper reporter. Mr. Montgomery further testified that he became aware of the accusatory instrument against Eric LaPorte at the same time from the same reporter. He did not recall speaking with his brothers at the substation on the night of the incident.

Colin Faulkner, however, testified that he spoke with William Montgomery three times concerning the assault complaint against Spencer Montgomery, including a conversation at the substation on June 15, 1991. Mr. Faulkner informed the Commission that he spoke with the District Attorney about the incident for the second time on the following day, when Mr. Montgomery came to his apartment at 149 River Street. According to Mr. Faulkner, the District Attorney indicated he did not intend to prosecute Eric LaPorte for the fake driver's license, but he asked Mr. Faulkner to refrain from pursuing the assault charges against Spencer Montgomery, a request Mr. Faulkner refused. Mr. Faulkner further testified that his third conversation with Mr. Montgomery was substantially similar to his earlier one, and that afterward he decided to drop the assault charges against Spencer. He stated that he did not feel pressured by the District Attorney to refrain from pursuing the assault complaint, but he felt he was making a deal with Mr. Montgomery to avoid further

problems and to avoid returning to New York from his home in Massachusetts after the conclusion of the summer. Mr. Faulkner testified that he informed Major Cleveland of his decision not to pursue the complaint against Spencer Montgomery on Monday, June 17, 1991 and that he signed a statement withdrawing the charges on the same day.³

Richard Oehler, Jr. testified before the Commission that he spoke with the District Attorney on his own initiative on June 17, 1991 concerning the trespass complaint.⁴ According to Mr. Oehler, Mr. Montgomery asked him to give a second statement to the Sheriff's Department, stating that the Montgomery brothers were not the instigators of the 149 River Street incident. Mr. Oehler told the Commission that he agreed to Mr. Montgomery's request because he wanted the trespassing charges to be dropped. The Sheriff's Department, however, refused to accept a second statement from him because Colin Faulkner already had withdrawn his complaint against Spencer Montgomery. Two days later, on June 19, 1991, William Montgomery dropped the trespass charges against Richard Oehler on the condition that Mr. Oehler stay away from 149 River Street.

First Assistant Warren County District Attorney Virginia Sleight testified before the Commission that she spoke with the District Attorney about the 149 River Street brawl around June 19, 1991. According to Ms. Sleight, the District Attorney initiated the conversation with her concerning the assault complaint filed against his brother, Spencer.

The Commission's Findings

The Commission's investigation established that District Attorney William Montgomery improperly involved himself in the investigation of the 149 River Street

incident immediately upon his arrival at the Warrensburg Substation and that he did so to assist his brother. The Commission heard credible testimony that Mr. Montgomery acted under the color of his authority as District Attorney to prevent Spencer's arrest and later, to induce Colin Faulkner to drop assault charges against Spencer. The Commission's inquiry also revealed evidence that Mr. Montgomery attempted to induce Richard Oehler into making a false statement clearing the District Attorney's brothers of wrongdoing in exchange for dropping the criminal trespass charges against Oehler. Furthermore, Virginia Sleight's testimony before the Commission provided evidence that Mr. Montgomery, contrary to his own sworn assertions, was aware of the assault complaint against his brother prior to September, 1991.

Mr. Montgomery's testimony at the private hearing before the Commission in New York County regarding his actions in connection with the 149 River Street incident was controverted by virtually all of the other testimony and evidence adduced by the Commission. The Commission, therefore, concluded that Mr. Montgomery's testimony before the Commission gave rise to a perjury prosecution, and accordingly, in December, 1992, the Commission referred evidence pertaining to Mr. Montgomery's testimony before the Commission about the 149 River Street incident to the New York County District Attorney's Office.

Additionally, the Commission obtained evidence that Mr. Montgomery may have committed substantive crimes in connection with his conduct surrounding the 149 River Street incident. Therefore, Commission referred the issues relating to these potential criminal charges to the Governor's Special Prosecutor Review Committee with a recommendation that a special prosecutor be appointed to determine if a criminal prosecution was warranted.

³ Colin Faulkner also gave a sworn statement to Kurt Mausert, a private attorney practicing in Warren County, regarding the incident at 149 River Street on June 14, 1991. Mr. Faulkner's testimony before the Commission was consistent with the statement he gave Mr. Mausert.

⁴ Richard Oehler also gave a sworn statement to private attorney Kurt Mausert, concerning Mr. Oehler's conversation with District Attorney Montgomery. This statement was substantially similar to his Commission testimony.

Prosecution of Michael J. O'Connor, Jr.

On July 3, 1991, just before midnight, twenty-one-year old Bruce Potter was allegedly assaulted by three men, later identified as Michael J. O'Connor, Jr.; Sergio Bartakian, an active duty Marine on temporary summer assignment to a Vermont military college, Norwich University; and Vincent Luciano, Jr., a full time student at Norwich University. Tammy Barber, Bruce Potter's girlfriend at the time, witnessed the assault. In his statement to the police, Mr. Potter indicated that just prior to the assault, he and Ms. Barber were having an argument during which they pushed each other. According to Mr. Potter, he was struck in the back of the head by someone and then Mr. O'Connor and the other two men kicked him in the head and mouth.

Mr. O'Connor was arraigned on the charges of misdemeanor assault in violation of Penal Law §120.00(1) on July 5, 1991. The complaint charged that the defendant kicked Mr. Potter in the head and mouth multiple times causing "...a bloody mouth [and] chipped teeth."

Mr. O'Connor's lawyer obtained handwritten statements from Messrs. Bartakian and Luciano on July 4, 1991. These statements, which were notarized by defense counsel, indicated that an unknown male had struck Bruce Potter. Mr. Bartakian stated that Mr. Potter pushed Mr. O'Connor and that O'Connor pushed back. He denied seeing anyone, except for Ms. Barber, kick Mr. Potter. Mr. Luciano maintained that neither he nor Mr. Bartakian nor Mr. O'Connor kicked Mr. Potter, although he admitted that Mr. Bartakian "bashed into" Potter in an effort to separate him from Ms. Barber.

Four days later, both Messrs. Bartakian and Luciano prepared additional handwritten statements regarding the assault in which they modified their earlier respective versions of the incident. These statements were also notarized. In his July 8th statement, Mr. Luciano admitted that he had not been truthful in his earlier statement when he claimed that the hitter had been a fourth person. Mr. Luciano further acknowledged witnessing Mr. Bartakian hit Mr. Potter once on the side of the head after which Potter fell to the ground and that Mr. O'Connor shoved Mr. Potter with his foot when

Potter attempted to get up. Mr. Luciano again denied that anyone kicked Mr. Potter.

In his July 8th statement, Mr. Bartakian claimed that Mr. Potter pushed Mr. O'Connor on the back causing O'Connor to turn and push Potter on the chest. Mr. Bartakian admitted hitting Potter. Mr. Bartakian also denied seeing O'Connor kick Potter in the face or head.

Subsequently, Mr. O'Connor's defense attorney wrote to the assistant district attorney assigned to handle the assault prosecution, suggesting that the assistant interview Mr. Bartakian, who was about to ship out to Guam. In a July 24, 1991 hearing, Judge Krogmann, before whom the *O'Connor* case was pending, directed the District Attorney to interview Messrs. Bartakian and Luciano. The next day, on July 25, 1991, Mr. Montgomery, accompanied by Glens Falls Police Captain Stanley Wood, interviewed Sergio Bartakian and Vincent Luciano, Jr. individually at Norwich University regarding the assault. The interviews were conducted in the presence of Marine Corps Major Harry Downey.

During his interview, Vincent Luciano said that Sergio Bartakian had punched Bruce Potter, thereby admitting that his first statement was false. According to Major Downey, the issue of perjury was discussed at the meeting, but neither Mr. Montgomery nor Captain Wood informed Mr. Luciano that he would be arrested for perjury. Sergio Bartakian, during his interview with the District Attorney and Captain Wood, admitted punching Bruce Potter, but denied that he or anyone else had kicked Mr. Potter. In response, the District Attorney informed Mr. Bartakian that he could be charged with assault on the basis of his admission.

Also, on July 25th, Bruce Potter signed an amended complaint charging that Michael O'Connor, Jr., "acting in concert with other individuals," injured him. On October 10, 1991, the defense filed a motion to dismiss the amended complaint in the interest of justice; however, the motion papers made no reference to any intimidation of a defense witness by District Attorney Montgomery.

In a subsequent affidavit filed in support of the defense motion to dismiss the complaint, defense counsel indicated that Vincent Luciano refused to cooperate in the defense of Michael O'Connor because

the District Attorney had threatened him with arrest if he returned to New York. In an affidavit, the District Attorney denied any misconduct on his part, however, he stated that Mr. Luciano's return to Warren County could subject him to arrest and prosecution. The court subsequently held hearings regarding the defense motion to dismiss the complaint during which the issue arose as to whether Mr. Montgomery had informed Vincent Luciano that he would be arrested and prosecuted if he returned to New York to testify in the *O'Connor* case. Mr. Montgomery denied this allegation, advising the court that he only informed Mr. Luciano that the latter could be subject to arrest if he returned to New York. The court sought to have Mr. Luciano attend another hearing in order to resolve the issue of witness intimidation, however, the District Attorney refused to grant Mr. Luciano immunity for the purpose of allowing him to testify at a hearing regarding the allegation of intimidation.

In a December 23, 1991 decision, which was critical of Mr. Montgomery's handling of this issue, Judge Krogmann dismissed the accusatory instrument against Mr. O'Connor. Judge Krogmann's decision was upheld by the County Court. As of August, 1993, the date of the Commission's public report, no criminal prosecutions had been commenced from the purported assault on Bruce Potter.

In a letter dated December 19, 1991, four days prior to the issuance of Judge Krogmann's decision and order dismissing the *O'Connor* prosecution, Mr. Montgomery wrote to Assistant United States Attorney ("AUSA") David Homer, asking if the federal prosecutor's office was conducting a narcotics investigation of Judge Krogmann or the judge's son. Mr. Montgomery's letter was copied to the D.E.A. and the Warren County Sheriff. On January 16, 1992, a local newspaper printed a story about the letter. In reply to Mr. Montgomery's letter, AUSA Homer wrote a letter, stating that his office neither was conducting nor had conducted any investigation of Judge Krogmann. Judge Krogmann, however, informed the Commission that he believed Mr. Montgomery wrote the letter to the United States Attorney's Office in retaliation for the court's dismissal of the *O'Connor* case and that the District Attorney backdated the letter.

The Commission interviewed Mr. Montgomery, Glens Falls Police Captain Stanley Wood and Marine

Corps Major Harry Downey, three of the people who attended the July 25th interviews of Vincent Luciano, Jr. and Sergio Bartakian at Norwich University in Vermont. Vincent Luciano, Jr. refused to cooperate with the Commission in its investigation. Since Mr. Luciano remained outside the Commission's geographical jurisdiction during the pendency of the Commission's inquiry, the Commission did not attempt to compel his testimony. Mr. Bartakian also was located outside the United States while the Commission's investigation was ongoing, so the Commission was unable to interview him regarding the intimidation allegations.

Notwithstanding the assertions of Michael O'Connor's attorney, the Commission was unable to determine whether Vincent Luciano intended to return to New York to testify in Mr. O'Connor's defense prior to his July 25th interview with Mr. Montgomery. Both Mr. Montgomery and Captain Wood informed the Commission that they travelled to Vermont to interview Mr. Luciano because he had refused to come to New York. Captain Wood, in a private hearing before the Commission, testified that, while he had advised Mr. Luciano that Luciano had committed perjury, Mr. Montgomery made no comments to Mr. Luciano regarding perjury. Major Downey told the Commission that Captain Wood and Mr. Montgomery had a general discussion with Mr. Luciano regarding perjury and immunity, but neither accused Luciano of having committed perjury nor did they offer Luciano immunity. Finally, Mr. Montgomery's testimony before the Commission was consistent with the statements of Captain Wood and Major Downey concerning the July 25th interview of Vincent Luciano.

Mr. Montgomery indicated to the Commission that, after he interviewed Vincent Luciano on July 25th, his assessment of the alleged assault on Bruce Potter was that both Mr. Luciano and Mr. Bartakian were criminally liable for their actions that evening. The District Attorney, however, was unable to identify any statements made by Mr. Luciano which supported his determination on this issue. The Commission's examination of this evidence revealed that, while Luciano placed himself at the scene of the assault, he denied participating in the assault itself. In his testimony before the Commission, Mr. Montgomery was unable to explain whether he intended to treat Mr. Luciano as a potential defendant or as a prosecution witness in the *O'Connor* case. He agreed, however, that Mr. Luciano's culpability was minimal.

The Commission's Findings

The Commission concluded that Mr. Montgomery did not overzealously prosecute *People v. O'Connor*. Moreover, the Commission's investigation found no credible evidence that the District Attorney intimidated a defense witness, Vincent Luciano, to prevent him from testifying. The Commission, however, determined that Mr. Montgomery exhibited questionable judgment in his evaluation of the misdemeanor assault case, in that he could not determine how to proceed effectively; consequently, no one was held accountable for the assault on Bruce Potter. Furthermore, Mr. Montgomery was unable to provide the Commission with a reasonable explanation for his office's failure to devise a plan for prosecuting the assault charges against Michael J. O'Connor, Jr.

The Commission's inquiry also established that Mr. Montgomery had a basis for making an inquiry to federal prosecutors regarding Judge Krogmann and his son and the Commission found no evidence that Mr. Montgomery backdated his letter to the federal prosecutor's office. Mr. Montgomery obtained information from two sources that Judge Krogmann's and his son's names had arisen during the course of a federal grand jury investigation into narcotics activities. The Commission further determined that, although Judge Krogmann insisted he was unaware of any inquiries made concerning allegations of narcotics use by either him or his son, Judge Krogmann, in fact, possessed this information months before Mr. Montgomery wrote to the federal prosecutor's office. The Commission, however, determined that the manner in which Mr. Montgomery chose to make his inquiry was ill-advised, resulting in the unwarranted publication of derogatory information which ultimately proved to be unfounded. In the Commission's view, however, the District Attorney's inquiry itself was not improper.

Mr. Montgomery's Failure to Report Arrests on His Bar Application

The Commission also sought to determine whether

Mr. Montgomery failed to report a July, 1982 arrest in Glens Falls for Obstructing Governmental Administration when he applied for admission to the New York State Bar that December. In support of this inquiry, the Commission obtained a copy of Mr. Montgomery's Bar application and, pursuant to a court order, copies of the court and police records pertaining to Mr. Montgomery's 1982 arrest. A review of Mr. Montgomery's Bar application revealed that he failed to include any information regarding this arrest on his application. The court and police records examined by the Commission established that Mr. Montgomery was arrested June 5, 1982 in Glens Falls, New York and charged with Obstructing Governmental Administration, a misdemeanor under the Penal Law, and with two violations of the Vehicle and Traffic Law for failure to comply with the order of a police officer and excessive use of his horn.

The Commission also questioned Mr. Montgomery regarding this arrest when he testified before the Commission. Mr. Montgomery acknowledged that he had been arrested in June, 1982, but he equivocated as to whether he knew he was obligated to disclose this information on his Bar application. In an effort to ascertain whether Mr. Montgomery had disclosed this information during his interview with a member of the Appellate Division, Third Department Committee on Character and Fitness of Applicants for Admission to the Bar ("Character Committee"), the Commission contacted all the Character Committee members who interviewed candidates before the Third Department at the time of Mr. Montgomery's admission in January, 1983; however, the Commission's efforts in this regard were inconclusive. Since any potential violation arising from Mr. Montgomery's failure to disclose his June, 1982 arrest on his Bar application would be within the jurisdiction of the Character Committee, the Commission forwarded information relevant to this issue to the Third Department for whatever action it deemed appropriate.

Mr. Montgomery's Alleged Failure to Prosecute Narcotics Arrests

Sheriff Lamy informed the Commission that Mr.

Montgomery improperly refused to prosecute certain defendants who were arrested as a result of a narcotics investigation conducted by an informal task force consisting of members of the Warren County Sheriff's Department, the New York State Police, and the D.E.A. Sheriff Lamy alleged that in connection with these drug arrests, Mr. Montgomery wrongfully declined to assist law enforcement officers in obtaining warrants and filing accusatory instruments and ultimately refused to present these cases to a grand jury. In a related matter, Sheriff Lamy accused the District Attorney of failing to take appropriate action when he was advised that a former member of his staff, Jeffrey Matte, had informed a potential target of the investigation, Jeffrey Canale, that Canale was a subject of the task force inquiry.

The Commission's investigation sought to determine whether Mr. Montgomery's actions regarding the handling of these task force related drug cases were improper. The Commission also attempted to ascertain whether Mr. Montgomery had wrongfully refused to take appropriate action regarding the purported leak of confidential information by former Assistant District Attorney Jeffrey Matte.

The task force investigation began in the Spring of 1990 when a confidential informant agreed to provide information to the Glens Falls Police Department in exchange for leniency on charges which the informant believed he faced for having issued several bad checks. In exchange for the postponement of the bad check charges so that the informant could repay the individuals to whom he owed the money, the informant agreed to provide information concerning alleged illegal narcotics activity involving Michael and Jeffrey Canale and several other individuals. At the time of the informant's offer, Jeffrey Canale was an Assistant Warren County Attorney. His cousin, Michael Canale, had been unsuccessfully prosecuted on drug related charges on a previous occasion.

The same day that the informant proposed his offer of cooperation to the Glens Falls Police Department, an investigator from that department notified Assistant Warren County District Attorney Jeffrey Matte and advised A.D.A. Matte of the informant's possible cooperation. Although A.D.A. Matte, after meeting the informant, authorized the investigator to proceed with the investigation, it is unclear whether he informed the District Attorney about his discussion with the informant.

The Glens Falls police informed the Warren County Sheriff's Department about the informant and his allegations concerning Michael Canale. The Sheriff's Department, in turn, advised the D.E.A. about the existence of the informant. Subsequently, the D.E.A. met with the informant and registered him with the D.E.A. The informant, however, stopped cooperating by the Fall of 1990.

In December, 1990, the informant was arrested on forgery charges and agreed to cooperate against Michael Canale in an effort to avoid going to jail on the new charges. Lieutenant Bruce Parent of the Sheriff's Department told the Commission that, around that time, he advised District Attorney Montgomery regarding the informant's second cooperation offer. According to Lt. Parent, Mr. Montgomery was aware of the informant's prior involvement in the case and knew that the informant's previous efforts had not produced positive results. Nevertheless, according to Lt. Parent, Mr. Montgomery agreed to allow the informant to cooperate in exchange for consideration in the pending felony case against him. Sheriff Lamy informed the Commission that, after the investigation began, he informally advised Mr. Montgomery regarding developments in the case.

Also in December, 1990, the New York State Police became involved in the investigation. New York State Police Investigator Richard Eggleston told the Commission that, in January, 1991, without the knowledge of the other members of the task force, he briefed Mr. Montgomery about the Canale investigation, including the goals of the investigation, the existence of pen registers on Michael Canale's home telephone with a view toward obtaining a wire tap on that telephone and the fact that the prosecutions would be conducted at the federal level.

By April, 1991, the task force had gathered sufficient evidence of Michael Canale's narcotics dealings so that it was seeking to close its investigation. On April 16, 1991, certain members of the task force conducted a full briefing for Mr. Montgomery to discuss the entire investigation. According to Lt. Parent, who was present at the meeting, Mr. Montgomery was informed that all the subjects of the Canale investigation were to be prosecuted federally and that the subjects of a second unrelated narcotics investigation would be prosecuted at the state level. Lt. Parent also told the Commission that, after the meeting concluded, he remained behind to

discuss privately with Mr. Montgomery the task force's suspicion that an assistant Warren County district attorney was leaking information and that this assistant might be associated with a local businessman and alleged cocaine dealer. Lt. Parent wanted Mr. Montgomery to safeguard the information concerning task force arrests from this assistant district attorney. According to Lt. Parent, there did not appear to be any problem when he left Mr. Montgomery's office that day.

The next day, however, Mr. Montgomery wrote to an assistant United States attorney claiming that his office had been circumvented in the task force investigation and that any cases resulting from this investigation should be prosecuted solely by the federal prosecutor's office. This letter was copied to the D.E.A., the State Police and Sheriff Lamy. After Mr. Montgomery wrote this letter, his relationship with the Warren County Sheriff's Department deteriorated.

On May 10, 1991, the Sheriff's Department issued a press release announcing the arrests of Michael Canale and other individuals on narcotics charges. According to Investigator Eggleston, members of the task force met with Mr. Montgomery during the ensuing weeks to discuss the future prosecution of the state cases. Mr. Montgomery, however, continued to refuse to prosecute these cases.

On September 12, 1991, the task force announced nine additional arrests relating to the narcotics investigation. In response, Mr. Montgomery issued a press release claiming that his office had been circumvented in the investigation. The task force publicly disputed Mr. Montgomery's claims. The narcotics cases arising from the May, 1991 arrests were prosecuted by the United States Attorney's Office for the Northern District of New York. Mr. Montgomery's office eventually prosecuted five of the nine cases stemming from the September, 1991 arrests. The four cases which the Warren County District Attorney's Office did not prosecute were dismissed by the federal prosecutor's office.

In his testimony before the Commission, Mr. Montgomery claimed that any information he received regarding the progress of the task force's investigation was the result of casual conversation. He testified that he never attended a formal meeting with members of the task force to discuss the investigation. Mr. Montgomery also testified that the task force, at the April 16,

1991 meeting, informed him regarding which cases would be prosecuted in federal court and which cases his office would handle, a decision with which he disagreed.

The Commission's Findings

The Commission found insufficient evidence to support the allegation that Mr. Montgomery improperly refused to prosecute narcotics cases resulting from the joint task force investigation. Although Mr. Montgomery initially refused to prosecute certain drug cases because they had come from a federal investigation in which he did not fully participate, the Commission found no evidence that his refusal to pursue the cases was beyond the scope of his discretion as a prosecutor. Although failure to prosecute these cases became an event of intense public discussion and interest, Mr. Montgomery, in fact, eventually prosecuted several of the cases. The open dispute as to the handling of these cases, and Mr. Montgomery's disproportionate response to receiving these referrals at the conclusion of the federal inquiry was, in the Commission's view, a direct result of Mr. Montgomery's inexperience as a prosecutor.

Failure to Prosecute Jeffrey Matte

In April, 1991, a telephone call placed by Michael Canale to his cousin, Jeffrey Canale, was intercepted on the federal wiretap of Michael Canale's home telephone. Task force members monitoring the conversation between the Canale cousins heard Jeffrey Canale tell his cousin, Michael that they were subjects of a narcotics investigation and that "Jeff" in the Warren County District Attorney's Office was the source of this information. The only "Jeff" who worked in the Warren County District Attorney's Office around that time was Jeffrey Matte who was employed as an assistant district attorney from January, 1990 until June, 1990.

The task force members were furious at Jeffrey Matte's apparent leak of information to a target of the narcotics investigation. According to task force members, Mr. Montgomery, upon hearing the tape of the

intercepted conversation, however, dismissed the taped conversation as "casual conversation" and indicated that he would not take any action against Mr. Matte or Mr. Canale. Mr. Montgomery testified before the Commission that, although he believed a crime may have been committed, he took no action against Jeffrey Matte because he assumed Mr. Matte was a subject of the task force investigation, and therefore, the task force would handle the matter.

The Commission also obtained testimony from both Jeffrey Canale and Jeffrey Matte concerning this issue. Mr. Canale testified that he had a conversation with Mr. Matte on June 28, 1990 during which Mr. Matte told him that he should "watch out," because a confidential informant had provided information about Mr. Canale's involvement with his cousin, Michael Canale, and others in an illegal cocaine distribution conspiracy. Mr. Canale also testified that he had a second conversation with Mr. Matte in April, 1991 at which time Mr. Matte disclosed the identity of the confidential informant to him.

Mr. Matte's testimony before the Commission conflicted with that of Mr. Canale, in that, he stated that he did not discuss the narcotics investigation with Jeffrey Canale when he was employed as an assistant district attorney. Mr. Matte testified that his only conversation with Jeffrey Canale regarding the narcotics investigation occurred in April, 1991 and that at the time of this conversation, Mr. Matte was under the impression that the task force investigation had terminated.

The Commission's Findings

The Commission determined that Mr. Montgomery did not violate his duties as District Attorney when he failed to take any action after being advised by law enforcement authorities that a former assistant district attorney had compromised an ongoing federal investigation. Mr. Montgomery testified before the Commission that he took no action because he believed the same law enforcement authorities which were pursuing the drug investigation were going to determine whether a basis for a criminal prosecution of Jeffrey Matte existed. In light of the circumstances of the alleged improper disclosure and of the independent drug investigation by the federal prosecutor's office, the Commission found

Mr. Montgomery's explanation to be plausible. Notwithstanding his explanation, Mr. Montgomery made no subsequent effort to ascertain if federal authorities had, in fact, pursued these allegations, calling into question his judgment as Warren County's chief law enforcement officer.

The Commission's inquiry also established that Jeffrey Matte may have committed the crime of Official Misconduct and may have violated his ethical responsibilities as an attorney through his disclosure of confidential investigative information to a target of a law enforcement investigation. The Commission referred the matter to the Governor's Special Prosecutor Review Committee with the recommendation that the special prosecutor appointed to investigate Mr. Montgomery's actions also review the information concerning the alleged disclosure by Mr. Matte to determine whether criminal charges were warranted. Additionally, the Commission referred the evidence regarding Jeffrey Matte's possible ethical violations to the Committee on Professional Standards of the Appellate Division, Third Department for whatever action it deemed appropriate.

Alleged Irregularities Involving Mr. Montgomery's Election Financial Disclosure Statements

In his October 10, 1991 letter, Sheriff Lamy also alleged that Mr. Montgomery had not filed financial disclosure statements required under the New York State Election Law on time and that these statements were not accurate as they indicated the retirement of a campaign debt without stating how the debt was paid off. The Commission's investigation established that only one of Mr. Montgomery's two campaign committees received loans and that this committee only obtained personal loans from the candidate himself. The financial disclosure statements indicated that some of these loans were repaid to Mr. Montgomery, although the loan balance listed on the statement for the period ending July 15, 1990 was omitted from the next two disclosure forms filed by the committee. The schedule which should indicate who repaid the loan along with the amount repaid was left blank.

The Commission interviewed Robert Allen, the Warren County Republican Commissioner of Elections concerning the omission of the loan balance from the subsequent disclosure statement. Mr. Allen informed the Commission that he believed the disclosure statement's failure to show whether the balance of the loan was repaid was an oversight and his primary concern was that Mr. Montgomery had filed the required forms late.

Mr. Montgomery testified before the Commission that he was unaware of a deadline by which the financial disclosure statements had to be filed. He also testified that the outstanding loan balance remained unpaid as of the date of his appearance before the Commission and surmised that the reason the loan balance was not indicated on the later disclosure statement was due to a clerical error. Subsequently, Mr. Montgomery sent the Commission disclosure statements for the period July 15, 1991 to January 15, 1992 and January 15, 1992 to July 15, 1992 which showed there had been no changes in the loan balance since the filing of the financial disclosure statement for the period ending July 15, 1990.

The Commission's Findings

The Commission determined that Mr. Montgomery's failure to file the required election financial disclosure statements on time was improper, but it did not rise to the level of criminal conduct. The Commission, therefore, did not recommend the appointment of a special prosecutor to investigate this matter.

Subsequent Action

On August 31, 1993, Governor Mario M. Cuomo, based on the Commission's recommendation, appointed the State Attorney General as the special prosecutor to investigate the allegations of misconduct by Warren County District Attorney William Montgomery, III and related matters. The special prosecutor's inquiry currently is pending. On November 30, 1993, the New York County District Attorney's office advised the Commission that, after a lengthy grand jury presentation, it had determined not to file criminal charges against Mr. Montgomery.

INVESTIGATIONS 1958 - 1993

Since the Commission was established in 1958, it has conducted hundreds of investigations on matters ranging from simple complaints, affecting only a few persons, to institutionalized corruption, affecting the entire State. The Commission's published reports are only a partial indication of the results of these investigations. Often the Commission will develop information and supply it to a cooperating agency, including federal, state or local prosecutors or the Attorney General, for prosecution or other action without issuing a public report. In other cases, the Commission, after investigating a matter, reports its conclusions and recommendations directly to the government official or agency authorized to address the problem. The Commission also receives and handles many complaints or allegations which do not warrant either a public report or a referral. On many occasions, substantial staff work will underlie a decision to close a matter without issuing a public report when the allegations were not or could not be substantiated.

On February 2, 1988, Governor Mario M. Cuomo, by Executive Order Number 109, established the Governor's Special Prosecutor Review Committee. This gubernatorial advisory body, consisting of five members, including the Commissioner/Director of Criminal Justice Services and the Counsel to the Governor, considers all requests for the appointment of special prosecutors to review the handling of controversial local criminal cases throughout the State. Special prosecutors are empowered to issue reports concluding there is no evidence warranting further investigation or prosecution of a matter as well as to impanel grand juries to investigate and ultimately, prosecute defendants at trial. Governor Cuomo has used his special prosecutor appointment powers sparingly, however, appointing only eleven special prosecutors during his eleven years in office.

Since the creation of the Special Prosecutor Review Committee, the Commission has experienced an increase in the number of Governor's referrals which it has received. Before the creation of this committee, in 1987, the Commission received two Governor's referrals, both of which concluded with the issuance of public reports by the Commission. The following year, the Governor referred two matters to the Commission for its review; the Commission's conclusions in these matters culminated in the issuance of both a public report and a private report to the Governor later that same year.

These public reports were discussed in Annual Reports issued by the Commission for those respective years. In 1993, the Commission actually investigated five matters which were referred to the Commission by the Governor's Office. Two of these inquiries are still pending. Where the Governor's referrals concern pending or confidential investigations, the Commission is precluded from discussing them at this time.

Although only a fraction of the many investigations conducted by the Commission result in the issuance of published reports, the Commission, as stated previously, reports its conclusions and recommendations in each matter referred to it to the complainant and to the appropriate government officials. Notwithstanding the confidential nature of the Commission's work, a brief discussion follows of some of the cases investigated by the Commission in 1993 which did not conclude with the issuance of a public report, but which, nevertheless, concerned matters of public knowledge and importance.

A Homicide Case in Westchester County

In April, 1987, at a gasoline station in Westchester County, a thirty-one year-old white male was shot to death by a part-time gas station attendant. The attendant later claimed that he had killed the decedent in self defense during the course of a robbery. Several witnesses to the incident gave differing accounts of the events in question.

The case was investigated by the New York State Police and the Westchester County District Attorney's Office. The shooter was not arrested, and, through his attorney, submitted a written statement regarding his actions to the District Attorney's Office. The case was closed after approximately three weeks of investigation. The District Attorney's Office did not present any evidence to a grand jury. A subsequent request to re-open the inquiry, made by the decedent's mother to the District Attorney's Office, was denied.

In August, 1991, the decedent's mother wrote to the Commission to request that it commence an investigation into the facts and circumstances surrounding her son's death, and law enforcement's investigation of the incident. The Commission commenced a preliminary inquiry. On January 23, 1992, by unanimous resolution, the Commission authorized a full investigation.

The Commission obtained and reviewed the files of the Westchester County District Attorney's Office and the New York State Police. The Commission also subpoenaed relevant records from several other institutions and agencies and conducted eighteen interviews, including interviews of law enforcement personnel and civilian witnesses.

At the conclusion of its investigation, the Commission determined that the decision to close the inquiry into the victim's death, without presenting the facts to a grand jury, was premature and inappropriate. In the Commission's view, critical factual issues relevant to the circumstances of the shooting were not resolved during the investigation conducted. It was the Commission's judgment that these issues required resolution, by a full investigation in a grand jury, prior to closing the matter.

In a private report to the Governor and Legislative leaders in December, 1992, the Commission recommended that a special prosecutor be appointed to review this case and present the matter to a grand jury. Subsequently, pursuant to Executive Law §63(2), Governor Mario M. Cuomo appointed the Office of the New York State Attorney General to act as a special prosecutor in this matter. As of this date, the special prosecutor's investigation is pending.

A Homicide Case in Nassau County

On January 2, 1991, Governor Mario M. Cuomo's Special Prosecutor Review Committee requested that the Commission undertake an evaluation of the facts and circumstances surrounding the shooting death of a thirty-two year-old black male in Nassau County in February, 1990. The Governor's Special Prosecutor Review Committee made this request in response to a letter to the Director of the New York State Division of Criminal Justice from the decedent's parents following the refusal of a Nassau County grand jury to indict the shooter and the Nassau County District Attorney's decision not to re-open the matter. By unanimous resolution, dated January 17, 1991, the Commission authorized an inquiry into the facts and circumstances surrounding this shooting death and the investigation of the incident by the Nassau County Police Department, the Nassau County District Attorney's Office and the Nassau County Grand Jury.

The Commission obtained and reviewed the files of the Nassau County police and the District Attorney's Office and the minutes of the grand jury proceedings in this case. The Commission also conducted numerous interviews, held private hearings and consulted with an independent forensic pathologist in an effort to evaluate the police investigation and the District Attorney's grand jury presentation into this shooting. Following its inquiry, the Commission concluded that, notwithstanding the numerous errors committed during the course of the grand jury presentation by the senior assistant district attorney in charge of the case, the standard for re-presentation of this matter to a new grand jury had not been met. The Commission determined, therefore, that the appointment of a special prosecutor to resubmit this case to a second grand jury was not warranted. The Commission advised the Governor and Legislative leaders of its findings in a private report in April, 1993.

Yonkers Parking Authority

In a letter dated June 15, 1992, the Save Yonkers Federation, an umbrella organization comprised of thirty-two Yonkers taxpayer and civic associations, wrote to the Commission, asking that the Commission conduct an inquiry into the past procedures and practices of the Yonkers Parking Authority ("YPA") concerning the reimbursement of the YPA's expense account. In its letter, the Save Yonkers Federation also raised other issues concerning the hiring practices of the YPA and questionable out-of-town travel by certain YPA members at taxpayer expense.

The Commission commenced an investigation into these allegations and others which arose during the course of the Commission's inquiry. During the pendency of its investigation, the Commission interviewed a former employee of the YPA who alleged that the former YPA office manager, who was a close relative of a prominent Yonkers elected official, manipulated the time records of family and friends employed by the YPA by granting these individuals unauthorized leave with pay and allowing them to use leave time prior to their earning it. This individual also claimed that members and friends of the former YPA office manager's family were hired by the YPA solely to provide these individuals with health insurance coverage and that once

this coverage became effective their employment at the YPA was terminated without notice to the insurance carrier, resulting in several months of unearned coverage at the expense of the YPA. The former employee further stated that the previous administrator of the YPA, while Executive Director of the Yonkers Industrial Development Authority ("YIDA"), commingled YPA and YIDA funds.

The Commission's inquiry established that the errors in certain YPA employees' time-keeping and health insurance records were the result of incompetence on the part of the YPA office manager. The Commission, however, found no evidence that the former YPA office manager improperly manipulated these records to provide the affected YPA employees with unearned benefits. According to the evidence adduced by the Commission's investigation, the former YPA office manager allowed certain employees to use leave time prior to earning it; a practice which the YPA had discontinued prior to the Commission's review. Although the Commission uncovered evidence that the YPA continued to provide health insurance benefits to certain YPA employees after these individuals left the employ of the YPA, no claims were submitted during these extended periods of additional coverage and the health insurance carrier refunded the excess premiums paid by the YPA.

In response to an allegation that the funds of the YIDA and the YPA were commingled in connection with the salary of former YPA Executive Director, the Commission examined certain records, including a contract between the YIDA and YPA. The Commission found no evidence of commingling. To the contrary, there was a contractual relationship between the YIDA and the YPA concerning the former executive director's services.

The Commission's review, however, revealed that the YIDA's use of payments in lieu of taxes ("PILOTS") appeared to be outside the usual practice of other industrial development agencies investigated by the Commission. The Commission's inquiry established that when the YIDA received PILOTS from YIDA sponsored projects, the YIDA did not remit that portion of the PILOTS corresponding to real estate taxes which would otherwise be due Westchester County. Instead, the YIDA retained this portion of the PILOTS, using the monies to pay for administrative expenses of the

agency. The YIDA continued this practice notwithstanding a change in the law on August 7, 1992 mandating industrial development agencies to remit PILOTS to the appropriate municipality within thirty days of receipt of the monies by the agencies. The Commission also found that although the YIDA remitted the appropriate PILOTS to the City of Yonkers, it routinely held the money for excessive lengths of time, retaining any interest earned by these sums. Although the Commission questioned the YIDA's practice concerning PILOTS, it determined that the YIDA's actions concerning PILOTS was not illegal, since absent a written agreement between the YIDA and the effected municipalities, the YIDA was not required under the existing law to disgorge any PILOTS it collected.

During the pendency of the Commission's inquiry, the State Legislature enacted an industrial development reform bill on July 1, 1993, requiring industrial development agencies to distribute PILOTS in the same proportion as tax revenue absent an agreement to the contrary between an affected tax jurisdiction, *i.e.*, the municipality, and the industrial development agency. With this change in the law, the Commission determined that the issue of the YIDA's practice concerning the distribution of PILOTS was resolved; and accordingly, the Commission closed its inquiry into this matter.

Office of the Wyoming County District Attorney

In a letter dated February 9, 1993, a mother whose fourteen year-old daughter was the victim in an Endangering the Welfare of a Child prosecution in the Town of Eagle in Wyoming County, wrote to the Commission, complaining that an assistant district attorney in the Wyoming County District Attorney's Office failed to prosecute the case. In her letter to the Commission, the victim's mother also stated she informed the assistant district attorney assigned to the case about a similar incident in the Town of Attica involving this same defendant, a fifty-seven year-old male. According to the complainant, the assistant failed to make a scheduled court appearance in the Eagle prosecution, causing the case to be dismissed on speedy trial grounds. After conducting a preliminary inquiry into these allegations, the Commission unani-

mously authorized an investigation into the facts and circumstances surrounding the prosecutions of this defendant in the Towns of Eagle and Attica, and, on a broader scale, analyzed the management of criminal cases in Wyoming County.

The Eagle Case

On July 22, 1992, in the Town of Eagle, the defendant, while horseback riding with a fourteen year-old girl, led her into a densely wooded area with which she was unfamiliar, made sexual comments to her and asked if she wanted to have sex with him. Although the defendant kept the victim in this area for approximately two hours, he did not subject her to any physical contact. After the girl prevailed upon the defendant to let her go, she informed her parents about the incident. On August 3, 1992, after the victim's mother discussed the matter with the Wyoming County Mental Health and Sheriff's Departments, the Sheriff's Department interviewed the victim and she signed an accusatory instrument. The following day, August 4th, the Sheriff's Department arrested the defendant, charged him with Endangering the Welfare of a Child, a misdemeanor, and issued him an appearance ticket.

At his arraignment on August 24, 1992, the court advised the defendant to obtain an attorney and the case was adjourned to September 14, 1992. Prior to that date, the defendant secured an attorney who requested a further adjournment to September 21st. Subsequent adjournments were arranged by telephone; the Commission's review of the court records in this matter revealed that all adjournments appeared to have been chargeable to the prosecution.

The assistant district attorney to whom this case was assigned informed the Commission that when he first met the victim and her mother, they told him about an incident in Attica in which this defendant, while soliciting sex from a fifteen year-old girl, spoke of his desire to have sex with the Eagle victim and several other girls. The assistant told the Commission that, on November 5, 1992, he wrote to the Wyoming County Sheriff's Department, requesting information about the Attica incident and that the Sheriff's Department provided him with this information on December 28, 1992 at

which time he informed both the court and defense counsel of his readiness for trial.

On January 4, 1993, the defense, however, filed a motion to dismiss the case on speedy trial grounds, to which the assistant consented. The assistant told the Commission that he consented to the dismissal because he believed the Eagle victim would not be a good witness; and although he never interviewed the Attica victim, he concluded it would be more effective to prosecute the defendant on the Attica case alone. On January 11, 1993, the return date for the motion, the assistant, who never submitted a written response to the defendant's motion for dismissal, failed to appear in court. Accordingly, the court granted the defendant's motion, dismissing the case against him.

The Attica Case

On June 16, 1992, the defendant, while alone with a fifteen year-old girl in her home in Attica, said he wanted to have sex with her and six other young girls, including the Eagle victim. The defendant had no physical contact with this girl either and he left the house shortly after the girl's father arrived home. The girl informed her parents about this incident that day. On August 13, 1992, after learning of the incident in the Town of Eagle, the Attica victim contacted the Sheriff's Department and signed an accusatory instrument. Later that day, an arrest warrant was issued for the defendant.

The Sheriff's Department, however, failed to execute the arrest warrant until February 14, 1993, although the defendant's home address was known to the Sheriff's Department and the defendant had a pending case in Wyoming County. The Sheriff's Department informed the Commission that it delayed executing the arrest warrant at the request of the Wyoming County District Attorney, although the District Attorney, when interviewed by the Commission, had no recollection of such a conversation. On March 5, 1993, the defense submitted a motion to dismiss the Attica prosecution on speedy trial grounds, citing the six month delay between the issuance and the execution of the arrest warrant. By April 21, 1993, a plea agreement had been reached in the Attica case.

The Commission interviewed the assistant district attorney assigned to the Attica prosecution, who stated that he thought the case was subject to dismissal on speedy trial grounds, since both the District Attorney's Office and the Sheriff's Department knew of the defendant's whereabouts while the warrant was pending. The judge who presided over the Attica case, informed the Commission, that, but for the plea agreement, he might have dismissed the case due to the six month delay in executing the arrest warrant. The judge also told the Commission that he believed this delay caused the assistant to agree to the disposition which the case received.

Case Management

In interviews with defense attorneys, judges and criminal justice officials in Wyoming County involved in the Attica and Eagle cases, the Commission inquired into case management in the county criminal justice system on a broader scale. The Commission also examined justice court files for numerous criminal court cases. The Commission concluded there were several problems with the management of criminal cases in the county. In a letter dated November 3, 1993, the Commission informed the Wyoming County District Attorney of its findings, conclusions and recommendations.

Conclusions

The Commission concluded that the performance of the assistant district attorney responsible for the prosecution of the Eagle case was woefully inadequate. In the Commission's view, this prosecutor exhibited questionable legal judgment and inadequate case management skills. In terms of case management, although the assistant acknowledged to the Commission that he could have announced his readiness for trial at the onset of the case, he failed to do so until after the case was subject to dismissal. His questionable legal judgment and inefficient case management provided a disservice to the victim and to Wyoming County. The Commission found no basis for ascribing fault to any

individual for the delay in executing the arrest warrant in the Attica case. On a broader scale, however, the Commission concluded that improvements were needed in criminal case management in Wyoming County.

The Commission found a lack of communications between the Sheriff's Department and the District Attorney's Office, in that, copies of arrest paperwork were not provided to the assigned assistant district attorneys in a timely manner. Moreover, a defense attorney who practices in Wyoming County informed the Commission that she occasionally had to supply assistants with copies of accusatory instruments due to the delay in forwarding the case paperwork. In the Commission's view, these delays could have a deleterious impact on the prosecution of cases. Additionally, the Sheriff's Department informed the Commission that, although the Sheriff's Department retains information concerning misdemeanor arrests and warrants, this information is sent only to the assigned assistant and not to a central location in the District Attorney's Office.

The Commission also noted problems in determining to whom adjournments are chargeable. Court records reviewed by the Commission failed to provide a sufficient basis upon which the Commission could determine to whom the adjournments were chargeable. In light of the informal manner in which adjournments are granted in the justice courts and the lack of a stenographic record, the Commission concluded that the District Attorney's Office should maintain accurate information indicating the basis for all adjournments. For example, if the prosecution had a valid defense to the motion to dismiss in the Eagle case, the Commission determined that, based upon its review of the court's file and the assistant's file, a documentary basis for the defense would not have existed.

Recommendations

In regard to the assistant responsible for the Eagle prosecution, the Commission recommended that the District Attorney take whatever remedial action he deemed appropriate. Regarding the handling of the Attica case, the Commission recommended that the District Attorney request his office receive formal notification from the Sheriff's Department and other police

agencies whenever arrest warrants are issued for defendants against whom prosecutions are known to be pending, since a formalized procedure would provide a better opportunity for appropriate steps to be taken with regard to the warrant. To reduce communication delays between the Sheriff's Department and the District Attorney's Office, the Commission recommended that copies of all arrest documents be telefaxed to the assistants shortly after these materials are prepared.

The Commission also suggested that the District Attorney's Office collect information on all pending prosecutions at the earliest opportunity and that this information be entered into a computer case tracking system with periodic updates to reflect adjournments and dispositions. Moreover, the computer should be programmed to generate automatic reports warning of impending speedy trial problems in cases. The Commission provided information to the District Attorney concerning a case tracking system developed by the New York State Division of Criminal Justice Services.

Hempstead Civil Service Commission⁵

At the request of the New York State Civil Service Commission ("the Civil Service Commission"), the Commission undertook a limited inquiry into allegations of improper political influence in civil service hiring in the Town of Hempstead. The Commission's inquiry followed an independent investigation by the State Civil Service Department into allegations of various improprieties in Hempstead civil service, during which the State Civil Service Department concluded that a violation of criminal statutes may have occurred. In order to better evaluate any potential criminal charges, the Civil Service Commission requested that this Commission evaluate this one aspect of the case.

The Commission sought to determine whether criminal violations of civil service law occurred in connection with the appointment of the incumbent to the position of Deputy Commissioner of Purchasing for the Town of Hempstead ("Hempstead") or with other individuals who declined appointments to Hempstead

civil service positions. During its investigation, the Commission interviewed thirty-nine individuals, including every person with information pertaining to this appointment, and every available person who declined a Hempstead civil service appointment since March, 1988.

With regard to the appointment of the incumbent as the Deputy Commissioner of Purchasing for Hempstead, the Commission determined there was evidence that the civil service system was manipulated to insure the incumbent's selection, but found no evidence that such manipulation was politically motivated. Furthermore, the Commission found no evidence of any criminal violations of the civil service laws concerning other civil service appointments in Hempstead.

The Appointment of the Hempstead Deputy Commissioner for Purchasing

In 1987, the incumbent in the position of Deputy Commissioner in the Hempstead Department of Purchasing, received the fifth highest score on the civil service examination for that position. This individual, who also was a member of the Hempstead Republican Committee, had been serving in this position provisionally since 1986, and had worked since that time for the Commissioner of the Purchasing Department. Since the civil service test for this position had been administered, civil service law required that an appointment to the permanent position be made from among the willing candidates with the three highest scores. After two other candidates were found ineligible for appointment, the incumbent became eligible as one of the top three candidates and received the appointment.

The Commission interviewed the Hempstead Purchasing Department Commissioner and the other candidates who attained the five highest scores on the civil service examination for this position, with the exception of one individual who died before the initiation of the Commission's inquiry. Three of these four individuals were registered Republicans, although only one was politically active.

⁵ At the conclusion of this investigation, the Commission forwarded its finding in a private report to the State Civil Service Commission without publicly releasing this information. Subsequently, the Commission's report was publicly released by the State Civil Service Commission.

The candidate receiving the highest score advised Commission staff that during his employment interview with the Hempstead Purchasing Department Commissioner he informed the Commissioner regarding his inability to assume the position for three weeks. According to the candidate, the Commissioner expressed no concern over this request nor did he advise the candidate that time was of the essence. The candidate signed an interview form, on which he indicated his unavailability. He did not believe, however, that by signing this form he was declining the position of Deputy Commissioner for Purchasing.

The third highest scoring candidate, a female, was subjected to improper suggestions in an effort to cause her to decline the appointment. For example, during her employment interview with the Purchasing Department Commissioner, the Commissioner repeatedly emphasized the negative aspects of the position, explaining that she would have to work in a basement office and opining that the position would be very demanding for a woman like herself with three children. This candidate also recalled the Commissioner advising her that he had a good dedicated employee, ranked number five on the examination list whom he wanted to appoint to the permanent position, and that he had to be careful about what he said. According to the female candidate, the Commissioner appeared to be impressed with her experience and background; however, he offered her a position as an Assistant to a Deputy Commissioner. She informed Commission staff that, after failing to receive any notice to report to work, she telephoned the Commissioner's office and spoke with his secretary who informed her that two candidates had declined the position thereby making it possible for the incumbent to be appointed. The secretary also told this candidate that since the incumbent had been appointed, there would be no position for her.

The fourth highest scoring candidate died in May, 1988. By a letter dated August 25, 1987, he removed himself from consideration for the appointment as the Commissioner's assistant, stating that he was unavailable for appointment until March 1, 1988. His widow informed Commission staff that her late husband had been pressured to remove himself from consideration and that in exchange for his withdrawal, he was promised and was given, a \$1,000 pay raise at the Department of Public Safety in exchange for his

declination. The Commission's review of Hempstead Civil Service records revealed that this candidate received a \$1,000 raise on September 7, 1987, less than two weeks after he notified Hempstead Civil Service that he was unavailable for appointment as the Deputy Commissioner of Purchasing.

In the Commission's interview of the Hempstead Purchasing Department Commissioner, he contradicted much of what the applicants told the Commission and attempted to provide reasons for declining to appoint each candidate who scored higher on the civil service examination than the incumbent. For example, the Commissioner stated that, in his opinion, the highest scoring candidate was the least prepared to fill the position, since his expertise was primarily in doing business with Russians. The Commissioner also contended that he clearly advised this candidate that the position had to be assumed within two weeks, although no such requirement was contained in the description of the job. The Commissioner acknowledged having this individual sign a note reflecting the candidate's unavailability to assume the position for several weeks, thereby creating the justification for removing this individual's name from the list of eligible candidates.

The Hempstead Purchasing Commissioner also offered other non-compelling reasons justifying his actions in appointing the incumbent as his assistant rather than a higher scoring candidate. He denied pressuring the deceased candidate to decline the position. The Commissioner informed the Commission that he was impressed with the qualifications of the female candidate and stated that he would have appointed her to the position if he had been unable to appoint the incumbent. He denied offering her an alternative position.

The Hempstead Purchasing Department Commissioner explained to this Commission that the civil service system provides a degree of flexibility in the selection of candidates. Although the Commissioner conceded that the appointment of the incumbent was a little unusual, he claimed that the situation ultimately was resolved to his satisfaction since one applicant did not want the job and the other was not available within the Commissioner's time frame. He further stated that he had known the incumbent for approximately fifteen years, describing this individual as "his right arm."

Conclusions

In the Commission's view, there was substantial evidence that the Hempstead Purchasing Commissioner unfairly manipulated the civil service system in order to appoint the incumbent, his candidate of choice. Based upon the Commission's interviews of the other candidates and the wife of the deceased applicant, the Commission concluded that while the Commissioner's explanations for his actions were less than compelling, they were not politically motivated. The Commission further determined that the Commissioner's maneuvering did not constitute any criminal violations of the civil service laws.

Although the death of one of the candidates prevented the Commission from fully evaluating the facts and circumstances surrounding his withdrawal from consideration, the fact that he was approved for and received a substantial pay raise in the permanent civil service position he held at another county agency within two weeks of his declination provided some corroboration for the allegations made by his widow. With regard to the highest scoring candidate, the Commission concluded that, although the signed note indicating his unavailability until after October 1, 1987 was genuine, this individual did not comprehend that by signing this document, he was, in fact, declining the position. The Commission also concluded that the Commissioner told the female candidate that the position as his assistant involved tedious work in unpleasant surroundings and that, by these and other statements made during her employment interview, he was attempting to induce her to decline the position. Similarly, when the Commissioner offered her a position as an Assistant to a Deputy Commissioner, rather than as his assistant, he was attempting to remove her from the incumbent's path.

The Selection Process in Hempstead

In response to allegations that applicants for civil service positions were pressured to decline appointments to make way for politically connected applicants,

the Commission interviewed virtually all applicants who declined positions within a three year period. No applicant told the Commission that he or she had been pressured to decline an appointment. From March, 1988 through March, 1991, there were twenty individuals who declined appointments to Hempstead civil service positions in thirteen separate job titles, four of whom declined more than one position. The Commission interviewed eighteen of these twenty individuals and the individuals ultimately appointed to these positions.

All the individuals assured the Commission that their declinations were not the result of any pressure, political or otherwise, exerted on them. All but one of the candidates were registered Republicans, although only one was a Republican Committee member. In the Commission's view, each of the individuals interviewed articulated a reasonable basis for declining the appointment, such as using the civil service test for a position in which they had no interest in order to hone their testing skills or having obtained better paying jobs after taking the examinations. The Commission found no evidence that two individuals ultimately hired, who were Republican Committee members, obtained their appointments as a result of their status as Committee members. Moreover, State Civil Service could not locate any complaint letters in state or local files alleging that candidates for any Hempstead civil service positions had been pressured or deceived into declining appointments.

Criminal Violations of the Civil Service Law

It is a crime to request or provide information about a civil servant's political affiliations with the intent that the information be used to determine fitness for a competitive civil service position. These prohibitions also extend to candidates for competitive civil service appointments. With respect to the appointment of the provisional incumbent as the Hempstead Purchasing Department Deputy Commissioner, the Commission found no evidence that any one requested or provided information about the political affiliations of the candidates.

It is also a crime to "defeat, deceive or obstruct" the right of any person to a civil service appointment. The Commission, however, found no reported cases involving criminal prosecutions under this section or its predecessor. Application of this statute in the context of the appointment of an applicant as the Hempstead Deputy Commissioner of Purchasing would be difficult, since no individual applicant had a "right" to the appointment and the Commissioner was not obligated to select any particular candidate. In the Commission's view, criminal charges under this section of the law would not be warranted in this matter, since eligible candidates only have the right to be considered for positions and a hope of being appointed.

In May, 1993, the Commission forwarded its findings in a private report to the State Civil Service Commission for whatever further action that agency deemed appropriate. Subsequently, the State Civil Service Commission forwarded this report to the Nassau County District Attorney's Office and the Hempstead Civil Service Commission. As of the date of this report, the State Civil Service Commission has not taken any further official action in this matter.

Dutchess County Telephone Bids

In a letter dated March 16, 1993, a resident of Dutchess County requested that the Commission conduct an investigation into the circumstances surrounding a proposed telephone service agreement between Dutchess County and the New York Telephone Company ("NYTEL") for a new county government telephone system. The complainant, a former employee of NYTEL, alleged that Dutchess County's plan to lease a new telephone system from NYTEL was more costly than simply purchasing a similar network from another vendor. The complainant also claimed that the County violated State law by failing to bid the proposed telephone service agreement before awarding it to NYTEL and that NYTEL executives "wined and dined" the Dutchess County Executive in order to secure his support for this agreement.

Commission staff interviewed the complainant on two occasions concerning her allegations. The Commission also interviewed officials from the New York State Public Service Commission, the New York State Office of General Services, the New York City Department of Telecommunications and Energy and the Dutchess County Purchasing Officer regarding the applicability of State competitive bidding requirements to telephone service contracts.

The Commission's inquiry established that an agreement to purchase telephone services consisting of dedicated telephone lines and actual dialtone service constituted a regulated public utility which is not subject to competitive bidding. Officials from the State Public Service Commission, the State Office of General Services and the New York City Department of Telecommunications and Energy informed the Commission that agreements to purchase or to lease telephone service from a telecommunications company are outside the restrictions of the State's competitive bidding laws. Since Dutchess County's proposed agreement with NYTEL concerned the purchase of telephone service, this contract would not be subject to the restrictions of the State's General Municipal Law.⁶ The Commission also determined that the Dutchess County Executive did not violate the County's purchasing procedures when he recommended the proposed NYTEL agreement to the County Legislature for its review and approval. In the Commission's opinion, the other issues raised by the complainant, such as, the cost of the NYTEL system to Dutchess County, did not warrant Commission action; and accordingly, the Commission closed its inquiry.

A Rape Case In St. Lawrence County

In July, 1993, Governor Mario M. Cuomo, through his Director of Criminal Justice Services, requested that the Commission investigate certain aspects of a multiple defendant rape case in St. Lawrence County, New York. The St. Lawrence District Attorney had permitted the five defendants to plead guilty to misdemeanor charges of Sexual Misconduct in satisfaction of the felony rape

⁶ Since January 1, 1992, New York State General Municipal Law §103 requires municipalities to bid all public works contracts involving an expenditure of \$20,000 or more and all purchase contracts costing at least \$10,000.

charge pending against them. In return for their pleas, the Town Court fined each defendant \$750.00 and, in addition, ordered one defendant to perform 200 hours of community service. The victim, her family, numerous women's rights ad-vocacy groups and concerned citizens, both in St. Lawrence County and other parts of the nation, expressed outrage over the disposition of the case and the lenient sentences imposed on the five defendants by the Town Court. The victim called upon the Governor to investigate this matter. Following a preliminary review of this case, the Commission, by unanimous resolution adopted on July 16, 1993, authorized an investigation into the facts and circumstances surrounding the incident and law enforcement's response to it.

Facts

In the early morning hours of October 26, 1991, a twenty-three year-old woman was allegedly raped by five men in a bar located in the town in which she resided. The victim had no recollection of the incident. She learned of the attack some two weeks later, after hearing rumors which had circulated in the town about the events of that morning. The victim reported the attack to the New York State Police, who conducted an investigation. As a result of the investigation, the State Police arrested five men on charges of first degree rape. Four of these men provided incriminatory statements to the State Police.

The cases against all five defendants were presented to a St. Lawrence County grand jury by an assistant district attorney. Indictments were obtained against all five defendants. The case was subsequently personally handled by the St. Lawrence County District Attorney because the assigned assistant left the District Attorney's Office. The County Court, upon motion of the defendants, reviewed the grand jury minutes and found the indictments to be legally sufficient. In subsequent hearings, the Court suppressed the statement of one of the four defendants who had provided a statement to the State Police. The Court then ordered separate trials for each of the five defendants.

Prior to trial, the District Attorney offered to allow all five defendants to plead guilty to misdemeanor charges,

with no recommendation as to sentence. While the superior court indictments were still pending, the District Attorney filed new accusatory instruments in Town Court, charging each defendant with Sexual Misconduct, a class A misdemeanor. Based upon the District Attorney's recommendation, the Town Court Justice accepted five misdemeanor pleas and fined each defendant \$750. One defendant was also ordered to perform 200 hours of community service. In public statements, the District Attorney maintained that he accepted the pleas because the cases were all legally insufficient as a matter of law, and he could not have obtained convictions.

The Commission's Preliminary Investigation and Conclusions

Pursuant to Court order, the Commission obtained and reviewed the grand jury minutes. The Commission also obtained and reviewed the court records, the police records and the District Attorney's files. The Commission interviewed numerous individuals. The Commission limited its preliminary analysis to the legal issues in the case, without addressing other prosecutorial considerations, such as witness cooperation or trial strategy.

After a review of the facts and relevant case law, the Commission concluded that, contrary to the District Attorney's assessment, sufficient evidence exists to corroborate the three confessions which the County Court held were legally admissible. Additionally, the Commission found that a legal basis existed for reinstating the indictments. The guilty pleas accepted in Town Court were jurisdictionally defective since indictments were still pending in County Court. Since the Town Court lacked legal authority to accept the pleas, the local court dispositions were, as a matter of law, a nullity. In dismissing the indictments five days after the pleas were taken, the County Court relied on these illegal misdemeanor dispositions, as well as the District Attorney's erroneous assessment of the law pertaining to the merits of the case. Under these circumstances, the trial court has the authority to restore the cases to their pre-dismissal status. Reinstatement of the indictments would nullify the errors committed without violating any of the defendants' constitutional or statutory rights.

Recommendations

In a private report to the Governor, the Commission recommended that a special prosecutor be appointed to handle the task of reinstating the rape indictments and prosecuting those cases which could proceed. In the Commission's view, the appointment of a special prosecutor was necessary because the St. Lawrence County District Attorney failed to make a strong effort to prosecute the case during the time his office handled the matter. For example, he did not interview any of the witnesses, he did not contact the victim until after he had offered misdemeanor pleas to the defendants and he apparently did not familiarize himself with the current law regarding relevant legal issues.

Furthermore, it was apparent to the Commission that the District Attorney no longer had the trust of the victim in this case and, in the Commission's opinion, it would be difficult for him to regain her confidence. The victim informed the Commission that, notwithstanding her willingness to proceed to trial in the case, the District Attorney never contacted her about the case and disposed of the matter without first informing her of his decision. The District Attorney's handling of the case had been criticized by the media, local community leaders and the victim's family, and his public response to these concerns had exacerbated the distrust that existed.

Finally, the Commission believed that the District Attorney would be unable to disregard his prior assessment of the case and proceed with a new prosecution. In interviews with Commission staff, the District Attorney maintained that these cases were factually and legally insufficient. If the District Attorney were to re-prosecute this case, he would be compelled to admit that this prior assessment was wrong. The appointment of a special prosecutor would allow a fair and unbiased evaluation of the strength and weaknesses of the case. It would also enhance the likelihood that victim would cooperate in good faith with the prosecution. Finally, in the Commission's view, a special prosecutor was required to help restore the public's confidence in the criminal justice system in St. Lawrence County.

TABLE OF REPORTS 1958-1993

1990-1993

An Investigation Into the Conduct of Warren County District Attorney William E. Montgomery, III

For the Record: A Report on the Regulation of Stenographic Reporters in New York State

An Investigation into Bail Bond Practices in Cayuga County

Investigation into the Sale and Closing of Roosevelt Raceway

Investigation into the Death of Ricky McCargo

Traffic Enforcement Agents in Lower Manhattan: A Misnomer

1980-1989

Nassau PBA Arbitration

Disease in the Dairy Cattle Industry: The Albert Mendel & Son Case

A Trust Betrayed: Fraud, Breach of Fiduciary Duty and Waste at the Teamsters Local 237 Welfare Fund

Corruption and Abuses in the Correctional System: The Green Haven Correctional Facility (including the Escape of Albert Victory)

The Investment of Public Funds by the New York State Dormitory Authority

A Disclosure of Attica Grand Jury Information: WHEC-TV's Documentary "Attica - Ten Years Later"

The Westchester County Jail Disturbance

The Co-Op City Repair Program

Sales and Use Tax Evasion by Boat Owners and Dealers

Corruption and Fraud in the Bedford-Stuyvesant Urban Development Corporation

New York State's Private Security Guard Industry: The Need for Regulatory Reform

The New York State Prevailing Wage Law: An Investigative Analysis

An Investigation of Allegations Arising from the Liberal Party Factional Dispute

The Westway Environmental Approval Process: The Dilution of State Authority

Investigation of the Building and Construction Industry: Minority Business Enterprise Programs

A Vehicular Death in St. Lawrence County - Duties Neglected and the Need for Improved Accident Investigation Training in Rural Counties

The Multi-Town Solid Waste Management Authority and the Crisis of Solid Waste Management

The New York City Prisoner Release

Investigation of the Building and Construction Industry: Report of Conclusions and Recommendations

Urban Development Corporation Employment Contracts

Concor Associates, Inc.

A Report on the World Trade Center Move-out

An Investigation of the New York City Taxi and Limousine Commission: Findings and Recommendations

A Case Study in Bureaucratic Failure and Stonewalling: The New York State Department of Agriculture and Markets Investigates Adulterated Apple Juice

The Collapse of the Schoharie Creek Bridge: New York State's Inadequate Bridge Inspection Program

An Investigation of the Participation of Public Officials and Employees in Betasoft, Inc. and Charter Account Systems, Inc.

Justice Disserved: An Inquiry into People v. Whitton

An Investigation into Allegations of Racial Bias Practiced by Criminal Justice Authorities in Orange County

An Investigation of the Suffolk County District Attorney's Office and Police Department

An Investigation into Allegations of Misconduct by the Westchester County Commissioner of Public Safety

Political Solicitations at the Niagara Frontier Transportation Authority and the Prohibition in Civil Service Law § 107 Against Political Fund Raising from Public Employees

1970-1979

Racketeer Infiltration into Legitimate Business

The Troy Garage Disposal Contract and Other Matters in Troy and Rensselaer County

An Alleged Attempt to Bribe Legislators in Connection with the Quarter Horse Harness Race Track Hill

Supervisory and Reviewing Functions of the Public Service Commission

The Construction of the Traphagen Elementary School in Mount Vernon, Westchester County

Narcotics Law Enforcement and Related Problems in the New York City Metropolitan Area

Illegal Gambling Activities in a Bronx County Social Club and the Ineffectiveness of Gambling Law Enforcement

Alleged Irregular Practices and Official Misconduct in Connection with Construction of Sewers on Staten Island, Richmond County

Racketeer Infiltration into the Sex-Oriented Materials Industry in New York City

Allegations Made by a Former Police Commissioner of New Rochelle of Political Interference in his Department

The Awarding of Contracts and the Purchases of Supplies by the City of Yonkers

The Illegal Importation and Distribution of Untaxed Cigarettes in New York State

Operations of West Hempstead (Nassau County) School Board No. 27

Alleged Collusive Bidding and School Busing Contracts in Nassau County

Real Estate Tax Assessments in the City of New York

Purchasing Practices and Procedures and Other Related Matters of the City of Albany

The Police Department and the Village Justice of the Village of Saranac Lake

Police Corruption and Related Matters in the City of Albany

The Criminal Justice System in New York City

a. Discipline of the Judiciary in the First and Second Departments

b. The Warrant Division of the New York City Police Department

c. The Availability, Illegal Possession and Use of Handguns in New York City

The Administration of the Estate of Elsie M. Owen, an Incompetent Person, in Putnam County

The State Commission of Correction

Contracting Practices and Procedures of the New York City Board of Education and Related Matters

Infiltration and Financial Investments by Organized Crime Elements in Legitimate Businesses and the Improper Use of Union Welfare Funds

The Operation and Management of Rehabilitation and After-Care Facilities of New York State Office of Drug Abuse Services

The State Racing and Wagering Board

a. Initial Report -- The Financial Condition and Operations of Roosevelt and Yonkers Raceways and their Regulation by the State Racing and Wagering Board

b. Second Report -- The State Racing and Wagering Board

c. Third Report -- State Licensing Agencies and Emprise Corporation

Report on Improper Disclosures of Grand Jury Proceedings

Waste and Solid Waste in Putnam County

The Nadjari Office and the Press

The Sheriff's Jury of New York County

The Sheriff's Department of Dutchess County

Onondaga County District Attorney's Office: The Anthony Alois Cases

Life and Death at the Bronx Psychiatric Center

After Ten Years of Educational Opportunity Programs (EOP) in New York State

The New York State Office of Vocational Rehabilitation

The Department of Motor Vehicles (DMV) Under Three Commissioners

Insurance Commissions and Party Politics I

Law Enforcement and Gambling in the City of Amsterdam

Insurance Commissions and Party Politics II

Fencing: the Sale and Distribution of Stolen Property

Insurance Commission and Party Politics III

Personnel Abuses at the Department of Labor

1960-1969

The Wiretapping Dilemma

Gambling and Corruption in Piermont, Rockland County

Special Unit Investigations into the Affairs of the City of New York

a. The Purchase of Rock Salt by the City of New York

b. Bureau of Real Estate

c. Electrical Inspectors of the Department of Water Supply, Gas and Electricity of the City of New York

d. New York City Lighting Maintenance Contracts

Law Enforcement in Buffalo

Syndicated Gambling in Central New York

Real Estate Tax Delinquencies in Albany County

Bingo Operations in New York State

Fraud and Waste of State Funds in the Construction of Yonkers Raceway

The New York City School Construction Program

An Inquiry into Certain Matters as Requested in a Presentation of the Special Grand Jury of Suffolk County

Syracuse Police Department

Misconduct by the Mayor of Johnson City, Broome County

Purchasing Practices and Procedures of Albany County

Pistol Licensing Law and Procedures in New York State

Gambling and Law Enforcement in Westchester County

Loan-Sharking Operations in New York State

Charges Involving County Executive Eugene H. Nickerson and District Attorney William Cahn of Nassau County

Narcotics Addiction in New York State

Organized Crime Activities and Problems of Law Enforcement in Rochester

County Jails and Penitentiaries in New York State

Charges Relating to the Organization of the 1965 New York State Legislature

The Limited-Profit Housing Program

Law Enforcement Problems in Niagara Falls

Racketeer Activities in the Air Freight Industry

The Conduct of Public Officers and Public Employees in Connection with an Application to the State Liquor Authority for a Liquor License

Conduct of Sheriff Robert W. Burns of Wayne County

The New York City Municipal Hospital Affiliation Program

Racketeer Activities in Mason Tenders Union Locals

The Management and Operations of the Lackawanna Police Department

1958-1959

The Apalachin Meeting

The Police Department of the Town of Hamburg, Erie County

Professional Gambling and Law Enforcement in the City of Ithaca, Tompkins County

An Investigation of Harness Racing Commissioner George P. Monaghan and Related Matters

Criminal Activities in the City of Utica, Oneida County

Copies of most of the public reports of the investigations noted in this section are still available. Requests should be made in writing, by mail only, to the Commission's New York City office. A fee of five dollars for reports still in print and ten dollars for reports out of print, in check or money order (do not send cash), plus mailing costs, must be enclosed for each copy of a report requested. The cost of the two volume Roosevelt Raceway report is twenty dollars (\$20.00).

THE COMMISSION OF INVESTIGATION

BACKGROUND

New York and other states have found it necessary, over the years, to create commissions to conduct investigations of problems dealing with crime, racketeering and corruption. In New York, a "State Crime Commission" was established by Governor Thomas E. Dewey in 1951 to "investigate generally the relationship between organized crime and any unit of government anywhere in the State, and to "examine into the relationship between the government of the State and local criminal law enforcement." Governor Dewey also directed the Crime Commission to address "whether any new State agency of investigation or supervision is desirable to keep a continuous check on criminal law enforcement throughout the State."

The State Crime Commission recognized the failure of law enforcement under certain conditions to cope with organized crime and corrupt officials. In January, 1953, having collected evidence of corrupt and ineffective law enforcement throughout the State involving sheriffs, police departments and district attorneys, the Crime Commission recommended the establishment of a permanent Commission of Investigation and stated:

[i]t is the strong view of this Commission that the creation of such a permanent Commission of Investigation, having members, counsel and staff of the highest calibre, would be a long step forward in destroying the stranglehold which organized crime has had in various areas upon the administration of the criminal laws in this State.

On the basis of this strong recommendation, the Legislature established the Office of Commissioner of Investigation in the State's Executive Department, headed by a single Commissioner. See Act of July 2, 1953, ch. 887, 1953 N.Y. Laws; N.Y. Executive Law § 11.

Establishment of the Commission and its Enabling Act

The need for a statewide investigative agency was confirmed by the experience of the Office of Commis-

sioner of Investigation as well as by the studies of a Joint Legislative Committee on Government Operations established in 1955. The Temporary Commission of Investigation was created in 1958, pursuant to Article V, Section 3 of the State Constitution, which allows the Legislature to create "temporary commissions for special purposes."

The enabling act of the Commission of Investigation, Act of April 25, 1958, ch. 989, 1958 N.Y. Laws; N.Y. Unconsolidated Laws, Section 7501, *et seq.*, was approved on April 25, 1958 by Governor Averell Harriman, who stated his conviction that the Commission "will be effective in dealing with the important area of criminal investigation which is assigned to the new Commission by this measure." 1958 McKinney's Sess. Laws of N.Y., at 1847 (Message of Governor Averell Harriman). The Act became effective and the first Commissioners took office on May 1, 1958.

The Commission has 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, and of public corporations and authorities;
- c. any matter concerning the public peace, public safety and public justice.

The Commission also conducts investigations and assists the Governor in connection with:

- a. the removal of public officers;
- b. the making of recommendations by the Governor to any other person or body, with respect to the removal of public officers; and
- 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.

In addition, the Commission can investigate the management of affairs of governmental bodies, advise and assist district attorneys or other law enforcement officers; cooperate with the United States government in the investigation of violations of the federal laws within the State; and examine matters and exchange informa-

tion with officials in other states relating to interstate law enforcement problems.

The Commission has been granted a variety of law enforcement tools to carry out its statewide functions. Witnesses may be subpoenaed and compelled to testify under oath or affirmation at private and public hearings under threat of penal sanctions. The Commission may require the production of records or other evidence. All governmental bodies in the State are statutorily required to cooperate with and assist the Commission in the performance of its duties. The Commission also has the important power to confer immunity from prosecution in accordance with Section 50.20 of the Criminal Procedure Law.

Information, including the names of witnesses or evidence gathered by the Commission, is protected from disclosure by several statutory rules of confidentiality. Violators of the confidentiality provisions of the Commission's statute are subject to penal sanctions. See N.Y. Unconsolidated Laws § 7505.

Investigatory findings, which are made public, are published in annual or interim reports. Reports of Commission investigations are provided:

1. to the Governor and Legislature -- for remedial executive or legislative action;
2. to prosecutors or State agencies -- for criminal prosecution or disciplinary action, including the removal of public employees; and
3. to the State Attorney General -- for civil monetary recovery where appropriate.

Reports are also generally made available to the public. Since its creation, the Commission has issued more than 100 public reports of its investigations and has conducted numerous public hearings. The Commission also keeps the public informed concerning the operations of organized crime and problems of criminal law enforcement in the State.

The Commission, originally created by the Legislature for a five-year term ending on April 30, 1963, has

been continuously extended, usually for additional two-year terms, in recognition of the importance of its work and the need for its existence as a uniquely independent, bi-partisan, investigative and fact-finding body. The Commission's term, which expired on April 30, 1992, was extended by the Legislature for an additional two years to April 30, 1994. Act of April 10, 1992, ch. 55, 1992 N.Y. Laws S.7589/A.10565.

Related Statutes

The functions, powers and duties of the Commission are directly affected by several statutes which define the procedures used to conduct investigations. The following are some of the relevant statutes.

Civil Rights Law Section 73, the Code of Fair Procedure for Investigatory Agencies, describes certain rights granted to witnesses who appear before specified agencies, including the Commission, such as:

1. the right to review a copy of Section 73 prior to attendance;
2. the right to representation and participation by counsel;
3. the right, in appropriate circumstances, to enter a written or sworn statement upon the record;
4. the right, in specified circumstances, to be provided with a transcript of testimony; and⁷
5. such additional rights and privileges as may be granted by the Commission.

Penal Law Section 215.65, Criminal Contempt of a Temporary State Commission, makes it a Class A Misdemeanor for a duly subpoenaed witness to fail or refuse to appear at a hearing or investigation of the Commission without lawful cause. Civil sanctions are also provided for a person who fails to appear, or appears and is uncooperative.

⁷ During the pendency of an investigation, a witness before the Commission has an absolute right to examine and review his prior testimony, in the presence of counsel, before testifying. In addition, subsequent to appearing before the Commission, a witness may review a transcript of his testimony at the offices of the Commission upon written request to the Commission. Copies of testimony will not, however be provided during the pendency of an investigation in order to ensure the integrity of the investigation process. At the conclusion of an investigation, a witness shall be entitled to a copy of his own 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.

Civil Practice Law and Rules 2308, Disobedience of a Subpoena, provides civil sanctions for a person who fails to appear or appears before the Commission and is uncooperative. In such circumstances, the Commission may move in the Supreme Court for an order of compliance and, under certain circumstances, the Court may issue a warrant directing a Sheriff to bring the witness before the Commission or to imprison a witness for failure to answer questions or supply records.

Criminal Procedure Law 2.10(3) designates the investigators of the Commission of Investigation as Peace Officers.

Structure of the Commission

The Commission was originally composed of four Commissioners. In 1983, Act of Sept. 27, 1983, ch. 1001, 1983 N.Y. Laws, the Legislature amended the Commission's enabling act to provide for six Commissioners: two each appointed by the Governor, the Temporary President of the Senate and the Speaker of the Assembly. A member of the Commission is designated as Chairperson by the Governor and serves as such at the Governor's pleasure. No more than three of the Commissioners may belong to the same political party. While bi-partisan in organization, the Commission is non-partisan in operation.

Donald O. Chesworth was named Commissioner and Chairman by Governor Mario M. Cuomo on January 31, 1990. Commissioner Earl W. Brydges, Jr. was appointed by the Temporary President of the Senate on December 27, 1972. Commissioner Thomas J. Culhane was appointed by the Speaker of the Assembly on September 19, 1977. Commissioners Brydges and Culhane have served continuously since appointment. Senator Ralph J. Marino, President of the Senate Pro Tem, appointed Salvatore R. Martoche to the Commission on July 10, 1990. Governor Mario M. Cuomo appointed Joseph S. Dominelli as Commissioner on January 19, 1990. Former Speaker of the Assembly, Mel Miller appointed William F. Passannante Commissioner on January 23, 1991 to replace Alton R. Waldon, Jr., who was elected to the New York State Senate on November 6, 1990.

The Commission's enabling act provides that:

[t]he commission shall be authorized to appoint and employ and at pleasure remove deputy commissioners, counsel, an executive officer, investigators, accountants, clerks, and such other persons as it may deem necessary....

Currently, in addition to the six Commissioners, there are twenty-seven staff members. A substantial portion of the staff is composed of experienced investigators and accountants who conduct the field work for the Commission's investigations and are designated Special Agents. The Commission's investigative staff has, on occasion, been supplemented by investigators from the Division of State Police. In addition, there is a chief counsel/deputy commissioner, a general counsel, a number of assistant counsels and a paralegal. Under the direction of the Commissioners, the legal staff oversees the investigations, gathers evidence, conducts hearings, prepares public reports, acts as liaison to prosecutorial agencies and is the Commission's legal representative in the State and federal courts. The functions of the Commission are assisted by an administrative staff.

PROFILE OF COMMISSIONERS 1993



DONALD O. CHESWORTH, Democrat of Monroe County, was appointed Chairman of the Commission on January 19, 1990, by Governor Mario M. Cuomo. Chairman Chesworth served as Second and First Assistant District Attorney for Monroe County from 1976 through 1981, before becoming District Attorney of that county in 1981. He served in that position from 1981 until August, 1983, when Governor Cuomo appointed him Superintendent of the New York State Police, where he served through 1986. In addition, the Chairman was a Special Agent with the Federal Bureau of Investigation from 1966 through 1972. From 1972 through 1975, he engaged in the private practice of law in Rochester, New York. He was admitted to practice law in Connecticut in 1966 and in New York in 1972. Chairman Chesworth graduated from Graceland College and Yale University Law School. The Chairman also has held various leadership positions with law enforcement organizations, including the New York State District Attorneys' Association, from which he received the Frank S. Hogan Criminal Justice Award in 1985, the New York State Association of Chiefs of Police and the International Association of Chiefs of Police, where he chaired the Organized Crime Committee of these associations. Presently, the Chairman is the Legal Advisor to the State and Provincial Division of the International Association of Chiefs of Police. Since 1987, the Chairman has practiced law privately in Rochester, New York where he has served as a member of numerous bar association committees, charitable boards and civic groups. Chairman Chesworth resides in Rochester with his wife Antoinette. He is the father of three children, Cynthia, Deborah and Donald III.



JOSEPH S. DOMINELLI, Republican of Schenectady County, was appointed to the Commission on January 19, 1990, by Governor Mario M. Cuomo. Commissioner Dominelli was Chief of the Rotterdam Police Department from December 1963 through February 1983. He is currently the Executive Director of the New York State Association of Chiefs of Police, a position he has held since 1975. Commissioner Dominelli served as the President of the NYS Association of Chiefs of Police in 1973, and was elected President of the International Association of Police Chiefs in 1979. Commissioner Dominelli has been appointed to various committees by Governor Cuomo, including the Criminal Justice Institute and the New York State Drug Task Force Advisory Committee. In addition, the Commissioner was the first recipient of the "Law Enforcement Executive of the Year" which was awarded to him by Governor Cuomo in 1986. He was also honored by the Jaycees in 1972 as "Man of the Year." Commissioner Dominelli attended St. Lawrence University on Crime and Delinquency and that University's School on Police Administration. He resides in Rotterdam, New York with his wife, Florence. He is the father of two children, Carol and Jo-Anne.



EARL W. BRYDGES, JR., Republican of Niagara County, has been a member of the Commission since he was appointed in December 1972 by his late father, Earl W. Brydges, the Senate Majority Leader and President *Pro Tem*, and later reappointed by former Majority Leader and President *Pro Tem*, Senator Warren M. Anderson. He was a member of the Rockefeller Commission to Revise and Simplify the Penal Law and Code of Criminal Procedure and the Advisory Board of the Governor's Crime Control Planning Council and is Special Counsel for environmental affairs to the City of Niagara Falls. He was also General Counsel to the New York State Business School Association for many years. Commissioner Brydges was admitted to practice law in New York in 1962 after attending Syracuse University and St. John's University Law School and was Confidential Law Clerk to the late Chief Justice of the State Court of Claims, Fred Young. He is a member of the Board and Executive Committee of Blue Shield of Western New York. Since 1975, he has been a member of the Board of the Martha Beeman Child Guidance Clinic and has been its president since 1987. In May, 1987, he received an honorary Doctor of Laws Degree from Niagara University, where he is a member of the Board of Trustees and the Legal Advisor for Student Affairs. He resides in Lewiston, New York with his wife, Marti and four children, Earl III, Kirsten, Jason and Courtney.



THOMAS J. CULHANE, Democrat, has been a member of the Commission since he was appointed by the Speaker of the Assembly in September 1977. A former State Assemblyman, representing the 82nd A.D. in Bronx County from January 1973 to September 1977, he was a member of several committees and Chairman of the Temporary State Commission on Management and Productivity in the Public Sector. Commissioner Culhane was admitted to practice law in New York in 1954 after attending Brooklyn Law School and was awarded a Master of Laws Degree (Labor) by New York University School of Law in 1970. Prior to his election to the Assembly, Commissioner Culhane was a Detective with the New York City Police Department, a practicing attorney in New York City, and served as a Commissioner of the Taxi and Limousine Commission of the City of New York.



SALVATORE R. MARTOCHE, Republican of Erie County, was appointed to the Commission on July 10, 1990, by Senator Ralph J. Marino, President *Pro Tem*. Commissioner Martoche served as Assistant Counsel to the Majority of the New York State Senate from 1974 to 1982. He was the United States Attorney for the Western District of New York from 1982 to 1986. From June 1986, until June 1988, Commissioner Martoche served as Assistant Secretary for Labor-Management Standards at the United States Department of Labor. He also served as Assistant Secretary for Enforcement at the United States Treasury Department for approximately two years where he supervised and coordinated the activities of all the Treasury Department law enforcement agencies, and led Treasury's efforts against illicit drug trafficking and money laundering. In all three positions, Commissioner Martoche was appointed by President Ronald Reagan and confirmed by the United States Senate. Most recently, at the request of former President George Bush, he served as Acting Director of the Office of Thrift Supervision. Commissioner Martoche is a member of the Bar in New York and the District of Columbia. He is a graduate of Canisius College and the University of North Dakota School of Law. Commissioner Martoche is married to Mary Dee Martoche, also an attorney. He has three children, Amy, Claire, and Christopher. Commissioner Martoche resides in Buffalo, New York.



WILLIAM F. PASSANNANTE, Democrat of New York County, was appointed to the Commission on January 23, 1991 by the former Speaker of the Assembly, Mel Miller to fill an interim term. He was re-appointed to the Commission by Mr. Miller in October, 1991. Commissioner Passannante was first elected to the Assembly in 1954 where he continuously represented a legislative district comprising most of the lower half of Manhattan for thirty-six years, serving as the Speaker *Pro Tem* for the last twelve years before his retirement in December, 1990. During his thirty-six year career in the Assembly, Commissioner Passannante held other leadership positions, including serving as Assistant Minority Leader, Deputy Speaker and as the Chairman of the Claims, Charities and Religious Societies, Social Services, the Joint Conference Committee and the Special Committee on Rule Changes. He also developed the Assembly Intern Program, serving as Chairman of the committee which administers that program from 1975-1990. A founding member of the National Conference of State Legislatures, he served as president of that organization in 1982 and 1983. From 1981 through 1990, he was a member of the National Governing Board of the Council of State Governments. In 1983, former President Ronald Reagan appointed him to the Advisory Commission on Intergovernmental Relations where he served until 1985. Commissioner Passannante earned a B.S. from the New York University School of Commerce and a L.L.B. from Harvard Law School. He was admitted to the New York Bar in 1948. Prior to his election to the Assembly, Commissioner Passannante was appointed an assistant United States attorney for the Southern District of New York, serving in that office from 1948-1953. He also served as Legislative Counsel to the President of the New York City Council in 1954. In 1991, he was awarded an Honorary Doctorate of Humane Letters from the State University of New York.

COMMISSION STAFF 1993

Donald O. Chesworth

Chairman

Earl W. Brydges, Jr.

Thomas J. Culhane

Joseph S. Dominelli

Salvatore R. Martoche

William F. Passannante

Commissioners

Helene B. Gurian

Deputy Commissioner/

Chief Counsel

Karen H. Greve

General Counsel

William F. Friedlieb

Chief Investigator

Jerome Lightfoot

Deputy Chief Investigator

Raffaella Petroccione

Executive Assistant

Melanie Alvarez

Sherida Azeez

Ann Marie Bayer

William N. Bowman

Alfonso Campagnola

Anthony Cartusciello

Ken Christophersen

Daniel G. Cort

Cheryl Cox

Stephen J. DiCarlo

Deirdre Frazier

Valencia Kellman

Joseph A. Lyons

Allan M. Morofsky

Heriberto Munoz

Gloria A. Oest

Francis M. O'Rourke

Francis D. Rawdon

Francis X. Santimauro

Patricia Schneider

Laurence Snyder

Rachel A. Wiener

Staff