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ATTICA: THE ANATOMY OF AN INVESTIGATION

ROBERT B. MCKAY*

Forty-three citizens of New York State died at Attica Correctional Facility between September 9 and 13, 1971. Thirty-nine of that number were killed and more than 80 others were wounded by gunfire during the 15 minutes it took the State Police to retake the prison on September 13.¹

Thus begins the official report of the Attica Commission.² The primary lesson is apparent to anyone who thinks about those two sentences: Everything possible must be done to avoid repetition of that tragedy. But, before prescriptions for the future can be advanced, there must be understanding of the past. The function of the Attica Commission can be explained in terms almost, but not quite, that simple. A principal purpose was unquestionably to find out what happened, and why, and thus to afford insight into future action that might be taken to prevent similar occurrences. The additional purpose, in this particular instance, was to sift the false from the true about the original taking of the prison; the retaking of the institution; and the rehousing of inmates after the uprising was put down. Even ordinarily careful reporters had stated as fact, at the time of the retaking, that some hostages had died with throats slit by inmates; that some hostages had been emasculated; and that at least one inmate had been deliber-

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2. Although the news media often referred to the “McKay Commission,” that seems to me a regrettable misnomer for two reasons: “Attica Commission” is more descriptive of the task undertaken, and the report was very much the product of all nine members of the Commission and the dozens of staff and consultants.

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ately executed after the prison had been secured. These and other rumors all proved to be false, but insistently held.

It was clearly important to find the truth and to assemble the evidence convincingly. We believe the report of the commission accomplished that objective—and more, as I shall suggest in the course of this discussion. My purpose, however, will not be to summarize the findings of the commission. Rather, I should like to set forth the way in which the commission undertook to complete its assigned task of fact-finding; the problem of relating to other governmental bodies involved with Attica; and the difficulty of communicating its message to the public.

The narrow perimeter of the investigation was confined to the four-day period between September 9 and September 13, 1971, from the original capture of the prison by inmates to its retaking by the state police. Within two days of the retaking, Governor Nelson Rockefeller announced the first of three official inquiries that had their genesis in the events at Attica. On September 15, 1971, Governor Rockefeller stated that Deputy Attorney General Robert E. Fischer would supersede the district attorney of Wyoming County (where Attica is located) to “conduct a broad investigation into the events before, during and after the rebellion in the Attica Correctional Facility.” The assignment was to look for violations of criminal law by inmates, correction officers or others, as a basis for possible indictment by a special grand jury convened for that purpose in Wyoming County.

Ordinarily, the matter would end with such an investigation leading to punishment of wrongdoers. But this case was unique. The Attica Correctional Facility had been widely regarded as the most secure of all the maximum security institutions in New York State. Within the Department of Corrections there was a general belief that the institution could not have been captured without advance planning and probably even outside help, but others disagreed. Although the matter was within the scope of the grand jury investigation, it was not clear that the ultimate questions of advance planning and external assistance could be answered in terms of individual indictments that might be returned. Similarly, questions continued in the public mind about a number of unresolved issues, including these: Why did prison officials not retake the institution, with or without guns, on the first day? Why did Commissioner Oswald at first rely on “observers” to “nego-

tiate" the terms of the settlement and then reject their efforts? How were the hostages treated and what was the level of discipline of inmates during the four days in D Yard? Was the planning for the assault adequate? Was there unnecessary brutality in rehousing captured inmates after the retaking?

There were other questions of larger import. What kind of institutions were the prisons? What purpose did they serve? Should corrective measures be undertaken?

When the governor and his advisers, including the legislative leaders of the state, met to ponder these questions, they quickly resolved that the criminal investigation was not enough. They concluded that two further inquiries were needed, one a citizens' committee to examine all the facts, not just those involving criminal conduct, and a second to recommend changes in the state's correction system.

There was at least one unique problem in establishing the citizens' fact-finding committee. Although it clearly required official status to assure the necessary authority and funding, appointment by the governor would raise credibility problems for the body since the governor himself and members of his immediate staff participated in the decision-making process that would in part be the subject matter of any fact-finding investigation. Mindful of that problem, the governor and the majority and minority leaders of the New York State Legislature devised an unusual solution to an unusual problem. They called upon Chief Judge Stanley H. Fuld of the New York Court of Appeals and the four presiding justices of the state's appellate divisions (the five highest ranking judicial officials in the state) to appoint a "citizens' committee" to investigate "the events leading up to—during—and following the riot." The accompanying statement stressed that the mission was to be fact finding with no jurisdiction over criminal aspects of the uprising, but indicated that the panel would be asked to study the governor's own actions during the uprising.

4. Report, p. xxiv. There are risks in this blending of executive and judicial functions. It is not impossible that questions about the jurisdiction and authority of the body designated by the judges could reach the appellate division or court of appeals level. See, for example, the discussion in the text at notes 13-24. This is not, however, the first time that New York State judges have made appointments to non-judicial bodies. In 1966, when the state legislature was unable to resolve a reapportionment impasse, the judges of the New York State Court of Appeals appointed a five-member body to draw legislative district lines, ordinarily a legislative function. When the reapportionment plan was challenged, it was upheld by the Court of Appeals, the entire court participating. See Matter of Orans, 17 N.Y.2d 107, 216 N.E.2d 311 (1966).
The five jurists announced the selection of the citizens’ committee on September 30, charging the nine members to “proceed as expeditiously as possible and render its report to the Governor, the Legislature and the public.”

The selection of the panel may have solved the governor’s need to disassociate himself from the selection process, but at the same time it appeared to create a new credibility problem for the panel itself. The Attica Defense Committee and other prison-watchers were quick to argue that a panel whose average age was about 50 and consisted of five white males, two white females (one of Puerto Rican background and upperclass connections), and two black males, could not possibly understand the trauma of prison life. Correction officers, state troopers, national guardsmen, and officials in the correction system were equally unimpressed with a panel that could not by any stretch of the imagination be said to include representatives of their viewpoint. Upstate New Yorkers could again voice their traditional complaint of under-representation, since only one of nine came from Western New York (where, after all, Attica is located), and only two others from upstate at all, both from Albany. Finally, as we were soon to learn, some members of the executive branch thought the whole idea of a citizens’ inquiry a mistake that could only harm the chief executive and his staff.

5. Report, p. xxiv. The commission members were the following:
Robert B. McKay, Chairman of the Commission, Dean of the New York University School of Law;
Edwin B. Broderick, Bishop of the Roman Catholic Diocese of Albany;
Robert L. Carter, a member of the law firm of Poletti Friedin Prashker Feldmann & Gartner in New York City;
Mrs. Amalia R. Guerrero, founder and president of the Society of Friends of Puerto Rico and former member of the New York State Park Commission for the City of New York;
Amos Henix, a former inmate, and currently Executive Director of Reality House, a drug rehabilitation program in Manhattan;
Burke Marshall, Deputy Dean of the Yale University Law School and former head of the Civil Rights Division of the Justice Department;
Walter Rothschild, Chairman of the Board of the New York Urban Coalition and formerly president of Abraham & Straus;
Mrs. Dorothy Wadsworth, an active participant in community projects in Rochester and Monroe County, and now Director of Development at the Rochester Institute of Technology;
William Wilbanks, a doctoral candidate at the School of Criminal Justice, State University of New York at Albany.

6. One black male, a former inmate of state and federal institutions, we later discovered was not technically eligible to serve on the panel because he had not been pardoned. No challenge was made to his extremely valuable service. The other black male was confirmed as a United States district court judge after completion of the report.
There was in fact another objection that could have been raised to the idea of the panel and its composition. Less commonly voiced, but an ironic commentary on the capacity of the panel to answer the question posed to it, was the fact that most members of the panel had never been inside a prison (although, as previously noted, one had served time in other prisons and was to find friends among the inmates at Attica); and none had any real acquaintance with the correction system. In an odd sense, our principal collective qualification was the openmindedness of ignorance, combined with the willingness to be informed of facts without preconceptions to make difficult the forming of reasoned judgment.

When each of us accepted initial appointment (without knowing the composition of the full panel), not one of us could have known all the crises of credibility we would face. Thus, still largely innocent of the problems that lay ahead, we met for the first time on the night of October 5, some of us in New York City as we assembled to fly together to Albany, and the others later that evening as we met at the governor’s mansion to discuss problems and procedures with the governor and members of his staff. The following morning we met with the governor, the legislative leaders, and key members of the executive branch. We were assured that we would receive in a forthcoming executive order the necessary authority (primarily subpoena power and assurance of cooperation from state officials), all necessary funds, and coequal status with the already-commenced criminal investigation. It was then agreed by all present that the panel should operate independently in order to assure the appearance as well as the fact of independent judgment on the crucial questions of fact.

Arrangements were promptly made for a private meeting room in the new quarters of the New York State Bar Association in Albany. There, meeting for the first time in executive session, we made several decisions crucial to the success of the undertaking.

First, while recognizing the need for private sessions to decide policy questions, we concluded that all decisions relating to the investigation should be publicly announced and that as much of the investigation as possible should be open to public scrutiny. This decision to “go public” meant the issuance of press releases, the holding of press conferences (including one after that first meeting), and preparation for disclosure of testimony and findings during the course of the investigation rather than solely in a final report.

Second, we agreed that an attempt should be made to interview every individual who was in any way involved with Attica in Septem-
ber 1971. This involved more than 2200 inmates; all the correction officers and other officials at the institution; state troopers, national guardsmen and sheriff's deputies called to the scene; the 33 observers and all relevant state officials, including Governor Rockefeller, Commissioner Oswald and his deputies, and representatives of the governor whom he sent to Attica.7

The decision to seek several thousand interviews meant that we would need a substantial staff, operating over several months, at various locations in New York State. The cost we estimated that first day would be more than $250,000, a figure ultimately revised upward to about $660,000. Since we knew that the success or failure of the venture would depend in large part on the quality of the chief of staff, we agreed to seek advice from as many sources as possible about that individual who, we thought, should be a lawyer with the title of general counsel. Without recounting the process of screening the large numbers of candidates, some of whom were interviewed, it is quite enough to say that a number of respected sources pointed to a single individual as the one best qualified for the assignment. We ultimately succeeded in persuading that man, Arthur L. Liman, a partner in the prestigious New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison, to undertake the task. His performance exceeded in every respect the high standards we had set.

By mid-November of 1971 the staff of lawyers, investigators, administrators, and clerks (ultimately 36 full time and many more part time as consultants) was beginning to take shape. On November 23 the full commission met for the first time at Attica to visit the prison, talk with the officials, review the interviewing procedures, and eat with inmates and corrections officers.

By the end of November we had four offices, in New York City, Rochester, Batavia (the nearest town to Attica with office space), and in the prison itself. The interview forms had been completed and tested; the interviews were well under way; and consultants had been secured.

November was also the month when we first realized how serious the potential conflict was with the criminal investigation which was in its near-final stage before the return of indictments, then

7. Other decisions, less crucial, but mechanically necessary, were these: The "citizens' committee" would be called officially the New York State Special Commission on Attica; and my role was changed from that of convening chairman to chairman.
estimated for January 1972. The difficulty was that the staff of Deputy Attorney General Fischer was looking for evidence of individual criminal conduct while we sought more general findings on an essentially no-name basis.  This created two basic problems, with a number of refinements. The two main issues were in a sense reciprocal in that each investigating body potentially wanted or needed information in the possession of the other. Deputy Attorney General Fischer and his investigators had been on the scene soon enough after the retaking to collect physical evidence, such as weapons in the possession of inmates in D Yard, and to take photographs that were nearly contemporaneous with the events in question. Of course, the criminal investigators had the films, recordings, and still pictures taken by various official groups during the uprising and the retaking. As official data, that was not part of the "work product" of the investigations, those items were essential to the fact-finding investigation. Fortunately, we learned before issuance of the executive order that the release of this evidence to the commission would be resisted, giving us an opportunity to make sure that the executive order gave the commission equal access to that data. Thereafter, there were a number of disagreements about what we were entitled to receive.  Although each request had to be separately negotiated (unnecessarily, we thought), ultimately we secured nearly all the records we thought essential.

The reciprocal problem was more serious. The executive order originally proposed to confer the necessary power upon the commission would have subordinated the commission to the criminal investigation being conducted by Deputy Attorney General Fischer. The objectionable language was the following:

The [commission] shall not take any action or engage in any activity that would jeopardize or prejudice the criminal investigations or prosecutions arising from the events at Attica Correctional Facility or the fair consideration of any pending criminal matter, or the rights and privileges of those individuals who may be the subject of such criminal investigations or prosecutions.

8. It was the commission's policy, observed throughout the report, to use names of participants in the uprising and the retaking only where the individual was no longer living or had himself publicly revealed the information in question. Names were of course not withheld as to state officials or prison officials who had responsibility for the decision-making process and the actions of the observers were reported by name.

9. The commission always acknowledged that we were not entitled to, and would not seek, access to interviews or other evidence of a nonofficial character that was secured by the investigating staff in preparation of the cases for presentation to the grand jury.
If that restriction had been imposed, we would have been prevented from even talking to witnesses who might be involved in the criminal investigation; and our investigation would in effect have been emasculated. While recognizing that the investigation we planned might in some respects adversely affect potential criminal prosecutions, we had understood from the beginning that this was an acceptable and necessary price to pay for the "full and impartial investigation and complete report" that we had been asked to provide.

The proposed executive order presented additional difficulties, as follows:

1. It would have required that all hearings be private, which of course would have been inconsistent with the decision made at the first meeting of the commission that at least some hearings be held in public. The problem remained of achieving credibility for the commission which we thought required regular reports to the public of our findings on the events and conditions at Attica.

2. The proposed executive order would have forbidden publication of the report until all criminal proceedings had been completed, which would almost certainly be a matter of some years. Clearly this was inconsistent with the concept of a prompt report to the public.

3. The proposed executive order appeared to require that all essential acts of the commission take place in Wyoming County, specifically including enforcement of any subpoenas that might be issued. We saw no reason to depart from ordinary practice, which would allow enforcement of a subpoena anywhere within the state where the production of witnesses or documents might be required.

4. The proposed order did not instruct state departments and agencies to cooperate with the commission. In particular, as already mentioned, we felt that we must have access to the raw materials (such as films and physical evidence) gathered during the criminal investigation as well as the right to an independent interview with all relevant state witnesses. Since the criminal investigation was under way before the commission, it did not seem appropriate that the commission's investigation should be blocked in part by the adventitious discovery of pertinent materials by the staff of the deputy attorney general.

5. Finally, and ultimately most important, was the concern that the proposed executive order would leave commission files open to subpoena by those responsible for the criminal investigation. We knew that, in order to secure the cooperation of witnesses essential to the fact-finding mission, the commission must, at a minimum, be able to
guarantee that the testimony and statements of witnesses would remain confidential in the commission files and not subject to subpoena by the prosecution.

In view of the above real and potential problems, the commission concluded that it would not be possible to conduct the "full and impartial investigation" with which we were charged under the terms of the proposed executive order. We were able to resolve some, but not all, of the issues at the staff level; but at last it became necessary to appeal in strong terms for Governor Rockefeller's personal intervention to secure an acceptable executive order. By letter of November 3, 1971, I reported to the Governor that, in the absence of explicit reassurance on these points, "some—perhaps all—members of the Commission will withdraw" from the investigation.

After further discussion all questions were apparently resolved as the commission had requested. Most of the issues in dispute were settled in the executive order of November 15, 1971. One significant point was left to oral agreement, which we believed was reached; but the absence of explicit written agreement on that point ultimately led to judicial proceedings not resolved until more than four months after issuance of the report. The issue involved the central question of how to prevent two official bodies, each armed with subpoena power, from securing access to each other's files. As noted above, we felt it imperative to retain the privacy of our own investigative files, particularly the records of individual interviews; and we had no interest in securing comparable work product of the deputy attorney general's staff, excepting only such physical data as was secured from the prison after the retaking and films and like material with the status of official documents. Accordingly, we sought (and thought we secured) agreement that neither body would subpoena records of the other, and that we would negotiate for access to materials of the kind described above as needed.

In accordance with that understanding, the commission completed its investigation without ever using the subpoena power to secure any materials from the deputy attorney general. Only after the commission report was in print did Deputy Attorney General Fischer disclose that he did not feel bound by any oral agreement, simultaneously seeking access to all commission files with a sweeping subpoena ducès tecum. The issues in that litigation are discussed below at pages 149-153.

10. The text of the executive order appears as Appendix A.
Meanwhile, on the assumption that the commission would be able to assure inmates, correction officers, and others that interview reports would be treated as confidential and not made available to the state, the commission staff prepared interview forms and instructions to interviewers. More important, for present purposes, is the statement then prepared which was subsequently read to all the interviewees whose cooperation was sought for fact-finding purposes. The following statement, read to all inmates, is typical of the statement read to other interviewees as well:

I am a member of the staff of the New York State Special Commission on Attica. Are you familiar with the McKay Commission? (If the inmate is not familiar with the Commission, the information packet contains a description of the Commission which was previously read to the inmates over the prison radio).

Our Commission is completely independent of all other State agencies. We are not connected with [Deputy Attorney General] Fischer, and we are not assisting in any way the prosecution of any persons. That is not our business. We are perfectly free to criticize any persons, no matter how high their public position, as the facts may warrant. We have the power to hold public hearings and to issue subpoenae for witnesses and for the production of documents, and to issue a public report on our findings.

The sources of the information given to us in these preliminary interviews will be kept completely anonymous. Not only do we have no connection whatsoever with [Deputy Attorney General] Fischer's investigation, or with any other prosecutor or State agency, but we are not connected with the prison authorities, the Parole Board, or any other governmental body. None of them will find out who is the source of our information, or who is not cooperating with us.

Despite this, you do not have to talk to us at all at this time. You will not suffer any consequences if you refuse to cooperate with us. If there are subjects which you do not wish to discuss with us, we will respect your wishes and not go into them in this interview. If at any time you feel that you want to have your lawyer present, we will arrange for it, or see to it that a lawyer is appointed for you.

The only way that the full and true story of Attica can be told is for all to cooperate, and we believe that cooperation of all is essential if there is to be any chance of prison reform and of avoiding another such tragedy in the future.

The statement prompts two observations:

1. The so-called *Miranda* warning was not given to any person

11. The key provisions of the interviewer instructions and of the interview forms appear as Appendices B and C. Although only marginally relevant to the legal questions here considered, they are offered for what I believe them to be, valuable models for future investigations.

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interviewed. Thus, no interviewee was advised that any statement he made might be used against him, as would be required in a case that might lead to criminal prosecution. Obviously, if the commission had in any way contemplated a voluntary or involuntary relinquishment of interview records to a body with prosecutorial authority, use of the statement would have been the height of impropriety. Deputy Attorney Fischer was aware that these assurances were being given, but made no effort to stop their use.

2. Not only was the Miranda warning not given, actually the reverse was the case; each interviewee was specifically advised that "The sources of the information given to us in these preliminary interviews will be kept completely anonymous."

Despite the fact that the above-described assurances were given to thousands of interviewees, and despite Deputy Attorney General Fischer's knowledge of that fact, in early September 1972 he issued a subpoena duces tecum, seeking to compel production before the grand jury in Wyoming County of

any and all testimony, statements, interview reports, writings of any kind, any and all other reports, tables, charts, diagrams, photographs, film or any other audio or visual material relating to the investigation. . . . 13

The argument advanced in favor of the subpoena was essentially threefold. First, it was claimed that in the absence of a written agreement pledging nonuse of the subpoena power the deputy attorney general was free to seek the commission files. Second, it was contended that the commission files were not protected by any privilege and were accordingly subject to seizure by any body with subpoena power. Third, it was asserted that the files were not sought primarily to gather further incriminatory evidence, but to search out exculpatory material so that the prosecuting authorities and the grand jury could "satisfy themselves pre-indictment that no exculpatory material is in the hands of the McKay Commission (a State agency)." This argument was said to be supported by the doctrine of Brady v. Maryland14 and People v. Rosario,15 to the effect that "a District Attorney or one operating pursuant

13. There was an accompanying order to show cause "why an order should not be entered herein enjoining and prohibiting temporarily and permanently [the commission] from destroying, obliterating, altering or disposing in part or in full in any way" the materials subject to the subpoena. Since the commission had no intention of destroying its files, this demand was easily satisfied, leaving only the subpoena at issue.

to law with the powers of a District Attorney with respect to an investigation has the power and the duty to seek all evidence."

The commission disagreed on all points and moved to quash the subpoena. The issues were briefed and argued on November 10, 1972, to New York State Supreme Court Justice Carman F. Ball, the justice who was responsible for the grand jury proceedings. The commission's response to the three points raised in support of the subpoena can be summarized as follows.

The commission asserted the executive privilege and the public interest privilege to establish the immunity of its files from subpoena. The executive privilege argument was based on general principles and on a specific New York statute. Section 6 of the New York Executive Law, under which the commission was appointed, authorizes the governor "either in person or by one or more persons appointed by him for the purpose, to examine and investigate the management and affairs of any department, board, bureau or commission of the State." In conducting its investigation pursuant to the governor's mandate, the commission was thus the direct arm of the governor. Accordingly, its actions, files, and records are entitled to protection under the blanket of the executive privilege. Significantly, Governor Rockefeller agreed that the files were entitled to immunity and directed Attorney General Louis J. Lefkowitz to support the commission in that argument before the court. That function was admirably performed by Assistant Attorney General George Zuckerman, resulting in the unusual phenomenon of two subordinates of the New York State Attorney General arguing on opposite sides of the same issue.16

Apart from the statutory argument applicable in New York State, the doctrine of executive privilege, based upon the constitutional principle of separation of powers, holds that the chief executive of a state, like the President of the United States, may not directly or indirectly be subpoenaed or ordered to testify or produce documents before a court of grand jury. As one scholar has observed, "no court has ever compelled the chief executive to furnish information in a judicial proceeding."17

16. The commission's position was also supported by two intervenors representing inmates as individuals and as members of a class.

Courts have also recognized the existence of a common law public interest privilege, applicable to confidential communications made to public officers in the performance of their duties, where it is in the public interest that the content and sources of such communications should not be divulged.\(^\text{18}\) To open the files of a confidential executive department investigation for use in a criminal prosecution would make impossible any future noncriminal investigations into matters even of great importance to the public. Never again could witnesses rely upon a state agency's assurances of confidentiality. "To violate the privileged status of disclosures" made to the commission would "vitiate the purpose" for which such investigatory bodies are created.\(^\text{19}\)

The commission also rejected the contention that Deputy Attorney General Fischer was duty-bound to seek the commission's files, whether for the purpose of aiding in the prosecution of alleged wrongdoers, or for the exculpation of those not involved in criminal activities. The commission argued that Mr. Fischer's reliance on *Brady v. Maryland* and *People v. Rosario* was misplaced. Those cases held only that the prosecutor is required, at the time of trial, to release evidence in his possession that is requested by defendants in criminal proceedings. This sensible rule is designed to prevent the manifest unfairness which would result from a trial at which the prosecution knowingly adduced evidence which was contradicted by other evidence in its possession. Consistent with that ruling the courts have refused to order the production of evidence in the hands of governmental agencies which had not cooperated with the prosecution in the preparation of its case.\(^\text{20}\)

Finally, the commission contended that there was an agreement for mutual abstention from use of a subpoena to secure any files of the other investigating body, which was no less binding because it was not in writing. Both bodies in question were official state agencies acting in the name of the state; both were accordingly bound by agreements authori-


\(^{19}\) Board of Ethics v. Temporary State Commission, 70 Misc. 2d 737, 334 N.Y.S. 2d 691 (Sup. Ct. N.Y. Co. 1972).

tatively made in their respective names. This question could be answered only through the holding of an evidentiary hearing and the testimony of a number of state officials. This unpleasant exercise in public display of official disagreement would, however, not be necessary, if the commission's position, that its files are protected by the executive privilege, should be sustained. Accordingly, the ultimate legal question in the case involved the applicability of the executive privilege or the public interest privilege as a protection for the commission files; an argument discussed above.

On January 15, 1973, the trial court granted the commission's motion to quash the subpoena *duces tecum* on the ground that "the public interest requires that the files and records of the Commission should not be turned over to the Grand Jury." Adopting the argument in favor of the public interest privilege that had been urged by the commission, the court reasoned as follows:

It seems to be almost beyond question that if the Commission in this case had not been able to assure its informants that their identities and information would be held confidential, the Commission could not have performed its important task which was so much in the public interest.

The Court recognizes that there are two competing public interests. On the one hand there is the public interest in the Grand Jury's exercise of its constitutional power to obtain all relevant evidence for the purpose of holding those responsible for their criminal acts and, on the other hand, there is the public interest in the performance of the duties of the McKay Commission to find out the circumstances which brought about the tragedy at the Attica Correctional Facility regardless of the criminal responsibility.

The object of the Commission was to establish the facts, not to indict or punish. (*Matter of DiBrizzi*, 303 N.Y. 206) In order to function it was necessary for the Commission to promise confidentiality. The McKay Commission's need for secrecy is a real one and is entitled to consideration. The ultimate decision as to disclosure lies with the courts, but great, if not conclusive weight, should be given to the claim of privilege when the circumstances are such that the harm which would result from an unwarranted disclosure is apparent. *United States v. Reynolds*, 345 U.S. 1

21. For this reason the commission also argued that the issue presented was a "political question" which the court was not required to decide.
22. Meanwhile, there was a brief flurry of litigation in federal court, when a class action on behalf of inmates was brought to restrain disclosure of the commission files to Deputy Attorney General Fischer and his staff. Blyden v. Rockefeller, Civ. No. — (S.D.N.Y. 1972). But this case, argued in October 1972, did not produce a decision. Judge Gagliardi deferred action to await the outcome of the proceedings in the state court.
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(1953); Hartranft's Appeal, 85 Pa. 433 (1878); Harding v. Pinchot, 306 Pa. 139, 159 Atl. 16 at 18, (Sup. Ct. of Pa. 1932).

In this case, to require disclosure would violate the integrity of the Commission's promise of confidentiality to thousands of witnesses and it would make it difficult, if not impossible, for the Executive Department to ever again conduct a confidential investigation into any matter in which there might be criminal aspects where a Grand Jury is conducting an investigation.24

The court did not decide the executive privilege argument and did not make a finding on the question whether there had been an agreement between Deputy Attorney General Fischer and the commission that the commission files would be immune from official subpoena. However, the court did observe that the grand jury was not precluded from its own examination of witnesses who had appeared before the commission; and it left unanswered the question whether disclosure could be ordered of statements made to the commission or its staff during any later trial of individuals indicted by the grand jury for crimes arising out of the Attica events. The court dealt with the question of subsequent trial only in these ambiguous terms:

In the event that a witness on the trial of an indictment had made a prior statement to the McKay Commission, it will be for the Trial Court to determine whether or not such statement should be made available at the trial.25

Finally, to ensure that the issue was not mooted, the court ordered that the files not be destroyed or otherwise disposed of, a result entirely consistent with an earlier decision of the commission to preserve the files.

With this judicial ruling the commission is apparently discharged of the last of its obligations in connection with the investigation begun almost 16 months earlier. There remains only the custodial function in connection with the files and disposition of any issues that would be raised if any defendants in a criminal proceeding should demand access to statements made to the commission.

24. Id. at —.
25. Id. at —.
TO ALL WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, the public interest requires a full and impartial investigation and complete report of the facts and circumstances leading up to, during, and following the events that occurred at the Attica Correctional Facility between on or about September 9, 1971 and September 13, 1971: and

WHEREAS, such investigation and report will be in addition to, apart from and not in lieu of the investigation of criminal acts related to such events now being conducted by Deputy Attorney General Robert E. Fischer for the purpose of grand jury presentation and possible criminal prosecutions: and

WHEREAS, on September 16, 1971, Senate Majority Leader Earl W. Brydges, Assembly Speaker Perry B. Duryea, Jr., Senate Minority Leader Joseph Zaretzki, Assembly Minority Leader Stanley Steingut and I requested Chief Judge Stanley H. Fuld of the Court of Appeals, Presiding Justice Harold A. Stevens of the Appellate Division, First Judicial Department, Presiding Justice Samuel Rabin of the Appellate Division, Second Judicial Department, Presiding Justice J. Clarence Herlihy of the Appellate Division, Third Judicial Department, and Presiding Justice Harry D. Goldman of the Appellate Division, Fourth Judicial Department, to appoint a Citizens Committee to conduct the investigation and

WHEREAS, on October 1, 1971, a Citizens Committee composed of Robert B. McKay, Chairman, Most Reverend Edwin Broderick, Robert L. Carter, Mrs. Mariano (Amalia) Guerrero, Amos Henrix, Burke Marshall, Walter N. Rothschild, Jr., Mrs. Robert H. (Dorothy) Wadsworth, and William Willbanks was named;

NOW, THEREFORE, I, Nelson A. Rockefeller, pursuant to section six of the Executive Law, have appointed and by these presents do appoint said named members of the Citizens Committee, to conduct a full and impartial investigation of the facts and circumstances leading up to, during and following the events which occurred at the Attica Correctional Facility between on or about September 9, 1971 and September 13, 1971.

The Committee is hereby empowered, pursuant to section six of the Executive Law and in accord with the Civil Practice Law and Rules, to subpoena and enforce the attendance of witnesses, to administer oaths and examine witnesses under oath and to require the production of any books or papers deemed relevant or material.

Every State department, division, board, bureau and agency shall provide to the Committee every assistance, facility and cooperation which may be necessary or desirable for the accomplishment of the duties or purposes of the Committee under this order.

IN WITNESS WHEREOF, I have subscribed my name to these Presents and caused the Privy Seal of the State to be affixed hereto at the Capitol in the City of Albany this fifteenth day of November in the year of our Lord one thousand nine hundred seventy-one.

(L.S.)

(signed) Nelson A. Rockefeller

BY THE GOVERNOR

(signed) Robert R. Douglass
Secretary to the Governor
ANATOMY OF AN INVESTIGATION

Appendix B

NEW YORK STATE SPECIAL COMMISSION ON ATTICA

December, 1971

CONFIDENTIAL

Memorandum to Interviewers

You have been selected to assist us in the important task of interviewing the inmates who were at Attica on September 9, 1971. We feel that lawyers and law students such as you are well-trained to conduct questioning objectively and probe sufficiently into all of the matters of concern to the Commission. You will be working from an outline prepared as a guide in order to ensure that each interview covers all pertinent topics. You will be able to study the outline in detail before you conduct any interviews on your own. But you should not feel confined to the outline; we are relying on you to conduct the interview in the manner most conducive to develop the facts on the pertinent topics.

Because of the extraordinary sensitivity of this investigation, certain standards of conduct must be maintained for all members of the Commission's staff. Most of these should be obvious, but they are set forth below:

1. Members of the Commission staff must not only be objective during their interviews; they must conduct themselves with impartiality at all times while they are present at Attica or any other correctional facility. The Commission needs, and so far has obtained, the cooperation of many diverse groups—inmates, correction officers, state police, administrators—and that delicate balance could be destroyed by overt demonstrations of sympathy or hostility to any one of them on the part of staff members. In addition, the ultimate credibility and public acceptance of the Commission's findings will depend in large measure upon the image created by its staff during the course of the investigation.

2. The introduction to the inmate interview, which you must be sure to read to the inmate at the outset of each interview, informs the inmate that he is under no compulsion to talk to us and that his anonymity as the source of any information he gives us will be scrupulously guarded. Naturally, that kind of assurance will be meaningless unless every interviewer is pledged to keep everything he or she learns during each interview, and the sources of information, in the strictest confidence. Rumors travel around penal institutions like wildfire and any breach of this rule of confidentiality could have serious, perhaps tragic consequences. In this respect, therefore, we are asking for more than the normal observance of legal ethics. You should not embark on this assignment if you are unwilling to keep what you learn in confidence.

3. The Commission's report will be the Commission's, not the staff's. We do not know what the conclusions of that report will be—only that it will be based on the facts uncovered by our investigation. We intend to involve all members of the staff in the discussions leading up to the report, since the time for dissent is before, not after, the report is written. Since the Commission and the staff will be under restraints of confidentiality in publicly revealing some of the information underlying the report, we must accept the fact that no matter how the public may debate or criticize the report, once it is issued, the staff cannot do so without jeopardizing the confidences of the inmates and others whom we are interviewing. We must be professionally silent.
4. Before you actually conduct any interviews on your own, you will be orally briefed by a member of the legal staff concerning the outlines of the events last September, life at Attica, and the basic inmate grievances which have been developed through preliminary interviews. You will also sit through one or more interviews conducted by a permanent staff member, in order to get the feel of the interviewing procedures. By the time you are interviewing on your own, you should have a command of the underlying facts and the vernacular of Attica. During the interviews, it is important to use neutral terminology in sensitive areas. For example, refer to the "events" or "occurrences" of last September, not the "riot", "rebellion" or "massacre". Guards are called "correctional officers"; inmates are not called "prisoners" or "convicts" though as you will learn, in the vernacular, prisons are referred to as "joints", and officers are sometimes referred to by some inmates as the "man".

5. During an interview, you should make notes of the inmate's responses in the space provided in the questionnaire and in the margins. You will be given time after each interview to complete your notes and also fill in the Interviewer's Evaluation on the last page. Be sure each interview begins with a reading of the Introduction and ends with an expression of appreciation to the inmate for his assistance. Spanish surnamed inmates should be asked if they would prefer to be interviewed in Spanish. If such a preference is expressed, the inmate should be told that it will be arranged and he will be called back at a later date.

6. Inmates cannot receive cigarettes in their packages from home, and therefore can obtain them only at the prison commissary. Since many inmates will chain-smoke during an interview, it is unfair to have them use their own cigarettes. Be sure that you have cigarettes on the table, and invite the inmate to use them.

7. Inmates may not accord law students the same respect as professionals. Our law student have been hired as investigators, and should introduce themselves as such, though, of course, if anybody asked his background or qualifications, he should respond candidly. To provide some background for you, the following materials are enclosed with this memorandum:

   a) a copy of the Executive Order of November 15, 1971 creating the Commission;
   b) Copies of sections of the Executive Law and the Civil Rights Law of New York State (§ 73(8) of the Civil Rights Law is the source of the Commission's power to keep information secret);
   c) Copies of press releases relating to the recent activities of the Commission and its staff;
   d) A tentative chronology of the events of September 8-13, 1971, as reported in some of the press;
   e) A drawing of Attica with key locations noted. (This drawing is from a Rochester newspaper and is used only for convenience. We do not necessarily accept the factual conclusions contained therein).

   * * *

Thank you for your willingness to help us. We hope it is a rewarding experience for you.

Good luck!

The Commission Staff
ANATOMY OF AN INVESTIGATION

Appendix C

Company on 9/9/71

Was inmate in D Yard

INMATE QUESTIONNAIRE

I. BACKGROUND DATA

(To be taken from Prison Records before interview begins)

NAME ____________________________

Age _______ Inmate # ________________

Address before Attica ____________________________

Offense and Term ____________________________

When Admitted to Attica ____________________________

ETHNIC IDENTIFICATION

(As observed by interviewer)

_____Black _____White _____Puerto Rican _____Other

II. PERSONAL INFORMATION

1. Have you served time in other institutions?

_____No _______Yes

2. If yes, which ones, when and how long?

NOTE TO INTERVIEWER: IF ANSWER TO ABOVE QUESTION WAS “YES”, BE SURE TO GET COMPARATIVE OPINIONS ON ATTICA vs. OTHER INSTITUTIONS.

3. Have you ever been out on parole on your present sentence?

_____No _______Yes


JOB ASSIGNMENT

5. Job at Attica; How assigned, any other jobs requested; (We are interested in any complaints about job favoritism or discrimination on race or other basis).

III. GRIEVANCES

6. We’ve heard a lot about inmate grievances. What, if any, complaints do you have about Attica?

INTERVIEWER: Try not to suggest grievances or to spend inordinate time on this subject. Let inmate discuss as many grievances as occur to him. On anything out of the ordinary, get details. Also ask how Attica compares with other penal institutions and whether conditions were improving or getting worse before September.

Among the common grievances we have heard:

- Medical
- Food
- Parole Board

- Strictness of Rules
- Religious & Political
- Freedom
IV. CHANGES AND UNDERCURRENTS BEFORE SEPTEMBER

(We are looking for events or attitudes that may have contributed to the September upheaval)

7. Has Attica changed since you have been here? When and in what respect?
8. How does Attica compare with other prisons?
9. What does inmate know of August, 1970, sit-down strike in metal shop and subsequent wage increase? (This is pertinent because it was an act of organized disobedience which appeared to produce results)
10. What does inmate know of July, 1971, demands for reform? It is alleged that non-action on these demands produced frustration).
11. What effect, if any, did disturbances at Auburn, Tombs and other penal institutions have at Attica?
12. Did Judge Curtin's decision on the Auburn transferees have any effect?
13. Death of George Jackson—How day of mourning (August 22) was organized, extent of participation, effect . . .
14. Sick call strike in August (200 or so inmates showed up) How organized, effect?
15. Commissioner Oswald's visit in September, 1971 to Attica—Knowledge? Effect?

V. EVENTS OF WEDNESDAY, SEPTEMBER 8.

16. Did you expect trouble on Thursday, September 9? If so, Why? (We are looking to see if inmate will volunteer information on incidents affecting A-5 Company on Wednesday or any indication of prearrangements.

17. Knowledge of the incident in A Yard on September 8, involving Dewar and Lammonte of A-5 and the Lieutenant, their subsequent removal to the box and the throwing of the glass at the officer who was removing them. (We are looking both for personal and heresay knowledge to the extent that such hearsay was contemporaneous and may have led inmates to expect or plan trouble—in other words, what effect these incidents had on inmates.)
VI. INMATES ACCOUNT OF HOW ATTICA WAS TAKEN BY INMATES AND WHAT HAPPENED DURING THE PERIOD

18. Narrative of what he did and observed from Sept. 8 until assault on Sept. 13. If he did not end up in D Yard, this can be short; if he was, try to find out his personal knowledge and, where pertinent, attitudes about the following, among others:
   —How he ended up in yard
   —How hostages were taken and treated
   —Who ran things in Yard and how leaders emerged
   —Election of Gallery representatives—was he one?
   —How were security guards selected? Was he one?
   —Oswald visits
   —How order was maintained, and were there acts of violence and appraisal
   —What observers (by name if he recalls) recommended, and what effect their speeches had
   —Why wasn’t Oswald’s offer accepted? Who opposed?
   —Was there a vote on Oswald’s offer?
   —Were there any other votes?
   —How important was amnesty and flight demand?
   —Was Oswald’s Monday A.M. ultimatum communicated? Voted upon?
   —Did he expect an assault with guns?
   —Did anybody advocate acceptance?
   —Fear of dissent?
   —Punishment of dissenters?
   —Amount and type of weapons held by inmates.
   —Discussion of Rockefeller visit, and effect, if any, of his refusal.
   —Was the “riot” petering out and would it have ended soon without assault.
19. Did he want to be in the Yard?
20. If he could have, would he have left Yard—Why or why not?

VII. ASSAULT—SEPTEMBER 13, 1971 A.M.

21. Where were hostages at the time of the assault; what was being done to them; threats to them, knives at throat, etc.?
22. Where was inmate when assault began, and what happened to him until the moment he was moved from D. Yard? If wounded, get details, including location.
23. Did he hear orders from helicopter; what were they, and relationship in time to shooting.
24. Did he see any inmate or hostage get hurt? (Get details, including names and locations)
25. Did he see any troopers or others shooting? (Get details, locations, etc.)
26. Did he see Barclay, Hicks, Melville at the time of the assault? Details .

VIII. HARASSMENT OR REPRISAL ACTS

27. Narrative of what happened to him after he left D Yard, with details of any acts of harassment, brutality, reprisals, including where and by whom.
IX. SCHWARTZ, HESS & PRIVATERA

28. Did you know them?
29. Did you see them in the Yard?
30. Why were they taken, and when?
31. Why were they killed—when?
32. Did he hear them scream?

X. PERSONAL OBSERVATIONS

33. Have current conditions changed much from before?
34. What is the mood of the inmates?
35. Do you have any additional problems that have occurred after the event?
36. What do you feel is the lesson of Attica?

INTERVIEWER'S EVALUATION

Date__________________________ Interviewee Interviewer

1. Should this inmate be seen by a member of the permanent staff for a more intensive interview? If so, why?
2. Does he have particular knowledge of any portion of the September events?
   Which ones?
3. Do you think this inmate was reluctant to talk to you but would talk to another staff member (of his own race or age), or would talk if we got him a lawyer?
4. Do you think this inmate is a potential witness for public hearings? Why, and on what subject(s)?
5. Did he say anything which should be noted with respect to the interview of another particular inmate?