The Association of the Bar of the City of New York

Office of the President

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Dear Sir/Madam:

Please find attached commentary on the Inquiries Bill, currently before the House of Lords.

The Association of the Bar of the City of New York (the "Association") is an independent non-governmental organization of more than 23,000 lawyers, judges, law professors, and government officials. Founded in 1870, the Association has a long history of dedication to human rights, notably through its Committee on International Human Rights, which investigates and reports on human rights conditions around the world. Among many other topics, the Committee has recently published reports on national security legislation in Hong Kong and human rights standards applicable to the United States' interrogation of detainees.

The Committee has been monitoring adherence to human rights standards in Northern Ireland for the past 18 years. During this time, the Committee has sponsored three missions to Northern Ireland, covering reform of the criminal justice system, use of emergency laws, and the status of investigations into past crimes, including in particular the murders of solicitors Rosemary Nelson and Patrick Finucane. The Committee's interest in the Inquiry Bill stems from our belief that it could have devastating consequences for the Finucane inquiry, as well as other inquiries into human rights cases from Northern Ireland. Beyond these cases, we believe the Bill, if passed into law, would concentrate power in the executive in a problematic way and jeopardize the integrity of investigations into matters of public concern.

We respectfully request that you consider the objections to the Bill in the attached commentary and the impact of the Bill on principles of democracy and human rights. We recommend that the Bill not be passed into law as it stands.

Very Truly Yours,

Bettina B. Plevan

Bettina B. Plevan, President
Association of the Bar of the City of New York

An Analysis of the U.K. Inquiries Bill and U.S. Provisions for Investigating Matters of Urgent Public Concern

The Committee on International Human Rights
of the Association of the Bar of the City of New York

January 25, 2005

Independence, Impartiality, and Transparency

The United States has no single legislative framework setting out a process for investigating matters of public concern, but, like the United Kingdom, U.S. law provides for such investigations through a number of different measures. Key to these various mechanisms in the United States are three controlling principles: investigations must be independent; investigators must be impartial; and the process of the investigation and the final recommendations must be made public. Even those inquiry-like investigations that are established by Executive Order are subject to judicial review and allow for substantial control by members of the investigation team. Once established, they are free from interference by the executive branch.

The United Kingdom's Inquiries Bill, proposed on November 25, 2004, violates these principles in ways that existing legislation, the Tribunals of Inquiry (Evidence) Act 1921, does not. The Inquiries Bill grants power to the executive to control all vital aspects of inquiries, taking the authority to establish inquiries out of the hands of Parliament and stripping inquiry chairpersons of control over the processes. By consolidating all inquiries under this legislation and repealing the 1921 Act, the United Kingdom would move away from inquiries as the public now knows them. Instead, provisions of the Bill would undermine the purpose of public inquiries: to investigate publicly matters of public concern, in an independent and impartial way.

The focus in this report on *independence* does not simply refer to an inquiry being independent from individuals or a department that might be implicated in the public controversy or matter being investigated. Instead, inquiries should be independent from the government as a whole once they are established. In ways both direct and indirect, obvious and obscure, government action is implicated in matters subject to inquiries. For an inquiry to be successful, it should not only be independent but also be seen to be independent from government as an institution.

A number of the above points were raised in the extensive debates in the House of Lords on December 9, 2004 and in subsequent discussions. We have reviewed the debates and agree with concerns expressed by various Lords:

- there should have been pre-legislative scrutiny of draft legislation before the Bill was introduced;
- it is cause for concern that the Bill takes power from Parliament to establish inquiries and gives extensive control over all aspects of an inquiry to an individual minister;

- inquiries should be independent of the minister, and the executive, once established;
- the Bill goes too far in restricting public access to hearings, evidence, and final reports; and
- it could be a danger to give a minister untrammeled power to convert an existing inquiry into one governed by the Bill.

We hope members of the House of Lords and House of Commons will take these criticisms into consideration when reviewing the Bill.

We offer this overview in the hope that a comparative perspective from a discrete yet similar legal system will shed further light on the strengths and weaknesses of the pending Bill. In particular, this paper reviews first, U.S. federal mechanisms of inquiry and second, inquiries that have occurred in New York City to investigate police corruption. We believe these show that independence and transparency must be cornerstones of a successful inquiry process. The report also analyzes provisions of the Inquiries Bill for their adherence to democratic standards and, in the conclusion, recommends that the Bill not be passed into law.

I. U.S. Practice

A. The Purposes and Characteristics of Inquiries in the United States

The United States has no single legislative framework establishing an independent process for probing matters of nationwide concern,[1] but various measures have a similar function. They include legislative committees, executive advisory commissions, special prosecutors, Inspector General Offices, and ad hoc, specific-event public inquiry commissions.

The essential purpose of all government commissions is to gather information.[2] Such inquiries are useful when the public's confidence in the government can be restored only after a thorough, independent, and impartial examination of the facts and circumstances giving rise to a particular event or crisis.[3] Commissions are for matters of great public importance, historically where there are allegations of corruption, scandal, disaster, or accident caused by government malfeasance and resulting in a crisis in public confidence.[4] An important dimension of this fact-finding function is the dispelling of rumors, which tend to heighten the sense of crisis.[5] The commission must tell the public what happened and why, and how similar occurrences may be prevented in the future.[6] These commissions ensure government

[1] Zeev Segal, *The Power to Probe Into Matters of Vital Public Importance*, 58 TUL. L. REV. 941, 972 (1984)
[2] Carl E. Singley, *The Move Commission: The Use of Public Inquiry Commissions to Investigate Government Misconduct and Other Matters of Vital Public Concern*, 59 TEMP. L.Q. 303, 304 (1986)
[3] *Id.* at 305.
[4] *Id.* at 323.
[5] *Id. at 305*.
[6] *Id.*

accountability by public exposure of the workings of government and the setting of acceptable standards of public administration.[7]

According to U.S. scholars, for a commission to be truly independent and impartial, in fact and appearance, as it must be to be credible, the appointing authority must not control the direction and outcome of the inquiry.[8] The commission should let the facts dictate the direction of the inquiry.[9] Individual investigations that have not adhered to these standards have been publicly discredited.

B. Nationwide Measures

1. Legislative Investigations

Congress has used congressional investigations since the beginning of the republic,[10] and federal, state, and local legislatures conduct hundreds of investigations each year.[11] At the national level, Congress's oversight keeps the executive branch from wielding unchecked powers in administering the law. Congress conducts most of its oversight through committees, holding formal as well as informal hearings on issues of executive agency action.[12] The diversity and scope of issues addressed by congressional oversight, as well as public awareness of oversight through the press, make it matchless in its importance.[13] Congressional oversight thus shapes the way that executive agencies administer the law,[14] which is essential to the checks and balances in the U.S. system.[15] The publicity engendered by it is also a significant check on agency action.[16]

Through commissions, Congress has the power to inquire into the methods by which the executive enforces the laws.[17] The Supreme Court has described this oversight authority as "an essential and appropriate auxiliary to the legislative function."[18] The only limitations on this power is that Congress may not reach into the "exclusive province" of the executive branch and investigations must be related to a legitimate legislative task.[19] Separation of powers also prohibits Congress from usurping the functions of the courts.[20] Even so, most judicial review of Congressional investigations has been limited to the consideration of the application of various procedural protections to witnesses appearing before

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[7] *Id.* at 306.
[8] *Id.* at 323-24.
[9] *Id.* at 326.
[10] Segal, at 941.
[11] Singley, at 308.
[12] Charles, Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199, 207 (1998)
[13] *Id.* at 215.
[14] *Id.* at 200.
[15] Alexander Aleinikoff, *Non-Judicial Checks on Agency Actions*, 49 ADMIN. L. REV. 193, 195 (1997)
[16] *Id.*
[17] Ronald L. Claveloux, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Conspiracy*, 1983 DUKE L.J. 1333, 1333 (1983)
[18] *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).
[19] *Barenblatt v. United States*, 360 U.S. 109, 11-12 (1959); *Watkins v. United States*, 354 U.S. 178, 187, 197 (1957).
[20] *See Sinclair v. United States*, 279 U.S. 263, 295 (1929); *Kilbourne v. Thompson*, 103 U.S. 168, 193-196 (1880).

congressional committees.[21] For example, in *Quinn v. United States*, the Supreme Court ruled that Fifth Amendment protections apply to witnesses testifying before congressional committees.[22]

The executive faces a high barrier in trying to keep information from both the legislative and judicial branches. In *United States v. Nixon*, for example, the Court stated: "Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide."[23]

Although legislative investigating committees are widely used, some committees have generated great controversy, such as the McCarthy and Watergate hearings. Controversy has often been a function of partisan composition of some committees, which are composed only of party members with no private citizens. Such factors significantly diminishes the value of this type of inquiry, and has engendered the need for judicial review.[24]

In the aftermath of the September 11, 2001 terrorist attacks, two official government inquiries took place. One was the National Commission on Terrorist Attacks Upon the United States ("The 9/11 Commission"), created by congressional legislation (see section C(3) below); the other was a joint inquiry of the Senate and House intelligence committees. Both issued reports critical of the nation's intelligence agencies.[25]

2. Executive Investigations

a. Executive Advisory Commissions

Executive advisory committees have historically provided pre-policy advice.[26] Participants are generally selected from the private sector.[27] The widespread use of such commissions dates back to President Theodore Roosevelt, and hundreds of advisory commissions have been formed since then.[28]

The U.S. Constitution does not specifically authorize executive commissions, but the authority is inherent in article II, section 3, which gives the president the duty to recommend legislative initiatives to Congress and the obligation to execute the laws.[29] The Federal Advisory Committee Act of 1972, 5 U.S.C. App. I (1976), regulates and authorizes such commissions currently.[30] State-level executive inquiries generally followed the same path of legal recognition, first through inherent power of the executive and then through legislative authorization.[31]

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[21] Singley, at 314.
[22] 349 U.S. 155, 161-65 (1955).
[23] 418 U.S. 683, 706 (1974).
[24] *Id.* at 308-09.
[25] Martin E. Halstuk, *Holding the Spymasters Accountable After 9/11*, 27 HASTINGS COMM. & ENT. L.J. 79, 81 (2004).
[26] Singley, at 309.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 310.
[31] *Id.* at 310-11.

b. Special Prosecutors

Executive department and agency heads may be scrutinized in both non-criminal and criminal investigations. Non-criminal investigations are conducted by department and agency Inspectors General.[32] Criminal investigations are conducted by the Department of Justice ("DOJ") or a special prosecutor.[33]

In the event that an incident arises where it would be a conflict of interest for employees of the Attorney General to investigate a matter, such as a criminal investigation of a high-level government official, the Attorney General has the power to appoint outside counsel. Pursuant to statute, the Attorney General may appoint attorneys to "conduct any kind of legal proceeding . . . which United States attorneys are authorized by law to conduct," including attorneys to assist United States attorneys "when the public interest so requires" and "subject to removal by the Attorney General."[34]

In the course of the Watergate investigation, the Attorney General appointed a special prosecutor within the DOJ with the authority to investigate and prosecute offenses arising out of the 1972 Presidential election. The special prosecutor was to have "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the DOJ."[35]

As the inquiry proceeded, strong disagreements developed between the executive and the special prosecutor, and the president directed the Attorney General to fire the special prosecutor. Both the Attorney General and his deputy resigned rather than carry out such an order. The special prosecutor was ultimately removed by the Acting Attorney General.

As a result of this conflict, the Ethics in Government Act of 1978 was passed, which included the creation of the "special prosecutor," independent from the Attorney General.[36] The special prosecutor provisions of the Act lapsed in 1999; since then Congress has not acted to renew them.[37] During the time they were in effect, if the Attorney General uncovered non-frivolous allegations that the President, Vice President, a member of the cabinet, or any other government officials had committed a federal crime other than a petty misdemeanor, the Attorney General could petition for appointment of a special prosecutor by applying to a special panel of judges of the U.S. Court of Appeals for the District of Columbia Circuit.[38] Members of the Judiciary Committees of both Houses of Congress could apply to the Attorney General for the appointment of a special prosecutor.

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[32] Dan W. Reicher, *Conflict of Interest in Inspector General, Justice Department, and Special Prosecutor Investigations of Agency Heads*, 35 STAN. L. REV. 975, 983 (1983).
[33] *See* 28 U.S.C. § 535(a) (1976) (giving the Attorney General and the FBI authority to investigate any violation of the federal criminal code involving government officers or employees); 28 U.S.C. §§ 591-598 (Supp. V. 1981) (the Special Prosecutor provisions of the Ethics in Government Act of 1978).
[34] 28 U.S.C. § 515; 28 U.S.C. § 543. "United States attorneys" here refers to government prosecutors.
[35] Atty. Gen. Order No. 517-573, 38 Fed. Reg. 14,688 (1973).
[36] Segal, at 954.
[37] The Independent Counsel Statute, 28 U.S.C. §§ 591-99 at § 599.
[38] *Id.*

Once appointed, the special prosecutor had the authority to conduct an independent investigation of the charges and either dismiss them or, if necessary, proceed with the prosecution of the official.[39] He or she was authorized to make reports to Congress. The Attorney General could only remove special prosecutors for extraordinary impropriety.[40]

In recent U.S. history, both statutory and non-statutory special prosecutors have prevented the executive branch from investigating its own actions and the president from influencing such an investigation.

c. Inspector Generals

Offices of Inspector General ("OIGs") are the lead organizations responsible for audit oversight of the executive branch.[41] Like special prosecutors, OIGs have responsibility for conducting special investigations of broad public interest and importance.[42] But OIGs are quite different from special prosecutors because they handle non-criminal matters, focusing on job-related misconduct by public officials including mismanagement, waste of funds, abuse of authority, creation or maintenance of dangers to public health or safety, and prohibited personnel practices.[43] OIGs do not exist for the sole purpose of conducting a single special investigations, but are instead permanent institutions subject to meaningful congressional oversight.[44]

The Inspector General Act of 1978, 5 U.S.C. App. 3 (1994), created a unified and powerful investigative force in the executive departments and agencies.[45] The Act achieved this by placing existing auditing and investigative resources under the authority of a relatively strong and independent Inspector General in each establishment.[46] The Act codified an idea – and to some extent a practice – that had been around since the founding of the United States: oversight of agency activity. As a result, the Inspector General in each department or agency reports fraud, abuse, waste, and mismanagement to Congress, and can recommend corrective action.[47] If a matter is criminal, an Inspector General refers the matter to the Justice Department.[48]

Inspectors General are appointed by the President with the advice and consent of the Senate, "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or

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[39] *Id.*
[40] *See* Angela L. Beasley, *The Ethics in Government Act: The Creation of a Quasi-Parliamentary System*, 5 WID. L. SYMP. J. 275, 275 (2000).
[41] William, Fields, *Legal and Functional Influences on the Objectivity of the Inspector General Audit Process*, 2 Geo. Mason Indep. L. Rev. 97, 98 (1993).
[42] *Id.*
[43] Reicher, at 983.
[44] Michael R. Bromwich, *Symposium: Running Special Investigations: The Inspector General Model*, 86 GEO. L.J. 2027, 2028 (1998). The author, Michael Bromwich, was Inspector General for the Department of Justice.
[45] Reicher, at 984.
[46] *Id.*
[47] *Id.*
[48] *Id.*

investigations."[49] The confirmation process involves both the Senate Governmental Affairs Committee and the committee having substantive oversight authority over the individual department or agency in which the IG is located.[50] There is no term of years for an IG, providing a safeguard against partisan appointments.[51] The President must justify any removal to both Houses of Congress.[52]

IGs have substantial autonomy[53] and no one in the agency is to prevent the IG from carrying out or completing an audit or investigation.[54] The OIG determines the scope of any investigation.[55]

> Once a matter comes to our attention and we launch an investigation, we feel an obligation to conduct the investigation thoroughly and properly and go wherever the facts take us. This autonomy and independence may mean that we take the investigation in different directions from what was originally envisioned by whomever referred it to us. This is an important aspect of IG independence and one that must be safeguarded carefully. *Without this OIG independence, top management's desire to limit an inquiry into a controversy or potential controversy so as to minimize potential embarrassment – in other words, management's view of the investigation as a form of damage control – could compromise the integrity of the OIG investigations.*[56]

Examples of investigations include: a cover-up of conditions at Immigration and Naturalization Services facilities; acts of racial and criminal conduct at an outing called "Good Ol' Boy Roundup" that was attended by many federal law enforcement officers over a 16-year period; misconduct within the FBI Laboratory; and CIA participation in creating the crack epidemic.[57]

More recently, the OIG of the Department of Justice conducted an investigation into treatment of post-September 11 alien detainees. In June 2004, that report – which heavily criticized detention conditions and the investigative process – was released. The Justice Department had fought any oversight by the judiciary or the media, requesting that the public trust it in the face of national security threats. Its own Inspector General's report demonstrated that government in secret does not foster justice.

According to the report, "The clear lesson is that government, in its understandable and laudable resolve to protect our security, cannot be relied on to protect our basic rights and liberties. Public scrutiny and the protections of our court system are necessary to ensure elemental fairness.[58] Lawrence Goldman, president of the National Association of Criminal Defense Lawyers, commented that: "This is what happens when the checks and balances of a democratic system of justice – the press, the courts, and lawyers for accused – are excluded."

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[49] 5 U.S.C. App. 3(a); Diane M. Hartmus, *Inspection and Oversight in Federal Courts: Creating an Office of Inspector General*, 35 CAL. W.L. REV. 243, 248 (1999).
[50] Bromwich, at 2029.
[51] Bromwich, at 2029.
[52] Hartmus, at 248.
[53] *Id.* at 2030.
[54] Hartmus, at 248-49.
[55] Bromwich, at 2032.
[56] *Id* (emphasis added). The author is Michael Bromwich, who was Inspector General of the United States Department of Justice.
[57] Bromwich, at 2031-32.
[58] Daniel Dodson, *Inspector General Report on Post-9/11 Detentions Highlights Result of Denial of Effective Oversight*, 27 CHAMPION 6 (2003).

3. Ad-Hoc Public Inquiries

Similar to executive advisory commissions, ad-hoc public inquiries are usually created during times of crisis, scandal, or government misconduct[59] and are the U.S. mechanism most like the Tribunals of Inquiry Act 1921.[60] They are created for a shorter duration and under greater public scrutiny, and their fact-finding function is more critical than their advisory function.[61]

Important commissions have been created in this fashion. The Roberts Commission, chaired by Supreme Court Justice Roberts and members of the military, was established to ascertain and report the facts relating to the Pearl Harbor attacks and determine responsibility for any U.S. errors.[62] The Warren Commission was created by President Johnson in an executive order and chaired by Chief Justice Earl Warren, to determine the facts surrounding President Kennedy's assassination.[63] This commission, though, failed to satisfy the public because it did not fix responsibility for the events giving rise to the assassination.[64]

The National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission) was an independent, bipartisan commission created by congressional legislation under the signature of President George W. Bush in late 2002.[65] The Commission was chartered to create a full and complete account of the circumstances surrounding the September 11, 2001, attacks, including the immediate response to the attacks. The Commission was also mandated to provide recommendations designed to guard against future attacks.[66]

Separation of powers and procedural protection issues may be implicated by public inquiries if they usurp the powers of other branches of government or place fundamental rights of witnesses in jeopardy. Both presidential and other ad-hoc inquiries have been subject to judicial review in the United States. For example, two U.S. Courts of Appeals judicially reviewed the President's Commission on Organized Crime for constitutionality in light of the fact that membership on the Commission included federal judges.[67] One court found that the composition of the Commission violated the separation of powers doctrine; the other found that it did not.[68] Subpoena powers of local and federal commissions have also been challenged in court.

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[59] Singley, at 311.
[60] *Id.* at 317.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 312.
[64] *Id.*
[65] Public Law 107-306.
[66] http://www.gpoaccess.gov/911/about.html
[67] Singley, at 315.
[68] *Compare In re: President's Commiss. on Organized Crime Subpoena of Scaduto*, 763 F.2d 1191, 1198 (11th Cir. 1985) *with In re: President's Commiss. on Organized Crime Subpoena of Scarfo*, 783 F.2d 370, 378 (3rd Cir. 1986).

C. Investigations into Police Corruption in New York City

States, cities, and local governments in the United States have created commissions to analyze certain situations and recommend governmental reforms. In New York City, two public investigations specifically addressed the problem of police corruption: the Knapp Commission in the early 1970s and the Mollen Commission in the 1990s.

1. The Knapp Commission

The Knapp Commission, established in May 1970 by an Executive Order of Mayor John V. Lindsay, investigated widespread corruption in the New York Police Department at the time.[69] A series of articles in the media, based on reports of a few whistleblowers, led the Mayor to create the Commission and work with the City Council to create an ordinance to secure funding and subpoena power.[70] Both the mayor's executive order and the grant of subpoena power were challenged judicially, but the New York Supreme Court held that both were valid.[71]

When articles about police corruption first appeared, the Mayor appointed a committee of public officials, including the District Attorneys of New York and Bronx Counties, the Commissioner of Investigations, the Police Commissioner of the City of New York, and Corporation Counsel, to investigate the matter.[72] The committee reported that the investigation was too extensive for them to complete, and the Mayor asked the committee to instead appoint an independent investigative body from the private sector. The Commission was then created by an Executive Order.[73] The Order appointed five members, including Whitman Knapp as Chairman.[74] Knapp later became a federal district judge in New York. The Executive Order specified that the Commission would prescribe its own procedures and staff, within the amounts appropriate for such staff.[75] The Order also directed all departments and agencies of the City to furnish the Commission with all services and cooperation it required.[76]

The Mayor subsequently lobbied the City Council to provide the Commission with investigatory powers. The Local Law, adopted by the Council in response, allowed the Commission to administer oaths or affirmations, to hold public or private hearings, and to compel testimony and the production of documents by subpoena. [77]

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[69] Edward J. Kiernan et al. v. City of New York, 64 Misc. 2d 617, 618 (N.Y. Sup. Ct. 1970); Singley, at 313.
[70] *Kiernan*, 64 Misc. 2d at 619; Selwyn Raab, *Similarities In Inquiries Into Crimes By Officers*, N.Y. TIMES, October 3, 1993, § 1, at 38.
[71] *Kiernan*, 64 Misc. 2d at 617; Edward Fahy et al. v. Commission to Investigate Allegations of Police Corruption and the City's Anticorruption Procedures et al., 65 Misc. 2d 781 (N.Y. Sup. Ct. 1971); *see also*, Singley, at 314-15.
[72] *Kiernan*, 64 Misc. 2d at 619.
[73] *Id.*
[74] *Id.* at 618.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 618-19.

Pursuant to its investigations, the Commission held a series of public hearings, during which it interviewed many officers from the police department.[78] The Commission questioned the Mayor privately, but Commissioner Knapp publicly defended that decision as being in the best interest of the Commission's mission, stating that he wanted to avoid a "political circus."[79] In response to questions about whether the Mayor was interfering or attempting to squash any part of the investigation, he replied "I can categorically say there are no grounds for such suspicions."[80] This independence was evidenced by the Knapp Commission's highly critical statements, both during the investigations and in its final report, regarding the police department leadership, including Police Commissioners, Commanders, and the Mayor.[81]

2. Mollen Commission

Twenty years after the Knapp Commission, credible evidence of widespread police corruption again surfaced. Rumors spread about the dishonest and illegal activities of New York police officers, and public distrust of New York government ran high. Mayor David Dinkins determined that a citizen's commission would be the best vehicle to respond to the concerns of New York's residents.[82]

Mayor Dinkins created the Mollen Commission by Executive Order on July 24, 1992.[83] The Order described the allegations of corruption and stated that "an investigation by the Police Department of these allegations would be subject to question by the public."[84] Therefore, the Mayor created the Commission to inquire into and evaluate the practices and procedures of investigating corruption in the police department and to make recommendations to improve the integrity of the department. The Order specified that the Commission could take evidence, administer oaths, and conduct other activities necessary to ascertaining the facts, including holding hearings, both public and private, as the Commission "deem[ed] appropriate."[85]

The Commission was chaired by Milton Mollen, who had previously served as the presiding justice of the Appellate Division, New York State Supreme Court, and as a deputy mayor.[86] It was

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[78] *See, e.g,. Excerpts form the Testimony by Serpico*, N.Y. TIMES, December 15, 1971; *Excerpts from Testimony Before Knapp Commission*, N.Y. TIMES, December 21, 1971.
[79] David Burnham, *Knapp and Lindsay Agree Mayor Should Not Testify*, N.Y. TIMES, December 20, 1971, at 1.
[80] *Id.*
[81] *Id.;* David Burnham, *Knapp Says Mayor Shares Blame for Corrupt Police*, N.Y. TIMES, July 2, 1971, at 1; David Burnham, *Knapp Unit Focuses on City Hall*, N.Y. TIMES, September 5, 1971.
[82] Judge Milton Mollen, Opening Statement at Public Hearings of Commission to Investigate Alleged Police Corruption (September 27, 1993), *in* N.Y. City Comm'n to Investigate Allegations of Police Corruption and the Anti-Corruption Proc. of the Police Dep't, Commission Report (July 7, 1994) (Milton Mollen, Chair), Ex. 2 [hereinafter Mollen Rep't].
[83] N.Y., N.Y., Exec. Order 42 (July 24, 1992) (establishing the Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department) [hereinafter Exec. Order 42].
[84] *Id.*
[85] *Id.* at § 1.
[86] Hon. Harold Baer, Jr. & Joseph P. Armao, *The Mollen Commission Report: An Overview*, 40 N.Y.L. SCH. L. REV. 73 (1995).

composed of a mixture of former judges and prosecutors, Democrats and Republicans, including the former head of the NYPD Civilian Complaint Review Board.[87] All served without compensation.[88]

In order to be effective, the Commission was given access to police officers and government employees. It was authorized to require any officer to attend an examination or hearing related to his or her duties and to request any documents or files of city agencies.[89] The testimony of the officers could not be used against them in a criminal prosecution.[90]

Although the Mayor created the Commission, and provided for the full cooperation of city agencies in his order, he and the Commission itself went to great lengths to emphasize its total independence from New York's government. The understanding of New York's residents that the Commission was independent allowed the Commission's report to have its full effect and resulted in people from other jurisdictions relying on its findings for many years. The Mollen Commission referred to its independence often in statements and press releases.[91] In the letter that accompanied its interim report, Judge Mollen thanked Mayor Dinkins for "the total independence" provided during the investigations,[92] and the final report specifically noted the freedom afforded to the Commission.[93] As a testament to its independence, public hearings by the Commission occurred just a few weeks before the mayoral elections, despite the political harm they likely caused the Mayor.[94]

At the end of an initial investigation, the Mollen Commission presented its findings at public hearings.[95] It then presented a report to the Mayor's office that reviewed the nature of police corruption and the failure of anti-corruption controls, and made recommendations for reform and more effective means of combating corruption.[96] The report was widely discussed in the newspapers. In one New York Times article, the reporters found the report "particularly powerful in its criticisms of sergeants and other commanders" and emphasized that a non-independent commission would not have been able to be as specific or open about the problems in the system.[97] The report withheld only information about ongoing investigations by the Commission.[98]

Judge Mollen, in the opening statement of the Commission's public hearings, pointed out that, "Mayor Dinkins found it essential, in the public interest, to appoint this Commission, with a mandate to ascertain the extent of corruption and to determine and recommend the best means to deal with it most

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[87] Clifford Krauss, *Corruption in Uniform: The Overview; 2-Year Corruption Inquiry Finds a 'Willful Blindness' in New York's Police Dept.*, N.Y. TIMES, July 7, 1994, at A1.
[88] Exec. Order 42 at § 2.
[89] *Id.*. at § 3(f).
[90] *Id.*
[91] Letter from Milton Mollen, Chair of the Mollen Commission, to Hon. David N. Dinkins (Dec. 27, 1993), *in* Mollen Rep't at Ex. 5; Mollen Rep't at iii; Judge Milton Mollen, Opening Statement.
[92] Letter of Milton Mollen.
[93] Mollen Rep't at iii.
[94] Robert D. McFadden, *Mollen Panel on Police Corruption Will Begin Hearings*, N.Y. TIMES, Sept. 18, 1993, § 1, at 23.
[95] Mollen Rep't at 8. The public hearings ran from September 27, 1993 to October 7, 1993.
[96] Mollen Rep't.
[97] Clifford Krauss, *Corruption in Uniform.*
[98] Mollen Rep't at 11.

effectively."[99] He went to emphasize that "it is imperative that the members of the public have confidence and faith in the integrity of the members of the Police Department."[100] The Mollen Commission, because of its structure, was able to respond to this mandate and restore public trust. The Commissioners, although appointed by the Mayor, were not directly associated with local government or the police department. Neither were the staff of approximately twenty lawyers, analysts, and investigators hired by the Commission.[101]

A new Mayor, Rudolph Giuliani, took office before the final report was issued, but in the aftermath of the Mollen Commission's report, the City Council and the Mayor created the Commission to Combat Police Corruption, an independent police investigation and audit board based on the Commission's recommendations.[102] Many other cities faced with problems of police corruption have referenced the Mollen Commission's findings when creating their responses.

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In sum, the separation of powers doctrine has resulted in the evolution of an inquiry system in the United States that is not formal or structured, but provides for democratic checks on all public inquiries. Once established, inquiries are independent of government; efforts are made to ensure impartiality of their members; and, except in rare circumstances, their processes and final reports are made public.

II. The Inquiries Bill As Introduced in the House of Lords

On November 24, 2004, the government laid before the House of Lords the Inquiries Bill. The Bill raises serious concerns about the independence and impartiality of future inquiries in the United Kingdom. If passed into law, it could also erode two fundamental tenets of democratic governance – transparency and accountability – and have serious implications for human rights cases in Northern Ireland and around the United Kingdom.

As drafted, the Inquiries Bill takes away from the Parliament the ability to establish inquiries into matters of "public concern" and cedes all power over such inquiries to the executive. A government minister would have complete authority over the scope of an inquiry, selection of panel members, public access to the inquiry, and whether any resultant findings would be made public. Even when the public's concern is regarding the conduct of government officials, only a minister could initiate and administer an inquiry under the proposed Bill. This is disturbing even if the establishing minister does not seem to have a vested interest in the subject matter of the inquiry.

The Inquiries Bill represents a retreat from meaningful, independent, and transparent public inquiries in the United Kingdom. By concentrating power in a single government official who will have control over the terms of reference and disclosure of information related to the inquiry, there is loss of accountability necessary to a successful inquiry. Independence also suffers when the executive is given discretion to alter the course of an inquiry, limit the expenses paid, or terminate the appointment of inquiry

[99] Judge Milton Mollen, Opening Statement.
[100] *Id.*
[101] Mollen Rep't at v.
[102] NEW YORK, N.Y., City Council, Int. No. 961, Local Law 91 of 1997 (Nov. 25, 1997); NEW YORK, NY, City Charter, Ch. 18-B, §§ 450 – 458.

members. As a result, inquiries into government misconduct may be manipulated so that evidence embarrassing to the government could be concealed rather than revealed. The Bill could have serious implications for human rights where government actors may perpetrate abuses, or fail to investigate them, unrestrained by fear of public exposure.

Implication for Human Rights Cases in Northern Ireland

If passed, the Inquiries Bill could have an impact on human rights cases in Northern Ireland, including the four public inquiries recommended by Justice Peter Cory into the murders of Patrick Finucane, Rosemary Nelson, Robert Hamill, and Billy Wright. The British government has announced its intention to hold inquires into the murders of Rosemary Nelson and Robert Hamill under the Police (Northern Ireland) Act 1998 and into the murder of Billy Wright under the Prison Act (Northern Ireland) 1953. Under Section 14 of the proposed Bill, there is the potential that these inquiries, which are currently stalled, could be converted so that they too are conducted under the new legislation.

The government has yet to agree to institute any inquiry into the 15-year-old murder of human rights lawyer Patrick Finucane. It raises serious concerns that the government is rushing to remake the law governing public inquiries in the United Kingdom and refusing to initiate an inquiry into the Finucane murder before the new legislation is in place. Unlike the 1921 Act or other legislation under which a Finucane inquiry might be brought, the Inquiries Bill includes provisions that restrict public access and the autonomy of the inquiry panel. In so doing, the government can prevent embarrassing information from becoming public and control an inquiry process that it has acknowledged will be critical of many of its agencies.

Independent public inquiry into these four murders is essential so that the people of Northern Ireland may move forward with confidence in the integrity of the government and its institutions. Any inquiry that is closely administered by the entity whose alleged misconduct is the subject of the inquiry will do little to restore public confidence, and its investigations and findings are likely to be viewed with skepticism.

The Importance of a Parliamentary Role

An important restraint on government misconduct will be lost if the inquiry process is administered by the government without a significant role by members of Parliament. Parliamentary committee inquiries may not be affected by this legislation, but they do not necessarily have the same powers as inquiries under the Bill. It is important that Parliament have the power to establish and determine the scope of inquiries into matters of utmost public importance.

Indeed, legislatures and parliaments play a crucial role in promoting transparency and accountability in government. As the link between the electorate and the government, they have oversight powers to ensure that mechanisms for accountability work effectively, that governmental programs are efficient, corruption is controlled, and the interests, rights and welfare of citizens are promoted. Likewise, an inquiry process that is independent and public is an invaluable tool for promoting transparency and accountability in a democratic society. Parliament should not agree to surrend its authority over the public

inquiry process – it should not forfeit access to this vital democratic instrument by passing the Inquiries Bill as drafted.

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Below we present comments on the provisions of the Inquiries Bill that in our view present the greatest cause for concern regarding damage to human rights and democracy. Since its most troublesome aspect is its basic premise – taking power from Parliament and inquiry panel members, and giving it to the executive – the Bill cannot be cured by amendment. Rather we recommend the Bill be rejected in its entirety.

A. Constitution of Inquiries

The most fundamental change to the inquiry process implicated by the Bill is the shift of the authority to establish an inquiry from Parliament to the executive. This is a major constitutional shift. The Bill would repeal the Tribunals of Inquiry (Evidence) Act of 1921, which currently provides that Parliament may establish an independent tribunal to inquire into matters of public importance, section 46(1), and instead provide that a government minister may cause an inquiry to be held "where it appears to him" that there is a matter of public concern. Section 1(1).

Once set up, the minister would retain control over the administration of the inquiry and any disclosure or publication of the inquiry's findings. The minister would decide who is to be appointed to the inquiry panel; the minister would appoint the chairperson[103] and could even replace the chairperson during the inquiry. Section 6(3). The required impartiality of the members of the inquiry panel is also left to the minister's discretion, and he or she could appoint a panel member where "in the minister's opinion the person's interest or association would be unlikely to influence his decisions." Section 8(1). Thus, there would be nothing beyond the minister's discretion to ensure that an impartial and independent panel is appointed. This clearly could lead to government-friendly individuals being selected for inquiries, which in turn would weaken public confidence in any findings made and the inquiry process itself.

The minister also would decide the starting date and the terms of reference for the inquiry. Section 5. There is no requirement that the minister consult with the chairperson or any of the parties that might have a legitimate interest in the inquiry before setting the terms of reference for the inquiry. Nor is there any provision that would permit amendments to the terms of reference during the course of the inquiry if it became apparent that there were important matters not included in the initial terms of reference. Under these provisions, there is a great risk that superficial inquiries into government wrongdoing would be established, in an attempt to satisfy the public's demand for an inquiry, without the possibility that they would effectively investigate and expose misconduct.

Section 36 affords the minister further control over the course of an inquiry: it provides that the minister would determine the funding of the inquiry. The minister "may agree to pay" the members of the panel and persons engaged to provide assistance to the panel. He or she must meet other expenses reasonably incurred in holding the inquiry, including publishing the report. But, the minister would not be

[103] We note the use of "he," "him," and "chairmen" throughout the Bill, and recommend that, if passed into law, those terms be changed to gender-neutral language, such as "chair" or "chairperson."

obliged to pay the expenses where he or she decides that the panel was operating outside the terms of reference. Thus, the minister could cut off funding for the inquiry when he or she does not approve the course of the investigation.

Section 12 provides that the minister could suspend the inquiry at any time. Section 13 provides that he or she could end the inquiry by providing notice to the chairperson even before the investigation is completed. The proposed Bill makes no reference to this being an exceptional recourse or to the circumstances in which this power might be invoked. Presumably, the minister could choose to end an inquiry where the panel's findings might prove problematic or embarrassing for the government.

B. Conversion of Inquiries

Section 14 extends to the minister the power to convert any ongoing inquiry established under current legislation to an inquiry under the proposed Bill once passed, subject only to the consent of the person who originally caused the pending inquiry to be held. It would allow the minister to change the terms of reference of inquiries commenced before the passing of this legislation, as well as change the conditions under which members were appointed and alter agreed procedures and conditions. Although ministers may intend to use this provision to benefit the public interest – by providing greater powers to already established inquiries, for example – the Bill does not ensure that it won't be used to limit an ongoing inquiry.

Any converted inquiry, regardless of what was agreed when it was established, will be held under the terms of the new Act. This is a very disturbing *ex post facto* provision; such laws are constitutionally prohibited in most democracies. Under Section 14, the inquiries slated to begin into the Nelson, Hamill, and Wright cases could be converted into inquiries under the new legislation. It is conceivable that the minister could redefine the terms of reference, limit public access to the inquiries, and keep secret crucial findings, thus undermining the central goals of public inquiries in these cases.

C. Inquiry Proceedings

Section 17 of the Bill allows the minister to restrict public access to inquiries once they are underway. Attendance at an inquiry, or the disclosure or publication of evidence, could be restricted at the minister's discretion as "necessary in the public interest." Section 17(3)(b). The minister could issue a restriction notice to the chair at any time before the ending of the inquiry or issue a restriction order, which can continue indefinitely. When issuing a restriction order, the minister may consider: how the restriction might inhibit the allaying of public concern, the risk of harm or damage that could be avoided or reduced by a restriction; whether conditions of confidentiality apply; and the extent to which not imposing a restriction would delay or impair the efficiency or effectiveness of the inquiry or result in additional costs.

Thus under the Bill, the grounds on which a minister could choose to restrict public access or disclosure of information are extremely broad. They include any risk of damage to national security or international relations, and damage to the economic interests of the United Kingdom. A minister's interpretation of these terms might be broad enough to preclude disclosure of information critical of the government. This provision could allow inquiry-related information to be kept from the public at the

discretion of one individual and one branch of government, without regard to the view of the inquiry panel members.

D. Inquiry Reports

At the end of an inquiry, the chairperson must submit a report signed by every member of the panel to the minister. If the report is not unanimous, it must reflect the points of disagreement. There is no provision for a dissenting member of a panel to publish a minority report; a member who disagrees with the panel and will not sign the report has only one alternative – to resign.[104]

Under the Bill, the minister may decide whether the chairperson or the minister will have responsibility for publishing any report and may withhold material in the report from publication as he or she considers it necessary in the public interest. The grounds upon which the minister could choose to withhold material from publication include any risk of damage to national security or international relations and damage to the economic interests of the United Kingdom or any part of the United Kingdom. Again, the minister's interpretation of any of these terms could well be broad enough to preclude disclosure of information that may embarrass the government. The minister would have the authority to suppress the entire report in the interest of national security, for example, regardless of the wishes of the chairman and members of the inquiry panel.

III. Conclusion

The purpose of public inquiries is to investigate matters of great or urgent public importance, generally in the event of a scandal, accident, or disaster, or where the government has been accused of misconduct, corruption, or a failure to act. To restore public confidence in the face of one of these incidents, inquiries must be independent and transparent. Public exposure ensures accountability, and independence guarantees that the facts dictate the outcome of the inquiry and bias does not color the proceedings.

These principles have been central to inquiry-like mechanisms in the United States, whether they are local, national, legislative, or executive measures. In all of the examples covered here – ad-hoc inquiries, legislative committees, and executive commissions and appointments – transparency, independence, and checks by way of substantive judicial review or congressional oversight have prevented the executive from maintaining control over inquiries once they are established.

The conduct of the government – in small or large part – will almost always be implicated in a case that is subject to a public inquiry. As a consequence, the government should not play a role in inquiries beyond establishing them. Indeed, where government is involved in the workings of an inquiry, the integrity of that proceeding is compromised. It was surprising and unsettling, therefore, that the Inquiries Bill was written to allow for ministerial control at every conceivable stage of the inquiry process.

[104] Explanatory notes to the Inquiries Bill, November 25, 2004 at ¶54.

We recommend that the Bill as a whole not be passed into law and that there be further consultation on reforming inquiry legislation. We understand that the Grand Committee of the House of Lords and the government have discussed possible amendments to the Bill. In the event that the Bill is revised, we respectfully recommend that great care is taken to ensure that independence and transparency are guaranteed.