

MEMORANDUM

April 6, 1973

TO: Downey Rice  
FROM: Edward Hussie  
SUBJECT: Use of Section 2 Concerning Applicability of  
Executive Privilege to the Pennsylvania Crime Commission

Section 2 deals with the structure of the Pennsylvania Crime Commission. Our chief argument in favor of the independence of the Commission members is the fixed and staggered term argument. There are several arguments that could be used against us based on the statutory composition of this Commission:

1. There is no requirement of consent by the Senate for appointment of such Commission members.  
  
Such consent is required for most executive offices, including Cabinet officials, and for members of the independent commissions, such as the Milk Marketing Board and the Public Utility Commission.
2. The Attorney General is specifically empowered by statute to appoint both the Executive Director and employees of the Crime Commission and to fix the amounts of their compensation.

For these reasons, you may wish at this point to solely rely on Section 1 and preserve Section 2 for rebuttal if the Attorney General relies on the above points.

EH:rf  
attachments

## APPLICABILITY OF EXECUTIVE PRIVILEGE TO THE CRIME COMMISSION

It is submitted that the Pennsylvania Crime Commission does not come within the purview of any purported claim of executive privilege.

Executive privilege by its inherent nature would appear to be limited to persons and agencies ( 1 ) who serve at the pleasure of the Governor, and ( 2 ) whose primary function and responsibility are pursuant to Article 4, Section 2 of the Pennsylvania Constitution which empowers the Governor to enforce the law.

The Pennsylvania Crime Commission does not fall within this definition because the Commission was specifically created by the General Assembly in 1968 to further as one of its primary duties a legislative function: The finding of facts as a basis for prospective legislation.

The enabling legislation setting forth the powers and duties of the Crime Commission, 71 P.S. 307-7 (6) provides that the Commission is empowered to:

Make a detailed written report of every completed investigation which may include recommendation for legislative or administrative action.

The legislative nature of the Commission is further reinforced by the provision in 71 P.S. 307-7 (9) which grants the Commission the power to issue subpoenas. The Crime Commission's subpoena power is pursuant to an investigative role which is legislative in nature, not a prosecutive function, which is executive. The Crime Commission, therefore, derives its essential power, to compel testimony through the issuance of subpoenas, as a derivative of an inherent legislative power: The power to find facts as a basis for legislation.

The Crime Commission therefor operates as an agent of the General Assembly to investigate subjects upon which legislation may properly be enacted. In Annenberg v. Roberts, 333 Pa. 203, the court notes:

It has been an almost continuous practice of successive legislatures to create such commissions, composed in whole or in part of persons not members of the legislature, ( emphasis supplied ), but, nevertheless, with the power to issue subpoenas for the attendance of witnesses and the production of books and papers.

In the case of the Crime Commission, the General Assembly, in its discretion appointed the Attorney General as Chairman of this Commission and placed it within the context of the Department of Justice. The purpose of such a decision is obvious: To allow the Commission to best avail itself of the expertise and resources of the number one law enforcement agency in the Commonwealth.

Recent decisions in both the Commonwealth Court and the federal courts indicate that the very authority of the Commission to issue subpoenas depends upon the Commission establishing a legislative purpose: In Commonwealth v. Nacrelli, involving the Crime Commission, 5 Commonwealth Ct. 551, the court states:

So long as one may garner from the statute its legislative purpose, and that purpose is within the constitutional power of the legislature, the investigative agency may set its own reasonable guidelines to carry out that legislative purpose.

The court goes on to say at 565:

It is the holding of this Court that the establishment of this Commission and the powers delegated to it by the legislature were not an unlawful delegation of powers.

The fundamental legislative character of the Commission is further apparent from the Nacrelli decision wherein the court notes at 571:

Its ( the Crime Commission ) "duty" is the submission of reports recommendatory in nature, relating to future legislation and to make recommendations to governmental and law enforcement agencies.

The court carefully distinguished the Crime Commission from a commission whose authority was struck down by the U. S. Supreme Court in Jenkins v. McKeithen, 395 U.S. 411, the Commonwealth Court noted:

That Commission ( the commission in the Jenkins case ) had no specific mandate requiring it to report to the legislature in furtherance of the legislative function. We contrast Jenkins with the instant case and find that a portion of this Commission's mandate requires that it submit "a detailed written report of every completed investigation."

The authority of the Pennsylvania Crime Commission to issue subpoenas was also challenged in the federal courts, Dixon v. Pennsylvania Crime Commission, 347 F. Supp. 138 ( 1972 ). The authority of the Crime Commission was upheld on the basis of its legislative function:

The plaintiffs here have attempted to apply the allegations of the Jenkins complaint to the Pennsylvania Crime Commission Act, but that attempt cannot survive close scrutiny because a careful reading of the statute reveals that the basic purpose of the Pennsylvania Act is clearly legislative rather than prosecutive. ( emphasis supplied. )

A claim of executive privilege for the Pennsylvania Crime Commission would, ironically, serve to undermine its legal basis of power since such a claim must minimize the legislative nature of the Commission. This claim places in jeopardy the Commission's power to issue subpoenas. Since this power stems directly from the legislative right to discover facts pursuant to legislation, a successful claim of executive privilege by the Governor could claim the Crime Commission, itself, as its first casualty.

It is, of course, abundantly clear that the General Assembly is empowered to review the financial records of the Pennsylvania Crime Commission. No state funds can be expended without the approval of the General Assembly. Article 3, Section 24 of the Pennsylvania Constitution provides:

No money shall be paid out of the treasury except on appropriations made by law and on warrant issued by the proper officers...

Inherent in the power to appropriate monies is the authority to review how those funds are expended. With hundreds of spending priorities competing for state funds, it is essential that the legislature have the ability to determine for itself the quality and efficiency of these programs.. This necessarily entails access to records pertaining to the expenditure of state funds.

A claim of executive privilege with respect to financial records, therefore, would present a direct challenge to the exclusive constitutional power of the General Assembly to appropriate funds to enact a state budget and to provide for the general revenues of the Commonwealth.

In any event, the Crime Commission is specifically required by statute to account to the General Assembly for all monies expended. 71 P.S. 307-7 provides:

The Pennsylvania Crime Commission shall have the power and its duty shall be....

- ( 7 ) To account to the Governor, the Auditor General and the General Assembly ( emphasis supplied ) at the end of each fiscal year for all monies received and disbursed.

Edward Hussie  
Counsel

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The Pennsylvania Crime Commission does not fall within this definition for the following reasons:

1. The Commission was specifically created by the General Assembly in 1968 to further as one of its primary duties a legislative function: The finding of facts as a basis for prospective legislation;
2. The statutory composition of the Crime Commission indicates a legislative intent to afford the Commission a degree of independence from the executive branch.

### I - THE CRIME COMMISSION CANNOT CLAIM EXECUTIVE PRIVILEGE BECAUSE IT WAS CREATED TO SERVE A PRIMARY LEGISLATIVE FUNCTION.

The enabling legislation setting forth the powers and duties of the Crime Commission, 71 P.S. 307-7 (6), provides that the Commission is empowered to:

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II - THE STATUTORY PROVISIONS GOVERNING THE COMMISSION INDICATE A LEGISLATIVE INTENT TO PROVIDE A DEGREE OF INDEPENDENCE FROM DIRECT CONTROL BY THE GOVERNOR.

71 P.S. 179 provides that the Commission shall be composed of the Attorney General and four commissioners appointed by the Governor. The act provides that the Commissioner shall serve two-year staggered terms.

The legislative provision for staggered terms reveals a specific legislative intent to preserve the independence of Commission members by prohibiting the Governor from removing them at his pleasure.

In Schluraff v. Rzymek, 417 Pa. 144, the State Supreme Court held:

That where the legislature creates a public office and provides that the holders of that office shall be appointed for fixed terms with staggered expiration dates, the presence of staggered terms indicates a legislative intent that the holders of the office are not removable by the appointer at his pleasure.

We, therefore, conclude that the essential function of the Pennsylvania Crime Commission is legislative, and is therefore, beyond any purported scope of executive privilege.

Edward Hussie  
Counsel